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VOLUMES 1, 2 AND 3 MUNFORD.

THE MICHIE COMPANY, LAW PUBLISHERS,
CHARLOTTESVILLE, VA.
1903.

NOV 15 1929

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REPORTS OF CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME I.

BY WILLIAM MUNFORD.

District of New York, ss.

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TABLE OF CASES REPORTED.

Alexander v. Greenup.....	184-149	Hunter v. Fairfax's Devisee.....	218-288
Ambler and others. Smith v.	590-600	Johnson and others v. Johnson's Widow & Heirs.....	549-554
Atwell's Adm'r's v. Towles.....	176-182	Johnston, Ward v.....	45-56
Austin's Adm'r v. Whitlocke's Ex'rs.....	487-493	Jones, Fitzgerald, Ex'r of Jones, v.....	150-160
Barton, Greenhow v.....	590-596	Leigh's case.....	468-486
Betts v. Cralle.....	238-246	Lewis v. Madisons.....	303-329
Blair v. Owles.....	38-44	M'Clenachan's Adm'r & Heirs, Humphrey's Adm'r's v.....	493-501
Bowyer, Todd v.....	284-287	Madisons, Lewis v.....	303-329
Bradley v. Welch.....	23-38	Mandeville, Sutton v.....	407-408
Brock, Harrison v.....	238-293	Marine Insurance Company of Alexandria v. Stras.....	408-418
Brown & Boisseau v. May.....	239-284	Marshall v. Frisbie.....	247-257
Bullitt's Ex'rs v. Winstons.....	600-605	Mason v. Dunman.....	456-460
Campbell, Ex'r of McDonald, Moon v.....	398-404	Mason's Devisees v. Peter's Adm'r's.....	437-443
Chapmans v. Chapman.....	98-118	May, Brown & Boisseau v.....	289-293
Chichester's Ex'r v. Vass's Adm'r.....	63-75	Mayo v. Giles's Adm'r.....	538-537
Chinn v. Heale.....	180-162	v. Turner.....	405-406
Clarke v. Conn.....	454, 455	Meredith's Adm'r v. Duval.....	76-97
Clay v. Ransome.....	162-176	Moon v. Campbell, Ex'r of M'Donald.....	600-605
v. White and others.....	373-366	Murdoch, surviving partner of Cunningham & Co., Day, Ex'r of Yates, who was Ex'r of Payne, v.....	460-468
Coles, Paynes v.....	160-162	Muse & Wife, Wyatt v.....	188-215-218
Conn. Clarke v.....	238-246	Newell v. Wood.....	555-557
Cralle, Betts v.....	258-268	Paynes v. Coles.....	373-396
Eppes v.....	258-268	Pecks, Harvey & Wife v.....	518-523
Cunningham's Ex'r, Hull v.....	330-338	Peter's Adm'r's, Mason's Devisees v.....	437-446
Dangerfield v. Rootes, Adm'r of Baylor.....	523-532	Price, Green v.....	449-454
Dawson, Glascock's Adm'r v.....	605-609	Ransome, Clay v.....	454-455
Day, Ex'r of Yates, who was Ex'r of Payne, v. Murdoch, surviving partner of Cunningham, & Co.....	460-468	Rootes, Adm'r of Baylor, Dangerfield v.....	529-532
Depew v. Howard & Wife.....	293-303	Royster & Wife, Hooper & Wife v.....	119-133
Digges's Ex'r v. Dunn's Ex'r.....	56-62	Sadler's Heirs, Wyatt v.....	587-549
Dillard v. Tomlinson.....	183-218	Saunders v. Wood.....	406
Dunman, Mason v.....	456-460	Smiths v. Ambler and others.....	596-600
Dunn's Ex'r, Digges's Ex'r v.....	56-63	Steptoe, Templeman, Ex'r of Steptoe, v.....	339-373
Duval, Meredith's Adm'r v.....	76-97	Stras, The Marine Insurance Company of Alexandria v.....	408-418
Eppes v. Cralle.....	258-268	Sutton v. Mandeville.....	407-408
Fairfax's Devisee, Hunter v.....	218-238	Tebbs and Wife, Hooe v.....	501-510
Fitzgerald, Ex'r of Jones, v. Jones.....	160-160	Templeman, Ex'r of Steptoe, v. Steptoe.....	339-373
Frederick Justices, Gordon's Adm'r's v.....	1-21	Todd v. Bowyer.....	447-449
Frisbie, Marshall v.....	247-257	Tomlinson, Dillard v.....	183-218
Giles's Adm'r, Mayo v.....	533-537	Towles, Atwell's Adm'r's v.....	176-182
Glascock's Adm'r v. Dawson.....	605-609	Turner, Mayo v.....	405-406
Gordon's Adm'r's v. Frederick Justices.....	1-21	Vass's Adm'r, Chichester's Ex'r v.....	98-118
Green v. Price.....	449-454	Ward v. Johnston.....	45-56
Greenhow v. Barton.....	590-596	Welch, Bradley v.....	284-287
Greenup, Alexander v.....	134-149	Whitlocke's Ex'rs, Austin's Adm'r v.....	487-493
Harrison v. Brock.....	23-38	White and others, Clay v.....	162-175
Harvey & Wife v. Pecks.....	518-523	Whitehorn & Wife v. Hines and others.....	567-590
Heale, Chinn v.....	63-75	Winstons, Bullitt's Ex'rs v.....	299-284
Henderson v. Hudson.....	510-518	Wood, Newell v.....	555-557
Hines and others, Whitehorn & Wife v.....	567-590	Saunders v.....	406
Hooe v. Tebbs & Wife.....	501-510	Wyatt v. Muse & Wife.....	183-215-218
Hooper & Wife v. Royster & Wife.....	119-133	v. Sadler's Heirs.....	537-549
Hopkins, Yancey v.....	419-437	Yancey v. Hopkins.....	419-437
Howard & Wife, Depew v.....	293-302		
Hudson, Henderson v.....	510-518		
Hull v. Cunningham's Ex'r.....	330-338		
Humphrey's Adm'r v. M'Clenachan's Adm'r & Heirs.....	498-501		

TABLE OF CASES CITED.

AMERICAN AUTHORITIES.

The cases in *italic* are such as have not been reported, or are not in print.

Adams, Pryor v., 106, 106, 107, 116, 348, 445	Chichester v. Vass, 108, 109, 489	Godfrey, Dawson v., 237, 611, 616, 626
Alderson, Biggers v., 29	Chichester's Ex'r v. Vass's Adm'r, 390	Gordon v. Frazier & Crosbie, 49
Alexander, Birch v., 178	Chinn, Downman v., 806	Gordon's Adm'r's v. Frederick Justices, 448
Dade v., 109	v. Heale, 105, 107	Gouverneur, Le Guen v., 193
v. Morris, 124, 127, 529, 530, 531, 532	Turner v., 444	Graham's Ex'r's v. Carter, 307
Anderson v. Anderson, 161	Chisholm v. Anthony, 586	Graham, Eckhols v., 280
v. Bernard, 503	Clarke and White, Ex'r's of White, v. Johnson, &c., 458	Green, Hyers v., 29
Drew v., 508	Cogbill v. Cogbill, 458	Grymes v. Pendleton, 346, 347, 354, 363, 368, 369
and Starke v. Fox, 440, 442	Cole, Eppes v., 407	Hall, Hunter v., 295, 297, 299
Anthony, Chisholm v., 444	v. Scott, 497	Hammett v. Bullitt's Ex'r's, 48
Archer, Tabb v., 390	Coles, Payne v., 404	Hardwicke, Cabell v., 8
Argenbright v. Campbell, 515	Colston, Long v., 103	Harmanson, Smith v., 48
Armstrong, Booth v., 13, 14	Commonwealth v. Beaumar-chais, 190	Harris, Wroe v., 264
Asberry v. Calloway, 503	Bedinger v., 107, 161	Harrison v. Feld, 180
Atkinson v. White, 192, 193	Fairfax v., 616	v. Harrison, 309
Atwell's Adm'r's v. Milton, 182, 440, 446	Gaskins v., 346	Hartshorne, Rhineland & Co. v. Sleght, 192, 193
Baird v. Blagrove, 488, 493	v. Lowther, 334	Hastie, Brewer v., 197
v. Rice, 283	Newell v., 199	Heale, Chinn v., 105
Tabb v., 164, 166, 168, 173	Stras v., 161	Hendley, Mantz v., 3, 8
Ballard v. Leavell, 227	Commonwealth v. Bristol, v. Jones, 227	Herndon, Cuninghame v., 173
Banister's Ex'r's v. Shore, 108, 108	Conrad, Marshall v., 226	Hewlett v. Chamberlayne, 503
White, Whittle & Co. v., 17, 20, 531	Consilla v. Briscoe, 298	Hill v. Burrow, 203, 551
Baring v. Reeder, 394	Cooke, Lee, Ex'r of Daniel, v., 440, 442	Hite, Jolliffe v., 199, 334, 337, 338, 496
Barnett v. Darnelle, 190	Corrie's Ex'r's v. Campbell, 285	Ex'r of Smith, v. Lewis's Ex'r's, 490
and Woolfolk v. Watson & Uruhart, 67	Cox, M'Ilvain v., 617	Hite's Heirs v. Wilson & Dun-lap, 347, 356
Barrett v. Floyd, 106	Craig v. Craig, 85	Hodgson and others, The Pres-ident and Professors of Wm. and Mary College v., 346, 353, 369
Beale v. Downman, 503	Croughton v. Duval, 49, 274	Home v. Richards, 405
Beaumarchais, The Common-wealth v., 190	Culbreath, Feld v., 297, 298	Hooe & Harrison v. Pierce's Adm'r, 458
Bedinger v. The Common-wealth, 107, 161, 199	Cuninghame v. Herndon, 178	Hoopes v. Smock, 533
Bell, Mackey v., 362	Cuninghame's Ex'r's, Hull v., 297, 298	Hoover v. Donnelly, 309
Mills v., 500	Currie v. Martin, 297, 298	Hord v. Upshaw, 109
Berkeley v. Bazley, 79	Curry v. Burns, 188	Hubbard v. Taylor, 606
Berkeley, Leftwich v., 79, 406, 556	Cutchin v. Wilkinson, 115, 190	Hudson v. Johnson, 530, 532
Bernard, Anderson v., 593	Dade v. Alexander, 440, 442	Overton & Wife v., 30
Beverly, Kinney v., 428	Daniel's Ex'r v. Cooke, 440, 442	Hull v. Cuninghame's Ex'r's, 500
Bibb v. Cauthorne, 8, 556	Darnelle, Barnett v., 190	Hunt v. Wilkinson, 58, 62, 286, 287
Duval v., 168	Davies v. Miller, 588, 539, 548, 548, 549	Hunter v. Hall, 295, 297, 299
Biggers v. Alderson, 29	Dawson v. Godfrey, 227, 611, 616, 626	Hyers v. Green, 29
Birch v. Alexander, 173	Deans v. Scriba, 197	v. Wood, 29
Blagrove, Baird v., 488, 493	Deck, Kirtley v., 27	Isabell, Pegram v., 402
Blount and Wife v. Gee, 197	Dick, Terrell v., 445	Johnson v. Brown, 300
Booth v. Armstrong, 12, 14	Dillard, Tomlinson v., 183	v. Buffington, 138
Bowyer, Todd v., 465	v. Tomlinson, 244, 359, 366, 571, 588, 588	Hudson v., 582
Boxley, Berkeley v., 79	Donnelly, Hoover v., 309	v. Macon, 503, 504, 505, 506, 509
Braxton v. Winslow, 1, 5, 7, 8, 9, 17, 18, 20	Dowdall, Pickett v., 138, 139, 142	Johnson's v. Meriwether, 503, 508, 509
Brewer v. Hastie, 197	Downman, Beale v., 503	Johnson, &c., White's Ex'r's v., 588
v. Tarpley, 58	v. Chinn, 606	Johnston, Guardian of Hinton, v. Thompson, 192, 349
Briscoe, Consilla v., 298	Drew v. Anderson, 606	Jolliffe v. Hite, 199, 334, 337, 338, 498
Bristow, The Commonwealth v., 227	Drummond v. Sneed, 508	Jones's Ex'r v. Jones, 448
Brock, Robinson v., 109	Dunlop, Triplett v., 192, 349	Jones v. The Commonwealth, 199
Brown's Adm'r v. Garland, 531, 532	Duval v. Bibb, 49, 274	& Temple v. Logwood, 498
Brown, Johnson v., 300	Croughton v., 280	White v., 300
M'Rae v., 179	Eckhols v. Graham, 349, 498	v. Williams, 301, 537
v. Turberville, 188, 194, 205, 206, 206, 347, 350, 358, 366	Elizey v. Lane's Ex'r, 407	Kenyon v. M'Robert, 538, 542, 543, 545, 546, 549, 551, 553
Buckner v. Smith, 535	Ellwell, Taylor v., 105	Kinney v. Beverly, 428
Buffington, Johnson v., 138	Fairfax v. The Common-wealth, 616	Kirtley v. Deck, 27
Bullitt's Ex'r's, Hammett v., 48	v. Muse's Ex'r's, 346, 353, 369	Knox v. Garland, 29
Burk's Ex'r v. Trigg's Ex'r, 50, 124	Farley v. Shippen, 501, 611	Lambert, Burnley v., 17, 585
Burnley v. Lambert, 17, 585	Feld v. Culbreath, 297, 298	v. Payne, 611
Burnley's case, 106	Harrison v., 180	Lane's Ex'r, Elizey v., 498
Burns, Curry v., 155	Fendall, Turner v., 290	Leavell, Ballard v., 290
Burrow, Hill v., 208, 551	Ferguson v. Moore, 508, 509	Lee, Ex'r of Daniel, v. Cooke, 440, 442
Buster v. Wallace, 291	Fitzgerald, Ex'r of Jones, v., 448	v. Tapscott, 24, 291
Cabell v. Hardwicke, 8	Floyd, Barrett v., 105	Leftwich v. Berkeley, 79, 406, 556
Call v. Ruffin, 3	Ford v. Gardner, 105	Le Guen v. Gouverneur, 192
Calloway, Asberry v., 503	Foster v. Foster, 442	Lewis's Ex'r's, Hite, Ex'r of Smith v., 490
Campbell, Argenbright v., 515	Fox, Anderson & Starke v., 440, 442	Lewis v. Thompson, 607
Corrie's Ex'r's v., 285	Frazier & Crosbie, Gordon v., 49	Logwood, Jones & Temple v., 488
Price v., 192, 193	Frederick Justices, Gordon's Adm'r's v., 443	Long v. Colston, 103
Carotte, Costars & Co., Murray v., 67, 69, 72	Freeland v. Royall, 190	Lowther v. The Common-wealth, 338
Carter v. Carter, 105, 106	Gardner, Ford v., 3	Lysle v. Stephenson, 80
Graham's Ex'r's v., 307	Garland, Brown's Adm'r's v., 581, 582	
Cartwright, Pollard v., 67, 68, 458	Knox v., 29	
Cauthorne, Bibb v., 8, 556	Gaskins v. The Commonwealth, 346	
Chamberlayne, Hewlett v., 503	Gee, Blount and Wife v., 197	
	Genner v. Sparkes, 273, 274, 376	

CASES CITED.

I MUNF.

M'Call v. Peachy,	107, 156, 161, 346, 353, 368, 369	Proudfit v. Murray,	194	Thornton & Wife, Tallafierro & Gaines v.,	17, 20
M'Donald, Witherinton v.,	368	Pryor v. Adams,	105, 106, 107, 116, 343, 445	Todd v. Bowyer,	466
M'Ilvain v. Cox,	617	Quesnel v. Woodlief,	67, 335, 498	Tomlinson v. Dillard,	183
Mackey v. Bell,	362	Reed v. Reed,	236	Dillard v.,	
M'Lochlin, Wilkinson v.,	84	Reeder, Baring v.,	364	344, 359, 366, 371, 563, 568	
Macon, Johnson v.,	508, 504, 505, 506, 509	Rice, Baird v.,	263	Trigg's Ex'r, Burk's Ex'r v.,	58, 124
M'Roos v. Brown,	179	Richards, Home v.,	405	Triplitt v. Dunlop,	192, 349
M'Robert, Kennon v.,	533, 542, 543, 545, 546, 549, 551, 552	Robinson v. Brock,	109	Turberville, Brown v.,	188, 194,
Mois v. Murray,	440	Rootes, Wilcox v.,	384	305, 306, 308, 347, 350, 358, 366	
Mants v. Hendley,	3, 8	Rose, Norton v.,	536, 537	v. Self,	30, 32
Marshall v. Conrad,	236, 238	v. Shore,	81, 83, 85, 92, 93, 94	Turner v. Chinn,	2
Martin v. Currie,	297, 398	Ross, Morris & Overton v.,	196, 445	v. Fendall,	390
Mason, Wilson v.,	301	Rowton v. Rowton,	516	Turpin v. Thomas,	445
Matthews, Nelson v.,	335, 338, 498, 500	Royall, Freeands v.,	67, 69, 72	Upshaw, Hord v.,	109
Maupin v. Whiting,	445	Ruffin, Call v.,	2	Vandevier, Pendleton v.,	449
Meriwether, Johnsons v.,	503, 508, 509	Sadler, Wyatt v.,	551, 553, 553, 554	Vass, Chichester v.,	108, 109, 489
Miller, Davies v.,	533, 539, 543, 548, 549	Scott, Cole v.,	300	Vass's Adm'r, Chichester's Ex'r v.,	390
Miller v. Page,	298, 301	Scot, Call v.,	497	Walcott v. Swann,	306
Mills v. Bell,	500	Scriba, Deans v.,	197	Walden v. Payne,	565
Milton, Atwell's Adm'r's v.,	182, 440, 446	Selden v. King,	551	Wallace, Buster v.,	291
Minor, Tallafierro v.,	129	Self, Turberville v.,	30, 32	Ware v. Hylton,	618, 619
Montague, Syme v.,	606	Shippin, Farley v.,	501, 611	Washington v. Smith,	567
Moore, Ferguson v.,	598, 599	Shore, Banister's Ex'r's v.,	103, 108	Watson & Urquhart, Barnett & Woolfolk v.,	67
Morris, Alexander v.,	124, 137, 529, 530, 531, 532	Rose v.,	81, 83, 85, 92, 93, 94	Watson v. Powell,	543, 548, 549
Morris, Overton, & c. v. Ross,	196, 445	Skipwith, Young v.,	368	Webb and others, Clarke v.,	17
Murray v. Carotte, Costars & Co.,	190	Sleght, Hartshorne,	Rhine-	Webster, Staples v.,	300
Murray, Proudfit v.,	194	lander & Co. v.,	192, 193	White v. Atkinson,	192, 193
Nelson v. Matthews,	67, 335, 338, 498, 500	Smith, Buckner v.,	533	White, Whittle & Co. v. Banis-	
v. Nelson,	306	v. Harmanson,	597	ter's Ex'r's,	17, 20, 531
Newell v. The Commonwealth,	199	Washington v.,	490	White's Ex'r's v. Johnson & others,	580
Norton v. Rose,	598, 537	Smith's Ex'r v. Lewis's Ex'r's,	597	White v. Jones,	306
Overton & Wife v. Hudson,	30	Smock, Hoomes v.,	533	Stephens v.,	27, 29
Page, Miller v.,	308, 301	Sneed, Drummond v.,	109	Whiting, Maupin v.,	445
Patterson, Pollard v.,	503	Sparkes, Genner v.,	273, 274, 276	Wilcox v. Rootes,	384
Payne v. Coles,	404	Staples v. Webster,	27, 29	Wilkinson, Cutchin v.,	115, 188, 190
Lambert v.,	611	Stephens v. White,	80	Hunt v.,	59, 236, 237
Walden v.,	585	Stras v. The Commonwealth,	161	v. M'Lochlin,	84
Peachy, M'Call v.,	107, 156, 161, 346, 353, 368, 369	Street, Taylor v.,	15	William & Mary College (The President and Professors of) v. Hodgson and others,	346, 353, 369
Pegram v. Isabell,	402	Stuart, Pendleton v.,	324, 326, 338	Williams & Roy, Ex'r's of Cor-	
Pendleton, Grymes v.,	346, 347, 354, 363, 368, 369	Swann, Walcott v.,	306	rie, v. Campbell,	285
Ruffin v.,	443	Syme v. Griffin,	505	Jones v.,	301, 587
v. Vandevier,	449	v. Montague,	606	Wilson & Dunlap, Hite's Heirs v.,	347, 356
Pendleton v. Stuart,	334, 336, 338	Tabb v. Archer,	390	v. Mason,	301
Pickett v. Dowdall,	138, 139, 142	v. Baird,	164, 166, 168, 173	Winslow, Braxton v.,	1, 5, 8, 9, 17, 18, 20
Pierce's Adm'r, Hooe & Harri-	453	v. Tallafierro v. Minor,	129	Witherinton v. M'Donald,	298
son v.,	453	& Gaines v. Thornton & Wife,	17, 20	Wood, Hyers v.,	29
Pleasants, Shore & Co. & An-	30	Wallace v.,	302	Woodlief, Quesnel v.,	67, 335, 498
derson v. Ross,	30	Tapscott, Lee v.,	34, 291	Wroe v. Harris,	264
Pollard v. Cartwright,	67, 68, 453	Tarpley, Brewer v.,	58	Wyatt v. Sadler,	551, 553, 558, 554
v. Patterson,	103	Taylor v. Ewell,	105	Yancey v. Lewis,	307
Powell, Watson v.,	543, 548, 549	Hubbard v.,	606	Young v. Skipwith,	368
Price v. Campbell,	192, 193	v. Street,	15		
		Terrell v. Dick,	445		
		Thomas, Turpin v.,	445		
		Thompson, Johnson, Guardian of Hinton, v.,	428		
		Lewis v.,	607		

BRITISH AUTHORITIES.

Aggas v. Pickereil,	524	Collier, Elliott v.,	115	Ingledeu, Harris v.,	308
Allcott, Bennett v.,	229	Collins v. Griffiths,	308	Irvine, Peters v.,	445
Alston, Lee v.,	104	v. Plummer,	308	Isherwood, Gartside v.,	535, 575
Ambrose v. Ambrose,	518	Collis v. Swaine,	104	Jackson, Cooth v.,	516
Hodgson v.,	547	Cone v. Bowles,	357	v. Hogan,	
Andrews, Back v.,	114	Cook v. Arnham,	356	530, 540, 541, 542, 543, 548	
Angerstein, Chaurand v.,	570	v. Martyn,	556	James, Price v.,	104
Anthony's Ex'rs, Applebury &		v. Tombs,	516	Janssen, Chesterfield v.,	305, 525, 574
others v.,	453	Cooth v. Jackson,	516	Jenkins v. Law,	28
Applebury & others v. An-		Cubitt, Brady v.,	381	Jesse v. Backus,	160
thony's Ex'rs,	453	Cud v. Rutter,	103	Jones v. Jones,	560, 574
Archer, Blatch v.,	274	Currier, Viscountess Pembroke		v. Roe, Lessee of Perry,	
Arnham, Cook v.,	356	v.,	403	306, 384	
Ashdown, Stilleman v.,	441	Curwen v. Fletcher,	285	v. Stanley,	307
Aspinall, Rushton v.,	178	Davies, Cole v.,	273	Kemp v. Squire,	348
Assurance Company (The Royal		Davis v. Topp,	441	Kent, Dunch v.,	48
Exchange) Thornton v.,	570	Darwent v. Walton,	308	Kien v. Stukely,	497
Atkins v. Farr,	116	Dedire, Fremoult v.,	816	King v. Hogg,	505
v. Rowe,	512, 518	Den v. Gaskin,	542, 543	Knight's case,	263
Atkinson, Grayson v.,	543	Desbouvrie, Pusey v.,	525	Bishop of Winchester v.,	104
Back v. Andrews,	114	Dighton, Lane v.,	518	v. Knight,	309
Backus, Jesse v.,	109	Doe, Lessee of Bowerman, v.		Knowler, Powell v.,	305
Bagshaw v. Spencer,	477	Sybound,	391	Lamas v. Bayly,	512, 513
Baker's case,	27	Donne v. Lewis,	441	Lane v. Dighton,	513
Baker, Squire v.,	497	Draper v. Borlase,	458	Wheatly v.,	14
Bampfild v. Popham,	303	Dunch v. Kent,	48	Lansdown v. Lansdown,	526
Banks, Mills v.,	348	Edwards v. Carrol,	345, 357	Law, Jenkins v.,	28
Barber, Geach v.,	103	Elliott v. Collier,	115	Layner, Steed v.,	12
Lea v.,	516	v. Wilson,	418	Lea v. Barber,	516
Barry, Stokes v.,	455	Erving v. Peters,	444	Lee v. Alston,	104
Barwicke's case,	106, 167, 169	Evans v. Llewellyn,	573	Levene v. Levene,	398
Battyn, Horner v.,	274	v. Prosser,	630	Lewis, Donne v.,	441
Bayly, Lamas v.,	512, 513	Fanshaw, Cocksedge v.,	37	Lowndes v.,	207
Beachcroft v. Beachcroft,	539	Farr, Atkins v.,	116	v. Pead,	575
Beatson v. Haworth,	412, 418	Fell v. Brown,	307	Lexington (Lord) v. Clarke,	517
Becket, Chater v.,	517	Filmer v. Gott,	525, 573	Llewellyn, Evans v.,	573
Beckley v. Newland,	306, 315	Fitzroy, Osmond v.,	573	Loker v. Rolfe,	104
Beckwith, Ibbetson v.,	543	Fletcher, Curwen v.,	285	Long's case,	268
Beerling, Reynolds v.,	580	Follott v. Ogden,	618	Loveacres v. Blight,	542
Bennett v. Allcott,	289	Ford, Martin v.,	188	Lowndes v. Lewis,	207
Bennet v. Vade,	525, 571, 572	Forth v. Chapman,	208, 561	Loxdale, Rex v.,	206
Benson, Greenside v.,	18, 19	Fotherly, Wankford v.,	108	Manaton v. Manaton,	441
Berrington, Rees v.,	49	Fox v. Black,	418	Mann, Smith v.,	160
Birch v. Wright,	408	Fremoult v. Dedire,	316	Mara v. Quinn,	14, 16
Black, Fox v.,	418	Fry v. Penn,	104	Master v. Miller,	491
Blake, Woodman v.,	306	Galton v. Hancock,	441	Martin v. Ford,	555
Blatch v. Archer,	274	Gartside v. Isherwood,	595, 575	Martyn, Cook v.,	307
Blight, Loveacres v.,	542	Gaskin, Den v.,	542, 545	Mayhow, Moore v.,	42
Mudge v.,	539, 547	Gawler v. Wade,	108	Meers, Horne v.,	497
Bodington, Wilker v.,	504	Geach v. Barber,	192	Melhuish, Tristram v.,	348, 349, 355
Bonafous v. Walker,	548	Germain, Lord Peterborough	574	Midday v. Smith,	274
Bond v. Hopkins,	453	v.,	192	Miller, Master v.,	491
Borlase, Draper v.,	581	Gibson, Cole v.,	574	Mills v. Banks,	348
Bowerman v. Sybourn,	887	& Johnson v. Hunter,	27, 29	Mitchell v. Sidebotham,	542
Bowles, Cone v.,	486	Goodright, Lessee of Baich,	164, 169	Mohun (Lord), Duke of Hamil-	
Boyer, Weymouth v.,	272	Rich,	525, 573	ton & Wife v.,	573
Brace, Pennoir v.,	381	Gott, Filmer v.,	548	Molesworth, Gregor v.,	348
Brady v. Cubitt,	105	Grayson v. Atkinson,	392	Moore v. Mayhow,	307
Brandon v. Sands,	570	Greenhill v. Greenhill,	18, 19	Mudge v. Blight,	530, 547
Bridge, Syers v.,	526	Greenside v. Benson,	548	Mundy v. Mundy,	106
Broderick v. Broderick,	539	Gregor v. Molesworth,	573	Nalsh, Tourville v.,	307
Booman, Huxlop v.,	307	Griffin v. Nanson,	308	Nanson, Griffin v.,	526
Brown, Fell v.,	383	Griffith, Twisleton v.,	555	Newland, Beckley v.,	306, 315
Buckle, Cannel v.,	497	Griffiths, Collins v.,	413	v. Shepherd,	539
Bucks (Duke of), Phillips v.,	884	Grimes v. French,	535, 574	Newman v. Newman,	160
Budgin & Wife, Christ's Hospi-	441	Guyon, Townson v.,	349, 355	Nichols, Hardingham v.,	307
tal v.,	383	Gwynne v. Heaton,	573	Nisbett v. Smith,	49, 274
Burt, Clifton v.,	611, &c.	Hamilton, Ormston v.,	441	Norton, Hobbs v.,	453
Calvin's case,	383	(Duke of) & Wife v. Lord		Nutt, Wright v.,	405, 618
Cannel v. Buckle,		Mohun,	573	Ogden, Follott v.,	618
Canterbury (Archbishop of) v.		Hancock, Galton v.,	441	Ormston v. Hamilton,	349, 355
Willis,		v. Prond,	18	Osmond v. Fitzroy,	573
Carrol, Edwards v.,	345, 357	Hanway, Clarkson v.,	526, 572, 574	Owen v. Hurd,	28
Cart v. Rees,	109	Hardingham v. Nichols,	307	Paignton, Heathcote v.,	525, 573, 574
Caryll, Hayes v.,	497	Harris v. Ingledeu,	518, 513	Peachy, Young v.,	574
Chapman, Forth v.,	203, 551	Sellack v.,	412, 418	Pead, Lewis v.,	575
Charnock, Thompson v.,	28	Haworth, Beatson v.,	525, 573, 574	Peat v. Powell,	539
Chater v. Becket,	517	Hayes v. Caryll,	525, 574	Pembroke (Viscountess) v.	
Chaurand v. Angerstein,	570	Heathcote v. Paignton,	512, 513	Currier,	403
Chesterfield v. Janssen,	305, 525, 574	Heaton, Gwynne v.,	539, 552	Penn, Fry v.,	104
Child, Walmsley v.,	103	Hendon, Waller v.,	453	Pennoir v. Brace,	272
Christie, Watson v.,	289	Heron v. Heron,	306, 315	Perlam, Clarke v.,	575
Christ's Hospital v. Budgin &		Hill, Rose v.,	547	Perry, Jones v.,	305, 384
Wife,		Hobbs v. Norton,		v. Phelps,	384
Clarke, Lord Lexington v.,		Hobson v. Trevor,		Peterborough (Lord) v. Ger-	
v. Perlam,		Hodgson v. Ambrose,		main,	192
v. Sampson,		Hogan, Jackson v.,		Peters, Erving v.,	444
Clarke v. Turton,	599	530, 540, 541, 542, 543, 548		v. Irvine,	465
Wride v.,	441	Hogg, The King v.,		Phelps, Perry v.,	384
Clarkson v. Hanway,	525, 572, 574	Holman & Robins, Taylor v.,		525 Phillips v. Duke of Bucks,	497
Clason v. Simmonds,	418	Hopkins, Bond v.,		274 Pickereil, Aggas v.,	524
Clay, Smith v.,	345	Horne v. Meers,		Piers v. Piers,	103
Clerk v. Withers,	274	Horner v. Battyn,		Pitt, Rex v.,	189
Clifton v. Burt,	441	Horwood, Underhill v.,	535, 573	Plummer, Collins v.,	306
Cocking v. Pratt,	573	Hunter, Gibson & Johnson v.,	27, 29	479 Popham, Bampfild v.,	192
Cocksedge v. Fanshaw,	27	Hurd, Owen v.,		530 Porter's case,	109
Cole v. Davies,	273	Hurst's case,		543 Porter, Senat v.,	413
v. Gibson,	574	Huxlop v. Brooman,			
Coles v. Trecothick,	570	Ibbetson v. Beckwith,			

CASES CITED.

I MUNF.

Powell v. Knowler,	306	Sherington v. Smith,	348, 356	Underhill v. Horwood,	526, 574
Peat v.,	539	Sidebotham, Mitchell v.,	542, 547	Vade, Bennet v.,	525, 571, 572
v. Robins,	441	Simmonds, Clason v.,	418	Vaughan, Simpson v.,	526
Watson v.,	539	Simpson v. Vaughan,	526	Wade, Gawler v.,	42
Pratt, Cocking v.,	573	Small, White v.,	525, 574	Walker, Bonafous v.,	504
Price v. James,	104	Smith v. Clay,	345	Waller v. Hendon,	512, 513
Prichard, Williams v.,	189	v. Mann,	169	Walmsley v. Child,	103
Prosser, Evans v.,	530	Mildmay v.,	274	Walton, Darwent v.,	308
Prond, Hancock v.,	13	Nisbett v.,	49, 274	Wankford v. Fottherly,	106
Pusey v. Desbouvrie,	525	Sherrington v.,	348, 356	Watson v. Christie,	259
Quinn, Mara v.,	14, 16	Snow, Stevenson v.,	412	v. Powell,	539
Radford v. Wilson,	307	Spencer, Bagshaw v.,	547	Weymouth v. Boyer,	426
Rees v. Berrington,	49	Squib v. Wyer,	109	Whaley, Wingfield v.,	497
v. Cart,	109	Squire v. Baker,	497	Wheatley v. Lane,	14
Reeves, Rogers v.,	508, 508	Kemp v.,	348	White v. Small,	525, 574
Rex v. Loxdale,	206	Stanley, Jones v.,	307	Wigg v. Wigg,	307
v. Pitt,	189	Steed v. Layner,	12	Wilker v. Bodington,	316
Reynolds v. Beerling,	530	Stevenson v. Snow,	418	Williams v. Prichard,	189
Rich. Goodright, Lessee of		Stileman v. Ashdown,	441	Willis, The Archbishop of Can-	
Balch, v.,	166, 169	Stokes v. Barry,	455	terbury v.,	4
Robins, Powell v.,	441	Story v. Lord Windsor,	104, 307	v. Willis,	512
Roe, Lessee of Perry, Jones v.,	306, 384	Stukely, Kien v.,	497	Willoughby, Woodman v.,	192
		Swaine, Collis v.,	104	Wilson, Elliott v.,	418
		Sybourn, Bowerman v.,	381	Radford v.,	307
		Sylvester's case,	106	Winchester (Bishop of) v.,	
Rogers v. Reeves,	508, 508	Tanner v. Wise,	539, 543	Knight,	104
Rolle, Loker v.,	104	Taylor v. Holman & Robins,	14	Windsor (Lord), Story v.,	104
Rose v. Hill,	539, 559	Thompson v. Charnock,	28	Wingfield v. Whaley,	497
Rowe, Atkins v.,	512, 513	Thornton v. The Royal Ex-		Wise, Tanner v.,	539, 543
Rushton v. Aspinall,		change Assurance Company,	570	Withers, Clerk v.,	274
Russel, Shaw v.,	542	Tombs, Cook v.,	516	Woodman v. Blake,	306
Rutter, Cud v.,	103	Topp, Davis v.,	441	v. Willoughby,	192
Ryal v. Ryal,	518	Tourville v. Naish,	307	Wride v. Clarke,	441
Sampson, Clarke v.,	383	Townson v. Guyon,	418	Wright, Birch v.,	408
Sands, Brandon v.,	106	Trecothick, Coles v.,	570	v. Nutt,	465, 618
Sellack v. Harris,	512, 513	Trevor, Hobson v.,	306, 315	v. Wright,	306, 315, 542
Senat v. Porter,	542	Tristam v. Melhuish,	497	Wyer, Squib v.,	109
Shaw v. Russel,	539	Turton, Clarke v.,	536		
Shepherd, Newland v.,	384	Twisleton v. Griffith,	573		
v. Shepherd,					

CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Appeals of Virginia,

AT THE TERM COMMENCING IN MARCH, 1810.

IN THE THIRTY-FOURTH YEAR OF THE COMMONWEALTH.

JUDGES,

WILLIAM FLEMING, ESQUIRE, Pres't. SPENCER ROANE, ESQUIRE.

ST. GEORGE TUCKER, ESQUIRE.

ATTORNEY-GENERAL,

PHILIP NORBORNE NICHOLAS, ESQUIRE.

Gordon's Administrators v. The Justices of Frederick.

Argued at the October Term, 1809.

Administration Bond—Action on—What Necessary to Sustain.—It is necessary, after a judgment against an executor or administrator, as such, to establish a devastavit, by means of a second suit, before an action can be maintained on the administration bond.

In this case, the decision of the Court, in *Braxton v. Winslow*, (1 Wash. 31,) was reviewed; doubts having been entertained whether the position there laid down, "that the plaintiff must shew, by an action brought against the executor, that he was

a creditor, and must prove by an action against the executor and the verdict of a Jury, that he had committed a devastavit," before an action could be maintained on

the administration bond, was, under the *actual case then before the Court, to be understood as requiring an action of debts suggesting a devastavit, before an action could be maintained against the securities of the executor or administrator: in short, whether three suits were necessary; 1st. A suit against the executor or administrator, as such, to establish the amount of the debt due from the testator or intestate; 2dly. A suit against the execu-

a distinction between the "want of right" to bring an action on an administration bond and the "want of evidence" to make out the case and remarks that the cases of *Braxton v. Winslow*, 1 Wash. 31, *Gordon v. Frederick Justices*, 1 Munf. 1, and *Catlett v. Carter*, 2 Munf. 24, "went off" on the ground of a "want of evidence" to make out the case.

In support of the rule that a judgment against an executor is necessary before a suit can be brought upon his administration bond, see the cases cited in *foot-note* to *Call v. Ruffin*, 1 Call 333.

See further on this subject, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6, where the question is discussed at some length and the late statutes of Virginia and West Virginia are set forth in substance; monographic note on "Official Bonds" appended to *Sangster v. Com.*, 17 Gratt. 121.

Executors—Devastavit—Proof of.—To the point that no less proof than the verdict of a jury is sufficient to convict an executor or administrator of a devastavit, the principal case is cited with approval in *Catlett v. Carter*, 2 Munf. 30, the court saying that the decision of the principal case was founded on principles laid down in the case of *Call v. Ruffin*, 1 Call 333.

But the sureties on an administration bond are not concluded by a verdict and judgment against the administrator or executor. In *Henrico Justices v. Turner*, 6 Leigh 127, it is said that Judge TUCKER admits this proposition to be true in Virginia. See further, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

***Administration Bond—Action on—What Necessary to Sustain.**—The headnote to *Meade v. Brooking*, 3 Munf. 548, reads, "After a judgment against an executor or administrator as such, a *ieri facias* and return of *nulla bona*, an action against him *alone*, on his administration bond could always be maintained without any previous suit suggesting a devastavit." In a note to this case, reference is made to the principal case and *Sess. Acts of 1813*, p. 40, ch. 13. In this case the court, speaking through the president, said, "It has been settled by a variety of decisions of this court, that securities in an executor's or administration bond cannot be charged for the misconduct or maladministration of their principal, (even where he is made a party to the action) before he be charged by a suit, and a devastavit established against him: but this court has never gone so far as to make that a necessary previous step, where the principal alone is sued on an executor's or administration bond; because in such an action, he has a fair opportunity of making a full defence, by pleading and proving that he has fairly and fully administered the estate."

For a collection of cases upholding the proposition referred to in the quotation above—that, although a creditor may sue the executor or administrator on his bond for a devastavit, he must first fix such devastavit against the executor or administrator before he can go against the sureties—see *foot-note* to *Braxton v. Winslow*, 1 Wash. 31.

The principal case is also cited in *Spottswood v. Dandridge*, 4 Munf. 294, 298, where the court draws

tor or administrator, suggesting a devastavit, and a verdict and judgment therein for the plaintiff; and, 3dly. An action on the administration bond.

This was an action of debt brought in the County Court, in the name of the Justices of Frederick, at the instance of N. Cartmill, against the administrators of Gordon and their securities, in the administration bond. The pleadings disclosed a former judgment recovered by the relator (Cartmill) against the administrators, on the pleas of payment, and fully administered; but it did not appear that there had been any intermediate suit fixing a devastavit. The Jury found a verdict for the plaintiff, subject to the opinion of the Court, "whether an action on the administration bond could be maintained, without shewing in evidence, in such action, a judgment in an action of devastavit against the administrators." The County Court gave judgment for the defendants, which, on appeal to the District Court, was reversed; and from that judgment of reversal, the defendants (the administrators and their securities) appealed to this Court.

Williams, for the appellants, relied on the case of *Braxton v. Winslow*, (1 Wash. 31,) recognised in *Call v. Ruffin*, (1 Call, 333,) as having settled the point, that an action cannot be sustained on an administration bond without a previous suit, fixing a devastavit, against the executor or administrator. By a note to *Turner v. Chinn*, (a) it appears, that the Judges consented to reconsider the case of *Braxton v. Winslow*; but no opinion was expressed on the 3 point. The question is, therefore, not influenced by what fell from the bench in the last-mentioned case.

But an additional reason may be given why a previous suit is necessary against the executor or administrator, to establish a devastavit, before an action is brought against the securities. The law declares, that no security for an executor or administrator shall be chargeable beyond the assets of the testator or intestate, on account of any omission or mistake in pleading, of the executor or administrator. (b) It is, therefore, reasonable, that the amount of assets, wasted by the executor or administrator, should be ascertained by the verdict of a jury, before the securities are called on.

Munford, for the appellees, observed an omission in the judgment of the District Court. They had failed to enter such judgment as the County Court ought to have rendered; but this Court might supply it, as was done in *Mantz v. Hendley*. (c) The judgment reversing that of the County Court, being correct, should "so far" be affirmed; and the appellees, in that event, should recover their costs, "being the party substantially prevailing."

In this case the verdict was general in favor of the plaintiffs, as to every thing in controversy between the parties, except the point submitted to the Court, which was, "whether an action on the administration bond could be maintained without

shewing in evidence, in such action, a judgment in an action of devastavit against the administrators." On such a verdict, every fact or circumstance, which (independently of the implied finding that no judgment had been obtained in an action of devastavit) could justify a decision in favor of the plaintiff, must be understood to have been proved to the Jury. (d) We have, therefore, a right to presume that, in the original suit brought to establish the debt, a verdict was found against the defendant on an issue joined on the plea of plene administravit, by which verdict it was ascertained, that he 4 *had assets sufficient to satisfy the plaintiff's claim; that (judgment being entered accordingly) a writ of fieri facias issued, and was returned nulla bona. The question propounded by the Jury to the Court was, whether, after all this had been done, it was necessary for the plaintiff to obtain another judgment, in an action suggesting a devastavit, before he could bring suit on the administration bond? On which question, I contend, the decision of the County Court was erroneous.

The devastavit was sufficiently fixed by the proceedings in the first action; so far, indeed, that the sheriff, instead of returning nulla bona, might have returned a devastavit positively; in which case, "the plaintiff might have had execution immediately against the defendant by capias ad satisfaciendum, or fieri facias de bonis propriis." (e) The Sheriff having neglected to do this, the plaintiff's remedy, in England, would have been "by scire fieri inquiry, or action of debt upon the judgment suggesting a devastavit," (f) it being very questionable whether, in that country, an action can be brought against an administrator on the administration bond, assigning a devastavit as the breach of the condition; (g) and it being certain that no bond and security is there required of an executor. The not exhibiting a true inventory or account, it seems, may be assigned as a breach; (h) and in the case of *The Archbishop of Canterbury v. Willis*, 1 Salk. 251, pl. 3, cited in 2 Bac. Abr. p. 409, Dublin edit. (i) a suit was maintained on the bond, at the instance of a creditor, who assigned as a breach the failing to pay him his debt. But, whether the last-mentioned action could have been supported, if the defendant had made a proper defence, is doubtful, the authorities being contradictory. (k)

In this country, the proper remedy appears to be an action on the bond, which our act of Assembly directs to be given by executors as well as administrators; the object of that act appearing to be to substitute the action on the bond for debt suggesting a devastavit; since both, 5 successively, *in the same case, are evidently superfluous. The bond may be put in suit for the benefit of any person injured; the devastavit may be assigned

(a) 1 Hen. & Munf. 54.

(b) 1 Rev. Code. p. 165, s. 33.

(c) 2 Hen. & Munf. 318.

(d) *Ford v. Gardner*, 1 Hen. & Munf. 72.

(e) *Tidd's Prac.* 933.

(f) *Ibid.* 1019, 1020.

(g) *Toller's Law of Executors*, 382.

(h) *Ibid.*

(i) *Title Executors, &c.* (E. 11.)

(k) See the cases cited in *Toller*, p. 382.

as a breach of the condition; and the plaintiff is bound, in that suit, to prove every circumstance which it is incumbent upon him to prove in the other.

But the case of *Braxton v. Winslow* (a) is relied upon as establishing the position, that both actions are necessary. That case has been frequently misunderstood; and, in the present instance, is misapplied. The language used by the Court (as expressed by the reporter) was unfortunately equivocal and inaccurate, but plain enough, when construed (as it ought to be) with reference to the subject matter before them. The suit having been brought on the administration bond, without any previous action against the executor, the Court decided, (with great propriety,) that a previous action should have been brought to establish the debt, and fix the devastavit; but they did not mean to decide, that two such actions were necessary. If the latter had been their meaning, it would not have been authority; because the case then under consideration did not call for a decision of that point; for the principle is well settled, that opinions of Judges are authority, so far as they apply to the cases actually before them, and no farther.

The dictum that an executor shall not be presumed guilty of a devastavit till it is found against him by a verdict, seems to have been pronounced obiter only, without being requisite to the decision of that case. But, even admitting it correct, it does not follow that a verdict, in an action suggesting a devastavit, was intended by the Court; it might be equally effectual, and adequate to the purposes of justice, if rendered on an issue joined on the plea of plene administravit in the original action, and coupled with a subsequent fieri facias, and return of nulla bona.

The case appears to have settled nothing, but that a devastavit ought to be fixed, before an action can be maintained on the administration bond. This question still recurs, *what is requisite to fix a devastavit? And this is answered, by the authorities already cited, as well as by the reason of the thing, that a devastavit is fixed, whenever it judicially appears, by the executor's own admission, or the finding of a Jury, that he had assets, and by the return of a sworn officer, that he had wasted or concealed them. The truth of the return may, indeed, be controverted by the defendant in the action on the bond; but, prima facie, it fixes the devastavit sufficiently to warrant the action. The same defence may be made, and the same evidence is admissible on both sides, in the action on the bond, as in that suggesting the devastavit. For what purpose, then, (but for the benefit of lawyers,) should three actions be resorted to, when two are sufficient? If it be said "for the protection of the securities, who, not being parties to the first action, ought not to be bound by a judgment improperly or collusively obtained against their principal;" I answer, that neither are the securities parties to the action suggesting the devastavit. Every objection, therefore, to a suit against

them in the second instance, applies equally in the third.

The act of Assembly in favor of securities, (referred to by Mr. Williams,) cannot have the effect of preventing an action on the bond; the plain intention of that act being to provide that, notwithstanding any omission or mistake in pleading, of the executor or administrator, the securities (under the plea of conditions performed) may avail themselves of any defence to which their principal might have resorted on the plea of fully administered. Its meaning cannot be that, if the executor omit to make a proper defence, or be guilty of a mistake in pleading, no action shall lie against his securities until a second action (in defending which he may be equally negligent or unskilful) shall have been brought against himself. Much less can it mean that no action shall lie against his securities, in a case in which the executor has positively admitted assets, or a Jury have found that he has enough to satisfy the plaintiff's *claim, and thereupon it appears he has wasted or concealed them, so that a writ of fieri facias could not be levied upon them.

Cur. adv. vult.

Monday, 26th March, 1810. The Judges delivered their opinions.

JUDGE TUCKER. This was an action upon an administration bond against the administrators and their securities for a devastavit, in which it was contended to be necessary to review the decision of this court, in the case of *Braxton v. Justices of Spottsylvania Court*, 1 Wash. 31.

The declaration (which is alleged to be at the instance of Nathaniel Cartmill) is in the usual form of a declaration on a bond for the payment of money; the defendants (without demanding oyer of the condition of the bond) pleaded jointly conditions performed and plene administravit. If this plea be regarded as the plea of the administrators, it might have been objected to, and ought not to have been received; as the plea of the securities, it was either an absurdity, or implied in the former plea of conditions performed. The plaintiffs, however, without objecting or demurring (b) to the plea, replied that they ought not to be precluded from having their action aforesaid against the said defendants, (at the instance of the said Cartmill,) by any thing in their plea alleged; because they say, that the defendants, the administrators, did not cause to be made a true and perfect inventory of the goods, &c. of the deceased which came to their hands, and did not exhibit an account of the same to the Court of Frederick, when thereto required; and did not faithfully administer the said goods and chattels in this; that the administrators aforesaid did not pay the amount of a judgment obtained in the said Court by N. Cartmill aforesaid, plaintiff, against the said defendants, for the sum of 72l. &c. in which suit the said administrators pleaded payment and plene administravit; *and because the said administrators have wasted the estate aforesaid; and this they are ready to verify,

(a) 1 Wash. 31.

(b) See 8 East. 5.

joined, and by protestation say the executor had not wasted the assets. The Jury found that there was 1,141. due to the relator upon the bill of exchange, and that the executor had wasted the assets; and judgment was entered for the penalty of the bond, but to be discharged by the payment of 1,141. as to this breach. From this judgment the defendants appealed.

"Whether the action could be maintained before a judgment first had by the plaintiff against the representatives of the debtor, and an execution and return of nulla bona."

"An attempt was made at the bar to shew that the paying of debts of an inferior dignity, first, was of itself a devastavit; and that a devastavit for ever so trifling a sum, renders the executor liable for the whole demand, although assets to the twentieth part never came to his hands. But neither reason nor authority warrant this doctrine; for, surely, if there be a sufficiency of assets, it is of no consequence in what order they are paid. But the person who means to make use of this act must shew himself to be a creditor in the usual course of law. It is not enough to produce a mere document of a debt; he must first institute a suit against the executor or administrator, because it is, in the first instance, a dispute between creditor and debtor, whether or no a debt actually exists; a dispute, which the securities to such a bond (who are strangers to the contract) are by no means competent to manage. It is a principle of universal law, that both parties shall be heard. Let us put this case: suppose A. binds himself in a bond to B. to pay him whatever sum C. owes him, (B.); now, before a forfeiture is incurred by A., must not B. first prove the sum that C. actually owes him? Mr. Waller, (the relator,) therefore, ought to have shewn, by an action against the executor, that he was a creditor."

The Court proceeds thus. "He (the relator) ought to have shewn by his action

After oyer of the bond and condition, the defendants (securities) pleaded conditions performed: the replication traverses the plea, and charges a breach in the non-payment of the bill of exchange, which was protested, of which the executor had notice, but had not paid it; having paid debts of inferior dignity after such notice, and wasted the assets. The defendants re-

against Moore, the executor, that he had committed a devastavit; a suggestion of a devastavit may be likened to a criminal prosecution, and an executor shall not be presumed guilty of a devastavit till it is found against him by a verdict."

11 *Here then we are brought to the inquiry, by what course of proceeding this fact may be found against an executor by a verdict.

Anciently, if the Sheriff returned nulla bona, and also a devastavit to a fieri facias de bonis testatoris sued out on a judgment obtained against an executor, it was sometimes the practice to sue out a capias ad satisfaciendum against the executor; or a fieri facias de bonis propriis. But the better and more frequent method was, to sue out a scire facias, and obtain an award of execution before issuing the fieri facias de bonis propriis. But the most usual practice upon the Sheriff's return of nulla bona to a fieri facias de bonis testatoris, was to sue out a special writ of fieri facias de bonis testatoris, with a clause therein, et si tibi constare poterit, that the executor had wasted the goods, then to levy de bonis propriis. And this we are told continued to be the practice of the King's Bench until the time of Charles I.; but 'in the Common Pleas a practice had prevailed in early times upon a suggestion in the special writ of fieri facias of a devastavit by the executor, to direct the Sheriff to inquire by a Jury whether the executor had wasted the goods, and if the Jury found he had, then a scire facias was sued out against him; and, unless he made a good defence thereto, execution was awarded de bonis propriis, which practice was, about the time of Charles I. recommended by the Court of King's Bench to be adopted in that Court likewise. It afterwards became the practice of both courts, for the sake of expedition, to incorporate the fieri facias inquiry, and scire facias into one writ, thence called a scire fieri inquiry. This writ recites the fieri facias de bonis testatoris sued out on the judgment against the executor, the return of nulla bona by the Sheriff, and then suggesting that the executor had sold and converted the goods of the testator to the value of the debt and damages recovered, commands the sheriff to levy the said debt and damages of the goods of the testator, in the hands of the executor, if they could be levied thereof; but, if it should appear to him, by the inquisition of a

12 *Jury, that the executor had wasted the goods of the testator. then the Sheriff is to warn the executor to appear, &c.(a) And if the Sheriff omits to give notice to the defendant of the time the writ is to be executed, the inquisition may be set aside for that cause.(b) And this practice, we are told, is still frequently adopted in England; but in this country no case of the kind has occurred within my own experience. But the most usual mode of proceeding, even in England, is by action of debt upon the judgment, suggesting a devastavit, which, we are told, was substituted in lieu of the proceeding by scire fieri

inquiry.(c) The foundation of this action is a judgment obtained against the executor. A judgment against an executor or administrator, whether by default, (that is, by neglect after an appearance, for in England no judgment can be in a personal action without appearance,)(d) or upon demurrer, or upon a verdict on any plea, pleaded by the executor, except plene administravit, or admitting assets to such a sum, et rien ultra, is, in England, (and perhaps in this country before the act of 1806, c. 21,) conclusive upon him that he has assets to satisfy such judgment. But our act of 1792, c. 92, s. 33,(e) declares, that no security for any executor or administrator shall be chargeable beyond the assets of the testator or intestate, by reason of any omission or mistake in pleading, or false pleading, of such executor or administrator. The effect of this provision, as it relates to the securities, I shall consider hereafter. Indeed, if the executor or administrator plead either a general or special plene administravit, it is now held, that he is only liable to the amount of the assets proved to be in his hands;(f) though the case was formerly taken to be, that if any assets, however small, were proved to be unadministered, the plaintiff was entitled to recover his whole demand from the executor: so that now a judgment against an executor on a verdict upon plene administravit, is only an admission of assets to the extent of assets which may be proved to be in his hands. If, therefore, upon a fieri

13 facias de bonis testatoris, *on a judgment obtained against an executor by either of the ways above mentioned, either no goods can be found, which were the testator's, or not sufficient to satisfy the demand; or, (which is the same thing,) if the executor will not expose them to the execution, that is evidence of a devastavit. And the English authorities in general seem to consider it as conclusive; but Serjeant Williams, in his note on the case of Hancock v. Proud,(g) says, that to a scire facias on a judgment, or action of debt suggesting a devastavit, the defendant cannot plead plene administravit, but only controvert the devastavit; of which fact the judgment and Sheriff's return of nulla bona testatoris, are almost conclusive evidence; and the judgment will be against the defendant de bonis propriis. The mode of proceeding is immaterial, it is said, because the executor is entitled to the same defence in an action of debt upon the judgment suggesting a devastavit, as in the proceeding by scire fieri inquiry. The usual course in an action of debt is, first, to sue out a fieri facias upon the judgment obtained against the executor, and, upon the Sheriff's return of nulla bona, to bring the action, and state in the declaration, the judgment, the writ, and return; and, on the trial, to give in evidence the judgment, the fieri facias, and the return, to prove the case. There are certain rules equally applicable to the proceeding by

(c) 2 Lord Raym. 974.

(d) 1 Lord Raym. 500, 3 Black. Com. 316.

(e) 1 Rev. Code, p. 165.

(f) 2 Wash. 302. Booth v. Armstrong.

(g) 1 Saund. 336.

(a) See Lilly's Ent. 664-666.

(b) 2 Lord Raym. 1382, Steed v. Layner; 1 Stra. 323, S. C.

scire fieri inquiry, and to the action of debt on a devastavit; 1st. The return of a devastavit by the Sheriff, on the execution issued upon the first judgment against the executor, is not conclusive, and therefore the executor may traverse the devastavit, whether it be found by the inquisition, or returned by the Sheriff. The form of the traverse is indeed different. In the scire fieri inquiry, the executor precisely and expressly denies the devastavit found by the inquisition, and takes issue upon it. (a) But, in an action of debt, the whole may be given in evidence on nil debet, (b) or on not guilty. (c)

2dly. The executor cannot, in either case, plead plene administravit, or any other plea of the same nature, which
14 puts his defence upon want of assets, unless the first judgment were of assets in futuro, or the declaration in the second action should suggest a devastavit of assets which had accrued after the judgment declared upon; in both which cases, such pleas have been held admissible. (d) The reason is, that such plea (except in the cases just mentioned) would be contrary to what is admitted by the judgment in the first action. And, if the truth were, that the executor had no assets, he should have set it up as a defence to the original action, which having neglected to do, he shall not be permitted to say so afterwards. For it is a general rule, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it, either in another action founded on it, or in a scire facias. And, if he did plead plene administravit to the original action, and the judgment was had upon a verdict, finding that he had assets sufficient to satisfy the debt, he is of course equally concluded from saying that he had no assets. But, if the verdict in the original action do not find, upon the plea of plene administravit, that there are assets sufficient to pay the debt, or if it do not find the value of the goods in the hands of the defendant, if not sufficient to satisfy the plaintiff's demand, as such a verdict would be uncertain and insufficient upon the issue joined, the judgment founded upon it may be reversed for error. (e) And for the same reason that the executor cannot plead the want of assets, (except in the cases above mentioned,) he cannot give in evidence the want of assets on the trial of the devastavit, either in the scire fieri inquiry, or in the action on the devastavit; nor even upon a writ of inquiry after judgment by default in the original action, according to the practice in England. See 1 Saund. 219, n. 8, Wheatly v. Lane, in which the editor, Serjeant Williams, has given a most copious and satisfactory view of this subject.

Such appears to be the modern course of proceeding against an executor in
15 England, in order to charge him *per-

sonally for a devastavit, and such the course by which he may defend himself against the charge; and, in my opinion, they will justify what is reported to have been said by the Court, 1 Wash. 33, "an executor shall not be presumed guilty of a devastavit till it is found against him by a verdict." The action of debt upon the first judgment, is the clearest, simplest, and must unexceptionable course of proceeding, because the declaration, in such an action, must set forth the whole of the plaintiff's case, and give the executor notice of the particular charge against him. Whereas, in an action of debt upon the executor's bond, the ordinary practice here seems to be, to declare upon the bond, as upon a bond for the payment of money, without setting forth the condition, or alleging any particular breach thereof; leaving it to the defendant whether the executor himself, or his representatives if he be dead, or the security if joined with him in the action, or sued alone, (as was done in the case of Taylor v. Street,) to guess at the breaches which may be afterwards assigned in the replication as in the case now before us. There is too much room for surprise in such a course of proceeding, which can hardly be practised in an action of debt brought upon the judgment, and suggesting a devastavit; a circumstance of itself sufficient in my eyes to give the preference to the latter action. But our act of 1792, c. 92, s. 33, (f) affords a stronger reason (one indeed that is conclusive to my mind) why this course of proceeding which I recommend must be adopted in all cases arising upon any executor's or administrator's bond executed since the commencement of that act, which expressly declares, "that no security for any executor or administrator shall be chargeable beyond the assets of the testator or intestate, by reason of any omission or mistake in pleading, or false pleading, of such executor or administrator." Put the case, that an executor, who has never received more than \$100 of his testator's estate, shall, by his own inattention or mismanagement, or that of his counsel or
16 attorneys, have made himself person-

ally *liable to satisfy judgments against him for demands against his testator for \$10,000. Can the securities be charged for more than the \$100, if that were, in truth, the whole of the assets? Certainly not. Is it not then incumbent on the creditor, when he brings an action against the securities, to shew that assets sufficient to discharge his debt have come to the hands of the executor, and that he has wasted them? Certainly it is; nor will it be sufficient to shew that the executor either by his neglect, or false pleading, has made himself liable for the debt personally, without shewing that he actually had assets sufficient to pay the debt, or a part thereof.

It may be asked, perhaps, how is a creditor to ascertain the amount of the assets which have come to the hands of an executor? The law, I conceive, has sufficiently pointed out the method; it requires the executor to give bond, with condition, "to

(a) See 1 Saund. 306; Lilly's Ent. 666, 667; 2 Saund. 403.

(b) 1 Saund. 219; 2 Lord Raym. 1502.

(c) 1 Salk. 314; 2 Lord Raym. 1508; 1 Term Rep. 462.

(d) See 6 T. R. 1. Mara v. Quin, and 2 Wash. 187. Ruffin v. Pendleton; Bull. N. P. 169, Taylor v. Holman & Robins.

(e) 2 Wash. 302, Booth v. Armstrong.

(f) 1 Rev. Code, p. 165.

make a true and perfect inventory of all the goods, chattels, and credits of the deceased, which have, or shall come to the hands, possession, or knowledge of the executor, or into the hands and possession of any other person, for him, and the same so made to exhibit into the Court granting the probate, (or letters of administration, as the case may be,) at such time as he shall be thereunto requir'd by the Court. (a) His oath also binds him to make a true and perfect inventory, and also a just account when thereto required. (b) If an executor should unreasonably delay to make and return an inventory, any creditor or other person interested in the estate might, by application to the Court, procure him to be summoned to return an inventory. By this course, which is conformable to the practice in England, (c) the amount of the assets may be ascertained, and by the same course the account of his executorship, which is also to be exhibited when thereto required by the Court, may likewise be obtained. And surely this course is infinitely more likely to attain the great ends of justice, than to trust to a common Jury to adjust and settle a complicated account of an executor's or administrator's

17 *transactions, in a contest between a creditor and the security for the executor or administrator. Or should a resort to a Court of Equity be found necessary for a discovery of assets, which may be concealed by the executor, or may have gotten into the hands of legatees, or others, with the assent or connivance of the executor or administrator, that Court might direct an account, as was done in this Court in the case of Taliaferro & Gaines v. Thornton & Wife, (d) against all parties, however remotely concerned in interest; the same course I perceive to have been intimated by Judge Pendleton, in the case of Burnley v. Lambert, (e) and White, Whittle & Co. v. Banister's Executors, (f) which I shall notice hereafter; and to have been pursued by the present Chancellor of the Richmond District, in that of Clarke v. Webb and others. (g)

To return to the case of Braxton v. The Spotsylvania Justices. The Court proceeds to say: "It may be objected that the act does not prescribe that a creditor shall not go against the securities in the first instance; and, therefore, that the action was well brought; to which this answer presents itself, that it is an established principle of construction, that where a statute has given a new remedy, without pointing out the mode in which this remedy is to be attained, the rules of the common law, and the practice of the Courts, founded upon the reason of the thing, shall be pursued." I subscribe most fully to this, as to every preceding part of the opinion, which is reported to have been unanimously given in that important case.

Those who object to the delay which such

a course of proceeding must require, would do well to consider that this is an additional remedy given by our law against executors; who, neither by the common law, nor by any statute in England, can be compelled to give bond and security for their conduct. And the creditor was, by the common law, as much without a remedy against the

18 ordinary, (who was *originally in the place of an administrator,) as he now is against an executor in England, under any statute of that country. For the ordinary, at common law, might have disposed of the whole of the intestate's personal chattels, and could not be compelled to grant administration, nor was even so much as obliged to pay debts; but several statutes being made by which power was given to him to grant the administration, and to pay the debts, he therefore obliged the administrator to bring in an inventory, and to see that it was distributed in payment of debts; and, finally, the statutes required (as our law does) that the administrator should give bond for the faithful performance of his duty. But the last statute upon the subject, 22 and 23 Car. II, c. 5, was never in force in this country; so that the remedy given by our acts of assembly is not, as was contended by Mr. Munford, a substitute for the action of debt upon a judgment against an executor suggesting a devastavit; but, as was said by the Court in the case of Braxton v. The Spotsylvania Justices, an additional remedy which our law has given to creditors, legatees, and distributees of persons deceased, for their benefit and security. Have they then a right to complain that they shall not be permitted to avail themselves of this additional remedy against an innocent security, until they shall shew the nature and amount of their claims; that the testator left assets to a certain amount; that they came to the hands of the executors, who have wasted them; and that there was sufficient thereof to have satisfied their demands in a due course of administration?

The only case that I have met with in the English books of an action at law brought upon an administration bond against the securities of the administrator, is that mentioned in the case of Green-side v. Benson, 3 Atk. 248. There the creditor, Benson, had brought an action against the administratrix on a bond of her husband, the intestate, for 300l. to which she pleaded that she had not assets

19 ultra 54l., which she paid into Court. Benson, not being satisfied *with the inventory brought in by her, procured an assignment of the administration bond, and put it in suit, by bringing three several actions, one against the administratrix, and one against each of the securities; and assigned for breach that she had not exhibited a true and perfect inventory.

These causes came on to be tried, and no defence was made by the two securities, and there was judgment for the plaintiff by default.

The securities brought a bill against Benson, the creditor, and Mrs. Hudson, the administratrix; and the relief prayed was, that the defendant, the administratrix, might indemnify the plaintiffs for being

(a) 1 Rev. Code, p. 163.

(b) Ibid. p. 163.

(c) See Nelson's Lex Testamentaria, p. 355; Sir T. Raym. Rep. 470; 6 Term Rep. 6, Mara v. Quin.

(d) May 5, 1806, MS.

(e) 1 Wash. 813.

(f) Ibid. 163.

(g) 3 Hen. & Munf. 8, 9.

sureties in the administration bond, and for an injunction against Benson, the creditor, till an account should be taken between them and Mrs. Hudson, and till she should have satisfied Mr. Benson, as far as the assets would go.

The counsel for the defendant, Benson, further stated, that the administratrix pleaded to the defendant's action, that she had assets only amounting to 55l. beyond what she had already paid, but the Jury found 226l. beyond the 55l., so that the creditor became entitled to both sums.

Lord Ch. Hardwicke said, the administratrix could not then dispute the verdict which had been found against her; nor was the case of the sureties at all better, as the verdict was obtained against the administratrix, who was the proper person to try it; that he did not think it proper to have the whole account taken over again, or to alter what had been found by the verdict, and directed an account to be taken only of what was exhibited upon the inventory, and the verdict to stand as a security for so much as that should fall short to satisfy the defendant's principal and interest on his bond.

If the law of England had been conformable to our act of 1792, c. 92, s. 33, (a) the latter part of this decree must have been changed; for, undoubtedly, the securities in that case could only have been made chargeable to the amount of the assets found by the verdict.

20 *But my principal object in citing this case was to shew, that in England they think it necessary to proceed separately against the administrator, and shew the amount of the assets which have come to his hands before they sue the sureties, instead of bringing a joint action against them all, before they have established either the amount of the assets, or the liability of the administrator, as the plaintiffs have done in this suit; and further to shew that that part of the decree, which declares that the verdict against the administratrix should stand as a security only for so much as the inventory might fall short of the payment of the creditor's debt, is according to the spirit of the decision in *Braxton v. The Spotsylvania Justices*; that the creditor must pursue the estate of the deceased until it is exhausted, before any suit can be brought against a security upon the administration bond.

In the case of *White, Whittle & Co. v. Banister's Executors*, (b) Judge Pendleton, in delivering the opinion of the Court, said, "A creditor may, at law, either sue out execution upon a judgment obtained against the executors, and levy it on the visible property of the testator, if any; or, if none be found, 2dly. He may proceed against the executors, as for a devastavit, on account of a misapplication of assets; or, 3dly. A creditor may not know the state of the assets, the amount, nor the claims against the estate; he may therefore file his bill in equity to have a discovery of those matters, and on that discovery being made, may either proceed at law," (that is to say,

upon the executor's bond, as I understand him,) "or that Court may retain the cause," (as was done in this Court in the case of *Taliaferro & Gaines v. Thornton & Wife*, before mentioned,) "and determine the disputes between the parties." This seems to me to be perfectly in conformity to the principles which were supposed to have been settled in the case of *Braxton v. The Spotsylvania Justices*.

Upon these grounds, I am of opinion, that the opinion of the County Court in favour of the defendant upon the 21 *point reserved, was correct; and, therefore, that the judgment of the District Court reversing that judgment ought to be reversed, and that of the County Court affirmed.

JUDGE FLEMING. This case has been so fully stated and investigated by Judge Tucker, that it is unnecessary for me to add any thing farther than to observe, that it seems now a settled principle, that a creditor of a deceased person cannot charge, or have recourse against the securities in an executor's or administration bond, until he has pursued the estate of the testator, or intestate, to the utmost extent of the law, and proved, by the verdict of a Jury, a devastavit on the executor or administrator, as the case may be, and then no farther than assets shall appear to have come into his hands; I therefore concur in the opinion, that the judgment of the District Court be reversed, and that of the County Court affirmed.

By both the Judges, (JUDGE ROANE not sitting in the cause, on account of his being interested in a suit which involved the same point,) the judgment of the District Court reversed, and that of the County Court affirmed.

22

*Harrison v. Brock.

Friday, March 9, 1810.

1. *Demurrer to Evidence—Joinder—When Not Compelled.*—Although, upon a demurrer to evidence, the testimony adduced on both sides ought regularly to be stated, yet, if it be parol and contradictory, the party tendering the demurrer cannot, after exhibiting his testimony, compel the other party to join in demurrer; for this, in effect, would be to enable the demurrant to confer credibility on his own witnesses, or at least to carry their credibility to be adjudged by an improper tribunal: the Jury, and not the Court, being exclusively judges of credibility.

**Demurrer to Evidence—Joinder—When Not Compelled.*—See monographic note on "Demurrer to the Evidence" appended to *Tutt v. Slaughter*, 5 Gratt. 804.

Same—*What Evidence Inserted Therein.*—In *Green v. Judith*, 5 Rand. 1, 19, JUDGE COALTER, in discussing the propriety of the practice as a general and universal one, of including in a demurrer to the evidence all evidence adduced on both sides, reviewed all the cases involving that point which had been hitherto decided. Among the others, the judge cites the principal case and after quoting therefrom, discusses the decisions therein at some length. In this case (*Green v. Judith*), it was held that the practice of inserting in a demurrer to the evidence, all the evidence on both sides, is established by repeated decisions in Virginia. In *Adkins*

(a) This act was first passed in 1785, c. 61, and had its commencement January 1, 1787.

(b) 1 Wash. 168.

2. **Evidence—Award Pendente Lite.**—An award made pendente lite, cannot be given in evidence upon the plea of non assumpsit.
3. **Pleading—Plea of "Arbitrament and Award"**—Effect.—The plea of "arbitrament and award" (in so many words) is a mere nullity, and no evidence should be received to support it, notwithstanding the plaintiff replied generally.
4. **Appellate Practice—Reversal of Judgment—Admission of Improper Evidence.**—A judgment ought not to be reversed on the ground that the Court, at the instance of the party against whom it was rendered, admitted improper evidence, or erroneously compelled the other party to join in a demurrer to evidence.

This was an action of assumpsit in the County Court of Amherst, by Josiah Harrison against Joseph Brock, for the carriage of tobacco and other produce by the plaintiff, a waterman, for the defendant, at his special instance and request. The declaration was filed in May, 1799; a common order against the defendant, for want of appearance, confirmed, and a writ of inquiry awarded, at June Rules, 1799, but afterwards set aside at May Quarterly Court, 1800, on the motion of the defendant, who pleaded "arbitrament and award;" (in those words only;) to which the plaintiff replied generally, and the cause was continued at the defendant's costs. At the ensuing November term, the defendant pleaded non assumpsit, "in addition to his former plea," and issue being joined, a Jury was empanelled, but could not agree. In August, 1801, and May, 1802, verdicts were successively had for the plaintiff, but new trials awarded.

At August term, 1802, a fourth Jury having been sworn, the defendant demurred to

the plaintiff's evidence, stating in his demurrer, "that on the trial of this cause it was proved that, some time about the 3d of August, 1798, the defendant was indebted to the plaintiff in the sum of 37l. 8s. 3d. for the carriage of tobacco and other produce; that on the day aforesaid, the plaintiff made application for payment thereof to a certain William Stevens, who was factor and storekeeper for the defendant, who was a merchant. Payment in money was refused; but Stevens told the plaintiff that he had a promissory note executed to the said Stevens by a certain Samuel

23 Holt, for the sum of 49l. *6s. 3d., dated 11th May, 1798, and payable sixty days after date, with interest from the date if not punctually paid, and proposed trading the same to the plaintiff. Harrison agreed to take the whole of said note in payment; this was refused by Stevens; but it was at length agreed that Harrison should take the said note in payment, and execute his notes to Stevens for the difference between the said note of Holt and his claim against the defendant. Harrison accordingly executed two notes bearing the same date aforesaid, to the said Stevens in his own right, and not as agent, for 5l. 19s. each. The note on Holt was then delivered to the plaintiff, and an entry was made by Thomas Woodroof, another agent and storekeeper for the defendant, in the books of the said defendant, by which Harrison was charged to the said Stevens for the amount of Harrison's claim against the defendant, and Stevens was credited for the same, and the said Harrison's account was balanced, which said entry was read to the plaintiff by the said Woodroof, who asked the plaintiff if he agreed to it, and he replied he did. These facts were proved by Thomas Woodroof alone, who also said that, at the time of the trade aforesaid, the note executed by Holt was not due; and that he the said witness was present, and heard the whole of the conversation relative to the said trade. Some short time afterwards Harrison presented the note to Holt for payment, which was not made. He immediately returned to Stevens, and wished him to take back the said note, which Stevens refused, alleging it was a fair trade. Holt was believed by many to be insolvent at the time of the trade aforesaid, and it was proved that Stevens himself believed him to be so, but at the time of the trade told Harrison he expected he would get the money upon application. It was also proved by a certain William Shelton that, some short time after the trade aforesaid, he was at the store of the defendant, when a dispute arose between the plaintiff and the said Stevens; that, on hearing them, he found that they differed as to facts; that he called upon the said Woodroof above mentioned to

24 *know if he was present, and heard the contract as to the note aforesaid; he then said he was not present the whole of the time, but was present when the entry aforesaid was made. Shelton also deposed that, previous to the trade aforesaid, he had told the said Stevens that Holt was insolvent. It was further proved that, some time afterwards, Harrison, the plain-

v. Fry, 38 W. Va. 557, 18 S. E. Rep. 740. It is said: "In the case of Childers v. Deane, 4 Rand. (Va.) 408, it was held that a demurrer to evidence should contain all the evidence on both sides. See also, Hoyle v. Young, 1 Wash. (Va.) 182; Green v. Judith, 5 Rand. (Va.) 1: *Harrison v. Brock, 1 Munf.* 35, and numerous other cases, where it is held that the whole evidence must be set out; that is, not only that offered by the plaintiff but that offered by the defendant." For further information on this subject, see monographic note on "Demurrer to the Evidence" appended to Tutt v. Slaughter, 5 Gratt. 364. The principal case is also cited in Harman v. Cundiff, 32 Va. 249.

***Evidence—Award Pendente Lite.**—To the point that an award made after the institution of a suit cannot be given in evidence on the plea of nonassumpsit, the principal case was cited in Austin v. Jones, Gilman. 353. This rule grows out of the general principle of law that the evidence, the pleading and the verdict, all have reference to the time of instituting the suit. Austin v. Jones, Gilman. 353.

See generally, monographic note on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684; monographic note on "Lis Pendens" appended to Stout v. Vause, 1 Rob. 169; monographic note on "Evidence" appended to Lee v. Tapecott, 2 Wash. 276.

†**Appellate Practice—Reversal of Judgment—Admission of Improper Evidence.**—See monographic note on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 268; monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

tiff, applied to the said Stevens, and told him that, if he would not take back the said note on Holt, he must assign it to him, which he positively refused. It was also said by the said Shelton, who had been long in the mercantile line, that it is not usual for merchants to call their customers to their day-books after making entries, and read the entries over, and ask them if they agree to the same. It was also proved by the said Shelton, that the said Stevens was to receive a liberal interest for all sums lent the defendant. It was also proved that the defendant had no personal agency, and no knowledge of the trade of the note aforesaid."

The demurrer farther stated, "it was proven by the defendant, that the matters in controversy in this suit were submitted to the determination of John Wyatt, William Ware, and Reuben Norvell, or any two of them, by an agreement entered into in the following words and figures, to wit: Whereas a dispute hath arisen and is now depending between Josiah Harrison, of the County of Amherst, of the one part, and Joseph Brock, of Orange County, of the other part, respecting the payment of a bond by William Stevens, as agent for the said Joseph Brock, which bond was payable from Samuel Holt to said William Stevens; now, for the ending and deciding thereof, thereby it is mutually agreed by and between the said parties, that all matters in difference between them shall be referred and submitted to the arbitrament, final end and determination of John Wyatt, William Ware, and Reuben Norvell, or any two of them, arbitrators indifferently elected by said parties, so as the said arbitrators, or any two of them, do make and publish their

award in writing ready to be delivered to the said parties, *or either of them, who may desire the same, on or before August Court next ensuing. And it is hereby mutually agreed by and between the parties aforesaid, that this submission shall be made a rule of the County Court of Amherst. In witness whereof, the parties to these presents have hereunto set their hands this 28th day of June, 1799. Josiah Harrison, (seal.) William Stevens, for Joseph Brock, (seal.) That two of the said referees did proceed to make up an award in the following words and figures, to wit: "We, the subscribers, mutually chosen by the parties to decide and determine a certain matter in dispute, between Josiah Harrison, of the County of Amherst, of one part, and Joseph Brock, of the County of Orange, of the other part, respecting a bond due from Samuel Holt to William Stevens, and which said bond was by the said Stevens given in payment of a debt due from the said Brock to the said Harrison, after maturely considering the testimony adduced, are of opinion, and do hereby award, that the said bond was received in payment, and ought to go (without recourse) to the extinguishment of the said debt. Given under our hands this 30th day of June, 1799. John Wyatt, Reuben Norvell;" which was duly delivered to the parties. The said award was made in the presence of both parties, both parties agreeing to the trial, and after hearing the tes-

timony offered by each. It was proven by one of the arbitrators that, at the time of making up the award aforesaid, the plaintiff and the said Stevens, who was agent for the defendant, differed in their statement of facts; the plaintiff alleging, that there were certain facts known to the said Stevens, which he could not deny if upon his oath. The arbitrators had then made up their opinion upon the subject, as expressed in the award aforesaid, but had not actually signed the award; but, to satisfy the plaintiff, examined the said Stevens on oath, previously observing to the plaintiff, that nothing that Stevens should say in favour of Brock should have any effect, but that, if he said any thing in favour of Harrison, it should be attended to. It was

26 *proven further by one of the arbitrators, that no impression was made on their minds by the examination of the said Stevens, but that they made up their award on the other testimony adduced by the parties; and that the principal cause which induced them to render the award aforesaid was, that evidence was produced to them to shew that Harrison preferred the debt on Holt to his debt from the defendant, inasmuch as he, the said Harrison, believed that the circumstances of Holt were better than those of Brock. It was proved that the attorney, who appeared for the plaintiff before the arbitrators, objected to the examination of the said Stevens as being illegal, but they did proceed to examine him merely to satisfy the plaintiff himself."

The plaintiff objected to joining in this demurrer, alleging, "there was a contradiction and clashing of evidence, and that the weight of said evidence and circumstantial proof ought to be determined by the Jury; which objection was overruled by the Court, and the plaintiff compelled to join in the demurrer, because it appeared to the Court that the facts adduced in evidence were fully and fairly stated in the demurrer;" whereupon the plaintiff filed a bill of exceptions. The Jury found a verdict for the plaintiff for 51l. 5s. 6d. damages, subject to the opinion of the Court upon the demurrer.

At March Court, 1803, (the demurrer being argued,) the Court gave judgment for the plaintiff; but, upon a writ of superseas, this judgment was reversed by the District Court holden at Charlottesville; the reason assigned being, "that the award made between the parties should have been considered as final and conclusive;" and thereupon the plaintiff appealed to this Court.

Munford, for the appellant. The County Court ought not to have ruled the plaintiff to join in demurrer; the evidence offered by him being parol and circumstantial, and testimony to contradict it being adduced by the defendant, instead of admitting its

27 truth as he ought to have *done. (a) But this being an error committed by the Court at the instance of the defendant, the plaintiff is entitled to the benefit of the decision, which was in his favour, and correct upon the merits.

(a) 5 Rep. 104. Baker's case; 3 T. Bl. 872, n. 26. 1 Doug. 119. Cockledge v. Fanshaw; 3 Tidd's Pr. 703. citing 3 H. Black. 187. Gibson & Johnson v. Hunter.

The plaintiff proved his claim in the first place. The defendant endeavoured to overthrow it by proof of delivery of a note. In such case, "the defendant must prove the agreement of the plaintiff to accept the thing delivered in satisfaction." (a) But, as to this point, the testimony adduced is doubtful. Thomas Woodroof is the only witness, and he unworthy of credit, having told different stories at different times, and being strongly opposed by other circumstances. On a demurrer to evidence, the Court must presume any and every fact which the Jury might out of complicated testimony have inferred. (b) The Court, in this case, might have inferred that the plaintiff was imposed upon by Stevens, in passing upon him Holt's bond, knowing it to be good for nothing, and were therefore right in disregarding the pretended payment by the transfer of that bond.

2. The plea of "arbitrament and award" was no plea, for reasons similar to those which influenced this Court to decide that the word "justification" was no plea in slander. (c) And though this was a mispleading, and the issue joined immaterial, the defendant, who was the party guilty of the first fault in pleading, has no right to take advantage of it. (d) A replender ought not to be awarded, but the plea should be disregarded.

3. The evidence of the award should not have been received on the plea of non assumption. By that plea, the defendant puts the plaintiff on proving the whole of his case, and entitles himself to give in evidence any thing which shews that no debt was due at the time the action was commenced. (e) Now, this award was made after the action brought, and should, therefore, have been specially pleaded, as a matter of defence arising *puis darrein* continuance. Besides, it could not be

28 a bar, without a rule of *Court. (f) The agreement was, that the submission should be made a rule of Court; but this was never done, and appears to have been neglected as much by the defendant as the plaintiff. It was not proved in Court by the affidavit of any witness thereto, (as the act concerning awards requires,) nor "entered in the proceedings of the Court," nor was a rule thereupon made by the Court. Without such rule, it was a mere agreement to submit to arbitration, revocable by either party, (g) and not sufficient to oust the Courts of Law or Equity of their jurisdiction. (h) A separate action might have been maintained for a breach of this agreement, (i) but it could not bar the plaintiff from proceeding in the suit then depending; neither could the Court have granted an attachment for not obeying the award entered thereupon. (k) Indeed, the failure to have the rule of Court made was an implied revocation.

(a) Peake's Ev. 249.

(b) 3 Wash. 210, Stephens v. White.

(c) Kirtley v. Deck, 3 Hen. & Munf. 388.

(d) *Ibid.*

(e) Peake, 248; Tidd's Pr. 592.

(f) 1 Rev. Code. c. 52, p. 49, 50; 3 Lord Raym. 789.

(g) Tidd's Pr. 748, 749, citing 8 Co. 82.

(h) *Ibid.* citing 8 Term Rep. 180, Thompson v. Char-

nock.

(i) *Ibid.* 749, 750.

(k) 3 Term Rep. 643, Owen v. Hurd; 8 Rep. 87.

Jenkins v. Law.

4. The award in this case was neither certain, mutual, nor final. It could be understood only by referring to other testimony of a parol and disputable nature. It was not mutual; for, while it went to establish the defendant's claim to a credit, it did not settle the amount of the plaintiff's account. Neither was it final; for it did not dispose of the suit at all, nor settle the question of costs. Besides, the testimony of one of the arbitrators proved that they received the illegal testimony of Stevens, which might have influenced one of them, if it did not the other.

Botts, for the appellee. It may be collected from the record, that all the testimony, except that relative to the award, was introduced by the plaintiff. Suppose, therefore, the defendant's evidence nothing, as he demurred, yet the contradictory facts disclosed in the plaintiff's evidence were sufficient to destroy it. Probably the only witnesses who knew of his claim were those who also knew of its being satisfied by the transfer of Holt's bond.

It is said not to be sufficient for a demurrant to demur in the forms usually practised, but he must "distinctly admit 29 *upon the record every fact and every conclusion which the evidence offered conduces to prove!" This doctrine is indeed laid down in the single case of Gibson & Johnson v. Hunter, (l) but is not conformable to the practice of this country. In Knox v. Garland, (m) Hyers v. Green, (n) Hyers v. Wood, (o) and Biggers v. Alderson, (p) the demurrers contained a statement of all the evidence on both sides, and concluded without any distinct admission by the defendants. The counsel observed, in the last mentioned case, "that by a demurrer to evidence the defendant not only admits the facts stated, but every rational inference which a Jury might deduce from them;" and this appears to be the correct doctrine, that such is the effect and construction of the demurrer, without any distinct admission. Whether the practice should be one way or the other, might appear a matter of no importance; but the inconvenience of establishing the rule contended for goes to the total destruction of demurrers to evidence. How is it possible for the demurrant to fix on the inferences which might be drawn from the evidence? But this, in fact, is the province of the Court, according to the case of Stephens v. White. (q)

The effect of the demurrer then being that the defendant impliedly admits the truth of the plaintiff's evidence, it only follows that he admits it such as it is; but here the plaintiff's own evidence was contradictory, and therefore the Court could infer nothing from it in his favour.

On the merits, he was not entitled to a judgment; for it is not at present proved that Holt was really insolvent, and Harrison ought not to hold the bond against him, and yet come upon Brock; neither is

(l) 3 H. Black. 187.

(m) 3 Call. 241.

(n) *Ibid.* 555.

(o) *Ibid.* 574.

(p) 1 Hen. & Munf. 54.

(q) 3 Wash. 210.

Brock responsible for any fraud committed by Stevens without his privity.

I admit the plea of "arbitrament and award," in so many words, was bad; but it gave the plaintiff notice that the defendant intended to rely upon an award, and was, therefore, sufficient to let it in upon the plea of non assumpsit, as where there are bad counts and good counts in the same declaration, evidence may be received

30 upon the good counts "of facts of which the defendant had notice by the bad counts, the great object being to prevent surprise, by giving notice of the cause of action, or ground of defence, as the case may be. (a)

But, if the award was not admissible, the objection should have been taken by bill of exceptions. The evidence would certainly have been proper by consent of parties; and the plaintiff's not excepting was equivalent to a consent on his part.

Mr. Munford contends that, since the award was made after the action brought, it should have been specially pleaded. But the same objection was taken and overruled in *Turberville v. Self*. (b) The award does not make the payment, but ascertains that there was a payment before the suit. (c) It may be considered as an indirect agreement of the parties to the facts stated therein.

If the failure to make the rule of Court was a revocation, I wish the counsel had fixed the time when it was to be considered as such. But, in fact, the submission was never revoked; for both parties attended with their witnesses, and acquiesced in the authority of the arbitrators. Their award might and ought to have been made the judgment of the Court; the going on afterwards to trial by Jury was an error favourable to the plaintiff, and not a subject of complaint on his part.

Taking the submission and award together, every reasonable degree of certainty is attained. The statute of jeofails applies to awards by analogy; but it is not necessary here, for no other controversy between the parties is stated, and no other debt appears but that for which the suit was depending; and, as to the supposed illegality, the case of *Pleasants, Shore & Co. and Anderson v. Ross* (d) shews that an award is not to be impeached on the ground of a mistake in law or fact, upon affidavits to prove it, but only where such mistake appears upon the face of the award.

31 *Munford, in reply, said, he did not mean to contend that an express admission of the truth of the plaintiff's evidence was necessary in the demurrer. An implied admission would equally answer the purpose; but such admission cannot be implied where the defendant introduces evidence to contradict that of the plaintiff.

In this case, what testimony was produced on each side does not distinctly appear in every part of the demurrer; but, at any rate, the award, and the witness in support of it, went to contradict the plaintiff's evidence. On his part, the justice of his claim

originally had been fully proved. Thomas Woodroof, (the only witness who said that he had taken Holt's bond in satisfaction) had been completely discredited by William Shelton. The circumstances proved by other witnesses, particularly that after presenting the bond to Holt for payment, the plaintiff immediately returned to Stevens, and wished him to take it back; that, some time afterwards, he applied to said Stevens, and said he must assign it to him; that Holt was believed by many to be insolvent at the time of the trade, and that Stevens himself believed him to be so, but told the plaintiff he expected he would get the money upon application; were amply sufficient to authorize the Jury to conclude, either that the plaintiff had not in fact received the bond as satisfaction, or that the trade was not binding upon him, being annulled and rendered void by the fraud; yet the award declared that the said bond was received in payment, and ought to go (without recourse) to the extinguishment of the said debt! This was certainly declaring that no fraud existed, and contradicting the whole current of testimony on the part of the plaintiff. The Jury, therefore, and not the Court, ought to have weighed the award compared with the other testimony, and determined which should preponderate.

The doctrine that the defendant may, in every case, by means of a demurrer, submit his evidence contradicting that of the plaintiff, to the Court, instead of the Jury,

"goes to the total destruction of the 32 trial by Jury," and "would, in practice, be intolerably harassing and oppressive. It seems clear, therefore, that in this case the plaintiff should not have been compelled to join in demurrer.

As to the merits, the question whether Holt was really insolvent or not, was proper for the consideration of the Jury; but that question, through the defendant's fault, having been wrested from the Jury to the Court, the latter became competent to decide it against him. The judgment, therefore, should not be disturbed, especially as the testimony was sufficient to justify the decision. That Brock was not responsible for the fraud committed by Stevens, is admitted; but it is equally certain that he cannot claim any benefit from that fraud.

Mr. Botts's doctrine concerning the notice given by a bad plea, and that in consequence of such notice, evidence may be received upon the good plea, is truly original and extraordinary. I had always understood the rule to be, that such evidence as goes to support the good plea, or count, is admissible, but none at all in support of the bad.

The plaintiff has excepted to the whole demurrer to evidence, and of course to the admissibility of the award as part thereof. The defendant himself, by tendering the demurrer, had taken it away from the Jury; the plaintiff, therefore, excepted in the only way which was left to him. In the case of *Turberville v. Self*, (e) the award was not made after the action brought, but "after the distress was taken respecting

(a) 2 Wash. 180, *Overton & Wife v. Hudson*.

(b) 2 Wash. 71.

(c) *Ibid.* 72.

(d) 1 Wash. 158.

(e) 2 Wash. 71.

accounts subsisting between the parties prior to the distress."

If the award could have been made the judgment of the Court, why did not the defendant bring it into Court, and move to have it entered as such? But the truth is, it was so vague and uncertain in not expressing the debt to which it was intended to apply; so incomplete in not disposing of the suit between the parties, that a judgment could not have been rendered upon it, even if every other objection had been surmounted.

33 *Friday, March 16. The Judges pronounced their opinions.

JUDGE TUCKER. Upon the original merits of this case, as disclosed by the fact stated, and admitted by the defendant in his demurrer to evidence, I cannot entertain a doubt. It appears to have been a case of fraud and imposition on the part of the defendant's agent, upon a poor, and probably ignorant, waterman, to shuffle him out of his well earned wages, by palming upon him the bond of a man whom, at the time, he believed, and probably knew, to be insolvent; and, when applied to by the plaintiff, who had endeavoured to obtain payment of the bond, to take it back, he not only refused to do so, but even went so far as positively to refuse to assign the bond to the plaintiff to enable him to bring suit upon it in his own name. These facts, and others of the same complexion, are admitted by the defendant to be true; he then exhibits a submission to arbitration, by the same agent in his behalf and by the plaintiff, after the suit was brought, (in which it was mutually agreed that that submission should be made a rule of the County Court of Amherst,) and an award made two days after, by which two of the arbitrators awarded, "that the said bond was received by the plaintiff in payment, and ought to go without recourse to the extinguishment of the debt." Why this submission was not made a rule of Amherst Court, pursuant to the terms thereof, does not appear. The plaintiff refused to join in the demurrer to evidence until overruled by the Court. The Jury assigned damages conditionally, and the County Court gave judgment in favour of the plaintiff; but that judgment was reversed by the District Court, because the County Court refused to consider the award made between the parties as final and conclusive.

It was admitted by the appellee's counsel, that the words "arbitrament and award," pleaded by the defendant in so many words, were a mere nullity, and must be dis-
34 regarded; "and that the cause is to be considered as having been tried on the plea of non assumpsit only. It is an invariable rule that every defence which cannot be specially pleaded, may be given in evidence, upon the general issue, upon the trial; but a submission to arbitration and an award might be so pleaded: of this the defendant was apprized, and probably considered the evidence offered as strictly within the issue joined. He is expressly stated to have had no personal agency, and no knowledge of the transactions of his agent, as above stated. Here, then, are two inno-

cent persons embroiled in a lawsuit by the misconduct of the agent of one of them. A Court of Equity, with all necessary parties before it, would probably find no difficulty in adjusting matters properly. But we are now in a Court of Law, and must endeavour to do justice, as far as the nature of the case will permit, between the parties.

According to the rules of Courts of Law, the only issue which the Jury were sworn to try, was upon the plea of non assumpsit; upon that issue evidence of a submission to arbitration, and an award made, was not admissible, because that matter might have been specially pleaded, and ought more especially to have been so pleaded, because both the submission and award were made after suit brought; whereas the plea of non assumpsit refers to the original ground and cause of action. If the Jury had rendered a verdict for the defendant upon this evidence, and it had appeared upon the record that they did so, it would have been error. (a) Would a judgment by the Court, upon a demurrer to evidence, have been more legal or conclusive in favour of the party offering improper evidence, than the verdict of a Jury? I conceive not; for the Court, in this instance, are merely substituted for the Jury, as triors of the facts relevant to the issue joined; and if it shall appear that they may have been influenced by improper testimony, their judgment, (like the verdict of the Jury,) if in favour of the party offering the evidence, ought to be set aside; otherwise, if it be against
35 that evidence; for, then, it is clear "the evidence has not had any undue influence. The judgment of the County Court was not influenced by this improper evidence; it was, therefore, I think, correct; and, consequently, the judgment of the District Court reversing that judgment ought itself to be reversed, and that of the County Court affirmed.

JUDGE ROANE. In this case, (as it appears upon the demurrer to evidence,) the plaintiff having established his debt, evidence was given, on the part of the defendant, of a conversation and transaction which is relied on, in bar, as an accord and satisfaction. This was proved by one witness only, who said he was present at the time of the transaction aforesaid, and heard the whole of the conversation, in which, it was further proved by him, the appellant agreed to take Holt's note in payment. This testimony was met by testimony on the part of the appellant, stating an after acknowledgment on the part of the said witness, (Woodroof,) that he was not present during the whole time of the transaction aforesaid; which testimony is in conflict with the former, and goes directly to impeach the credibility of this witness, adduced on the part of the appellee. The appellee demurred to the evidence, (the whole evidence on both sides being stated,) and the appellant was ruled to join in the demurrer, although he objected thereto. It is true, the demurrer does not state explicitly what evidence was given on the part of the appellant and appellee respectively;

(a) 2 Wash. 281, Lee v. Tapscott.

but I infer it, as aforesaid, from the nature and effect of the testimony.

In a demurrer to evidence it has been decided that the whole evidence must be stated, and thereupon the judgment of the Court is to be pronounced: the question, therefore, becomes important, whether, in the case before us, the Court rightly ruled the appellant to join in demurrer. It is admitted that a discretion in this respect exists with the Court, at least in cases

depending on loose or contradictory testimony; and it remains to be inquired, whether that discretion was rightly exercised in the present instance. The appellee's testimony is (as aforesaid) contradictory to, and in conflict with, that of the appellant. It is true, it is not opposed to the testimony originally adduced by him, but to that which came out in the replication, if I may be permitted so to express myself; but, on principle, that can make no difference, as all the testimony was given anterior to the exhibition of the demurrer. If the right of the appellee in this case to compel his adversary to join in demurrer be absolute, what is it but to give credit to his own witness, or, at least, to carry his credibility to be adjudged of by an improper tribunal? as the Jury, and not the Court, are the proper and exclusive Judges of credibility. Under that idea, a defendant (and, *e converso*, a plaintiff) might ensure success in all cases by bringing a prodigal witness to oppose the plaintiff's demand, and then instantly conferring credit on him by demurring to the plaintiff's testimony, and compelling him to join in demurrer; and, in general cases, the plaintiff might not be so fortunate as the present plaintiff, in having confronting testimony to exhibit. This would be intolerable in its consequences; and this consideration would undoubtedly afford a good reason with the Court for refusing to compel the plaintiff to join in demurrer.

In 5 Bac. 467, (Gwill. ed.) it is said, that "if it be alleged by one party that there is such a writ, and denied by the other, and thereupon there is a demurrer to evidence, no judgment can be given," (and therefore I infer the adverse party should not be compelled to join,) "for the being or not being such a writ, is a fact which a jury should determine; but in such case the writ should be admitted *tiel quel*, and then its effect should be adjudged by the Court." This case seems analogous to the one before us. With respect to the difficulty, stated by Mr. Botts, as to the impossibility of the demurrant's knowing what inferences do exist, and are therefore to be admitted, I should be satisfied *if, while he waives a reliance in the credibility of his witnesses, when opposed to the testimony of the party demurred to, (which he may do in general terms,) the drawing of the proper inferences be left to the Court. It is only substance that I am in quest of, and that is entirely attained, if my construction, while it does not confer on the Court the province of judging of credibility, does not take from it the power of inferring the facts admitted to be true.

As the County Court, therefore, compelled

the appellant to join in demurrer in this case, without an explicit admission, on the part of the appellee, of the truth of his (the appellant's) testimony, so far as it conflicted with his own; or, which is the same thing, without a waiver of his own conflicting testimony, I am of opinion that their judgment was erroneous. As, however, the first opinion of the County Court, compelling the plaintiff to join in demurrer, was favourable to the appellee, though erroneous, and as their final judgment on the demurrer would have been a *fortiori* for the appellant, if the appellee's conflicting testimony had been excluded, and would, in that case, have been altogether correct, I see no reason for disturbing that judgment. It is, however, the reversing judgment of the District Court which the appellant complains of. That judgment is erroneous in considering the award stated in the demurrer as final and conclusive. That award was not proper evidence on the plea of non-assumpsit. My opinion, therefore, is to reverse the judgment of the District Court, and permit that of the County Court, in favour of the appellant, (although erroneous as aforesaid,) to stand, for the reasons just mentioned, especially as the justice of the case is entirely in favour of the appellant, and he has already been compelled to encounter so much litigation.

JUDGE FLEMING. It appears to me that the County Court of Amherst erred in compelling the plaintiff to join in the demurrer to evidence, and also in permitting the award, made *pendente lite*, to go in evidence to the jury *on the issue joined on the plea of non assumpsit; but, the judgment in that Court being in favour of the appellant here, he has no cause of complaint on that account; and, as it appears from the evidence that a most palpable fraud was practised on him by Stevens, the storekeeper and agent of the appellee, the merits of the cause are clearly in his favour. I therefore concur in the opinion that the judgment of the District Court be reversed, and that of the County Court affirmed, which is the unanimous opinion of the Court.

Blair v. Owles.

Monday, March 12, 1810.

1. **Vendor and Vendee—Notice of Lien—Effect.**—Notice of a lien or encumbrance on property binds the purchaser, if received by him at any time before the execution of the conveyance.
2. **Same—Same—Liability of Vendee.**—A purchaser, with notice of an annual encumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value.
3. **Same—Same—Same.**—In such case, the purchaser, or the property, may be made liable in the first instance, at the election of the plaintiff.
4. **Same—Same—Suit by Claimant of Lien—Parties.**—In a suit in equity by the claimant of an encumbrance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party.

8. Same—Same—Witness Thereof*—Purchasing Agent.

—A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever; for the vendor himself may be purchasing agent for the vendee by his appointment; and the vendee, by constituting him his agent, makes him a competent witness to prove the notice.

Nancy Owle and Betsy Owle, infants, by Daniel Vandewall, their guardian and next friend, brought suit in the Superior Court of Chancery for the Richmond District against William Price, administrator with the will annexed of Charles Price, deceased, Archibald Blair and others; stating in their bill, that Charles Price, their father, made his last will and testament, dated the 18th of June, 1797, and recorded the 3d of July ensuing, in which he expressed his desire that "twenty pounds per year should be raised out of the schooner Virginia, and paid for their support so long as the said schooner should last, and that

they should have the privilege of getting firewood off of the land "that he bought of Barret Price's estate, for ten years to come;" that, soon after the death of the testator, William Price, administrator with the will annexed, sold his interest in the schooner, subject to the encumbrance upon it, to Richard Thompson; who, thereupon, paid the twenty pounds per annum for four years, but afterwards (having sold the schooner to James Brown) refused to make any farther payments; that the executors of Barret Price (as the complainants believed) executed a deed for the said land to Charles Price, in his life-time, but the deed was not recorded; that the said administrator possessed himself of the said deed, and then sold the said land to Archibald Blair, who knew of the said last will and testament; that, as the testator had four sons and daughters, the said William (as one of them) owned but a fourth part of the said land; that it was agreed on between the said William Price and the said Archibald Blair, that the deed which had been executed by the executors of Barret Price to the said Charles Price, should be returned to the said executors, and that they should execute a new deed to the said Blair; which the complainants believed was done to exclude them from the benefit of cutting firewood from the said land, of which the said Archibald Blair, after the execution of the last-mentioned deed, deprived them. They therefore prayed relief in equity, against the said Archibald Blair personally, or otherwise, as the Court should think proper.

As to all the defendants, except Archibald Blair, the suit remains undecided in the Court of Chancery. He, by his answer, admitted that he requested a friend (whose name he did not mention) to bid for the land (being fifty acres, near Scuffletown) in his behalf; and that it was struck out to him, as the last bidder, for sixty pounds; but averred "that, at the time of purchase, he knew of no encumbrance that the said

land was under whatsoever." He farther stated "that, some time after he had purchased, Daniel Vandewall mentioned to him that the said land was under
40 "an encumbrance, by the will of the late Charles Price, to furnish firewood for a certain number of years to certain persons; that he was surprised at the information, having no knowledge that the said Charles Price had ever any claim to the said land; but, upon finding there was such a will, he applied to William Price, executor of Barret Price, (who sold the land,) for an explanation concerning the said will; when the said William Price informed him that the said Charles Price had no right to make such a will; that there had been a kind of a bargain with the said Charles Price for the land, but that the said Charles had never complied with the terms thereof; and the deed passed to him was incomplete, having only two witnesses, and had never been recorded; but that, as farther security and satisfaction to the respondent, William Price, executor, and one of the children of the said Charles Price would join in the conveyance to him of the said fifty acres; which he accordingly did. The respondent denied that he had any other knowledge of the plaintiffs' equity than above stated, and therefore pleaded that he was an innocent purchaser without notice, for a valuable consideration actually paid;" insisting, "that, if the plaintiffs were entitled to any compensation, they ought to recover it of those who sold, and not of him who had thus innocently acquired the land."

Annexed to this answer, and prayed to be taken as part thereof, was the deed mentioned therein from William Price, the elder, executor of Barret Price, and William Price, the younger, "executor," and one of the children of Charles Price, dated the 12th of April, 1798; in which they, "for the consideration of sixty pounds, one half to them in hand paid, and the other being secured to be paid," (without specifying by whom the public sale had been made,) jointly conveyed the said land to Archibald Blair, "free from the claims of all persons whatsoever."

The answer of William Price, jun. (among other things), alleged, "that he knew
41 nothing of the execution of the *deed supposed to have been made by the executor of Barret Price, and required that the plaintiffs should produce proof of all matters appertaining thereto; that the complainants were not born in wedlock; and that the land sold to Archibald Blair was sold after public notice given by the crier of the encumbrance of the firewood mentioned in the bill."

The deposition of William Price, the elder, (executor of Barret Price,) stated, "that he was present when the land was offered for sale by the administrator of Charles Price, and heard the crier proclaim that there was an encumbrance of ten years' firewood on the said land; that he became the purchaser thereof in behalf of Archibald Blair; that, on the day the same was to be sold, he called on Mr. Blair, agreeable to his request, and informed him the said land was to be sold under the en-

*See monographic note on "Witnesses" appended to Claiborne v. Parrish. v Wash. 146.

cumbrance before mentioned; that Mr. Blair informed him it was not in his power to attend the sale, but signified his desire to become the purchaser, and requested him to purchase on his behalf, limiting him as to the price; that he accordingly attended the sale, and, the land being struck off within the price limited, became the purchaser, for Mr. Blair, as before stated."

On the 21st of September, 1807, the Judge of the Superior Court of Chancery directed an issue to be tried at the bar of the said Court, on the 10th day of the then next term, "to ascertain the value of firewood which the plaintiffs were at liberty to get upon the land in the bill mentioned, for ten years from the death of the testator." A Jury was accordingly empanelled, and returned a verdict, "that the said firewood was worth 22 dollars annually," amounting in all to 220 dollars for ten years; and the Court decreed, that the said Archibald Blair was liable for the value, as fixed by the Jury, for 9 years and 4 months, and that he should pay to the plaintiffs 205 dollars and 32 cents, the value of the said firewood, for the time last mentioned,

according to the verdict. From that decree, *Archibald Blair appealed, and, on the petition of the appellees addressed to this Court, the appeal was taken up out of its turn on the docket.

Williams, for the appellant, contended, 1. That Blair had no notice at the time of the purchase. His answer, positively denying such notice, is contradicted by one deposition only, which (being that of one of the bargainors) ought not to have been admitted as evidence.

2. The notice given him by Vandewall, coming from a stranger to the contract, ought not to affect him. (a) When he made inquiry into the subject, William Price, sen. who had sold him the land, denied the right of Charles Price to devise or encumber it; but, for his satisfaction, procured William Price, jun. the administrator, to join in the deed, in which they convey the land "free from the claim of all persons whatsoever." If, then, he were considered as a purchaser with notice, the two Prices were bound to make good the title to him. Therefore,

3. William Price, sen. executor of Barret Price, ought to have been a party to the suit, (b) and he and William Price, jun. administrator of Charles Price, should have been decreed to pay the money, to prevent circuitry of action and future litigation; and according to the rule of equity that the Court should make him pay that ought to pay. (c) So, in a bill against a devisee, you must make the heir a party, upon the same principle. (d) If, however, I should be mistaken in this,

4. The decree should not have been against Blair personally, but against the land in his hands; for, perhaps, the land may not be worth the money. A purchaser with notice is not personally bound, but the land is bound; and on that principle the decree must be reversed.

Warden, contra. The will of Charles Price, recorded eight months before the purchase, was sufficient notice to all the world of the encumbrance, and especially to Blair, *who bought of William Price, the administrator with the will annexed, and could not make out his title without referring to the will; for, where a purchaser cannot make out his title but by a deed which leads him to another important fact, he must be considered conversant of it; for it is crassa negligentia that he sought not after it. (e) The deposition of William Price, sen. was admissible, because, although he joined in the deed, the land was not in fact purchased of him, but of the administrator of Charles Price, (as the same deposition proves,) and he was Blair's agent in bidding for it. A circumstance in the answer shews this: Blair says, that he purchased by a friend, taking care not to mention his name; now William Price, sen. comes forward, and says he was that friend.

Daniel Vandewall was not a stranger, but guardian of the claimants: the notice from him was therefore good; for, though after the purchase, it was before the deed was made, and that is enough.

Nicholas, on the same side. The answer does not positively deny notice; but rather admits it by the evasive mode of denial, containing a negative pregnant. The notice to William Price, sen. by the crier at the sale, being to Blair's agent, was sufficient to bind him. (f)

As to the question of parties; I admit that all parties necessary to the decision of the question should be before the Court, but not persons eventually or remotely interested, or against whom the defendant can only have a claim founded on his having been compelled to pay the money. If any person set up a claim to this land, such person ought to be a party; but the circumstance that the defendant took a writing of indemnification from William Price, sen. does not render it necessary to make him a party.

With respect to the object of the decree; Blair, being a purchaser with notice, ought to be considered as personally liable, at the election of the plaintiff; and, in case of his inability, (which is not pretended,) the land should be liable.

*The decree is not indeed in this form; but, being substantially correct, ought to be affirmed.

Saturday, March 17. The Judges pronounced their opinions.

JUDGE TUCKER. From the state of facts contained in the answer of the defendant, Mr. Blair, in the original suit, I think he was clearly a purchaser with full notice of the defendant's claim to the right of firewood from the land which he purchased. This notice he had before a conveyance was made to him; and, from the conveyance itself, it appears that he paid only half the purchase-money at that time, giving security for the payment of the other half at a future day. This brings the case fully within the authorities cited in 2

(a) Sugden, 490.

(b) See 1 Vern. 110; 3 Atk. 51.

(c) Mitf. 144, 230.

(d) 1 Wille, 51, Gawler v. Wade.

(e) 1 Powell on Mort. 463, 465; 2 Chan. Cas. 246; 1 Vern. 319, Dunch v. Kent.

(f) Sugden, 492, citing a number of authorities.

Fonb. b. 2, c. 6, s. 2, n. (i), s. 3, n. (m), b. 3, c. 3, s. 1, n. (b).

I am therefore of opinion that the decree should be affirmed.

JUDGE ROANE. I am of opinion that the decree should be affirmed. It was objected, that the executor of Barret Price should have been a party; but, from facts disclosed in the answer of Blair himself, as well as from other testimony, it appears clearly that he was a purchaser with notice of this encumbrance. I should have had doubts whether the lien should not have been confined to the land, had it not appeared that Blair refused to give the plaintiffs permission to enjoy the benefit of the firewood.

JUDGE FLEMING. There appears to have been sufficient notice, without recurring to the answer of Blair. It is the unanimous opinion of the Court, that the decree be affirmed.

45 *Ward v. Johnston.

Tuesday, March 6, 1810.

1. **Bond with Collateral Security—Covenant—Assignment of Breach.*—**Covenant (as well as debt) lies on a bond with collateral condition. If there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failing to pay the penalty; but, where such stipulation is either expressed or implied, the failure to perform the condition may be assigned as the breach.

2. **Bond—Joint and Several—Liability of Security.—**A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition; the words being "If the above bound L., and W. his security, shall, &c. then this obligation to be void," &c.

3. **Pleading and Practice—Judgment against Two Defendants on Confession of One—Effect.†—**Where two defendants have appeared and pleaded, an entry in the record "that the parties came, &c. and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous.

***Bond—Joint and Several—Covenant against Principal and Surety.**—As holding that an action of covenant will lie against both the principal and surety on a joint and several bond with a collateral condition, the principal case was cited in *Supr's of Jackson Co. v. Leonard*, 16 W. Va. 488, 489. *MOORE, J.*, who delivered the opinion, then cites *Mr. Robinson in his New Practice*, vol. 8, p. 365, as saying that *Ward v. Johnston*, 1 *Munf.* 45, is, "to say the least, of very questionable authority."

See generally, monographic note on "Covenant. The Action of" appended to *Lee v. Cooke*, 1 *Wash.* 306.

†**Pleading and Practice—Judgment against Two Defendants on the Confession of One—Effect.**—In a note appended to *Wrenn v. Thompson*, 4 *Munf.* 377, the principal case is cited to the point that a judgment against two defendants, on the confession of one, is erroneous, notwithstanding the plea is joint.

On this point, see the principal case also cited in *Garland v. Marx*, 4 *Leigh* 333.

For further information on this subject, see monographic note on "Judgments by Confession" appended to *Richardson v. Jones*, 12 *Gratt.* 53.

4. **Same—Same—Entry on Reversal.**—In reversing the judgment[†] for that error, the Court ought to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other.

5. **Same—Same—Reversal—Rights of Security.**—In such case, the plaintiff having, after the judgment, moved for permission to proceed against the security: and it appearing, by a bill of exceptions on this motion, that the judgment had been confessed by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal; the Court, in reversing the judgment, ought to have given the security leave to plead *puls darrein continuance*; all the proceedings having been brought up by a writ of *supersedeas*.

6. **Supersedeas—When Several Judgments May Be Brought up by One Writ.**—Several judgments and orders, relating to each other, may be brought up by one writ of *supersedeas*; provided the whole be sufficiently described, as intended to be comprehended therein.

7. **Principal and Surety—Exoneration of Surety—Stay of Execution.†—**Quære, whether a security is exonerated at law, or in equity, by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution by an agreement to which the security was not a party?

This was an action of covenant, brought by James Johnston against William Long and William Ward, in the County Court of Greenbrier. The declaration charged "that, whereas the defendants, on the 30th day of September, in the year 1794, at the County aforesaid, covenanted to and with the said plaintiff, under the penalty of four hundred pounds, to which they signed their names and affixed their seals, in the words and figures following, to wit: The condition of this obligation is such, that whereas the above-mentioned William Long hath this day bargained with and sold unto the above-mentioned James Johnston, a certain tract of land, lying in the County of Greenbrier, on the waters of Culbertson's Creek, formerly known by the name of Murphy's Place, containing three hundred and sixty-four acres, more or less; if, there-

†**Principal and Surety—Discharge of Surety—Stay of Execution.**—In the principal case, it was decided that, if the fact, that a creditor has accepted a confession of judgment from a principal and granted him a stay of execution by an agreement to which the security is not a party, can avail the surety at all at law, it must be by way of plea; and the cause was sent back. It came up again in *Ward v. Johnston*, 6 *Munf.* 6 8 *Am. Dec.* 729, with the plea regularly pleaded and demurred to and a majority of the court were inclined to think—so reads the headnote—that a surety is exonerated in equity, though not at law, by the plaintiff's accepting a confession of judgment from the principal, and covenanting thereupon to grant him a stay of execution for a limited time; the surety not having assented to such new contract and compromise. See *Stephoe v. Harvey*, 7 *Leigh* 531, 532, citing the principal case and *Ward v. Johnston*, 6 *Munf.* 6.

As to the effect on the surety of an extension of time to the principal, see also, *foot-note* to *Wright v. Stockton*, 5 *Leigh* 158; *foot-note* to *Devers v. Ross*, 10 *Gratt.* 232; *foot-note* to *Hill v. Bull*, *Gilm.* 149; *foot-note* to *Stephoe v. Harvey*, 7 *Leigh* 502.

fore, the above bound William Long and William Ward, his security, doth make unto the said James Johnston, his heirs, executors or assigns, a clear deed in fee-simple to the said tract of land, at or before the next May Court held for 46 *Greenbrier County, then this obligation to be void, otherwise to remain in full force and virtue, which obligation is here shewn to the Court; and the plaintiff in fact saith, that the said defendants, although often required, did not, on or before the May Court thereafter the date aforesaid, nor at any time, make and deliver a deed to the plaintiff as therein mentioned, but the same he hath and still do refuse to make, to the damage of the plaintiff, four hundred pounds, and therefore he sues."

The bond exhibited was in the usual form of a joint and several bond, with a condition corresponding with that set forth in the declaration, except that a proviso was added in these words; "provided that, if default be made by the said Long, the said Johnston doth agree to take the sum of two hundred pounds like money as aforesaid, with lawful interest from this date."

The defendants jointly pleaded "conditions performed;" but, afterwards, "at a Court held on the 31st of August, 1797, came the parties by their attorneys, and the defendant Long, acknowledgeth the plaintiff's action. Therefore, it is considered by the Court, that the plaintiff recover against the said defendants, two hundred pounds, the debt in the declaration mentioned, with interest from the 30th of September, 1794, and his costs," &c. Execution issued on this judgment against both defendants; and, while it was in the Sheriff's hands, to wit, on the 30th of May, 1798, the County Court, on the motion of Ward, quashed the execution as to him; leaving it to have its effect against Long. The next day two motions were made by the plaintiff; first, that the order of the preceding day, quashing so much of the execution as related to William Ward, be rescinded; and, (this being refused by the Court,) secondly, "to revive the proceedings as to the other defendant;" both which motions were overruled with costs, and exhibited by a bill of exceptions. On the same day last mentioned, the plaintiff farther moved the Court "to enable him to proceed to judgment against Ward;

47 it appearing "the cause as to him had lain dormant;" whereupon a written agreement, under the hands and seals of the defendant Long and the plaintiff, dated August 28, 1797, was produced by Ward; according to which Long was to appear "at Greenbrier, August quarterly term, 1797, and confess judgment in the action of debt brought against him by James Johnston; execution was to be staid until the February Greenbrier Court, 1798, at which time Long was to have his option either to pay the principal and interest mentioned in the bond, or make an ample and indefeasible title to the land therein contemplated: if he took his option to make the title, he was still to pay the whole interest due on the bond." A further agreement (also under seal) was endorsed, that

William Ward, the co-obligor in the bond mentioned, was not to be affected by the within agreement." But Ward was not a party to either of those agreements. The plaintiff objected to the introduction of this paper, "as any thing whereby the opinion of the Court should be affected;" but the Court overruled his objection and motion likewise; and decided "that the judgment, as confessed by Long, be final and conclusive between the parties." The plaintiff likewise offered to shew "by oral testimony, that the meaning of the endorsement on the paper admitted by the Court, was not to exonerate William Ward, the security, but to bar the exoneration of him: but the Court were of opinion that no such oral testimony should be admitted." A second bill of exceptions was filed, disclosing these circumstances.

The District Court (holden at the Sweet Springs) granted a supersedeas to the judgment of August 31st, 1797; and, on the 21st of October, 1800, being of opinion "that the said judgment was erroneous in this, in considering the judgment confessed by the said William Long to be final and conclusive as to the other defendant William Ward," reversed "the said opinion and judgment of the County Court for costs;" and retained the cause to be tried "as to the issue between the said James Johnston and the defendant 48 *William Ward." Afterwards, to wit, on the 27th of May, 1802, a Jury was empanelled, and returned a verdict, "that the said William Long and William Ward had not performed the condition of their covenants in the declaration specified;" and assessed the damages of the plaintiff to 276l. 13s. 4d. besides his costs. The Court thereupon entered judgment for the plaintiff "against the said William Ward for the damages aforesaid, and costs;" from which an appeal was taken to this Court.

Wickham, for the appellant, contended, 1. That, if all the proceedings had been regular, the judgment could not be sustained, being a regular judgment in covenant; for covenant will not lie on the condition of a bond, unless there be an agreement in the condition that it shall be performed. Covenant may lie on a bond with penalty; but the breach assigned must be for failing to pay the penalty, not for failing to perform the condition. In the condition of this bond there was no stipulation to do any act: the obligor had, therefore, his election to submit to the penalty. But, if covenant would lie, the plaintiff might lay damages as high as he please, and recover more than the penalty.

In this case, Ward was only a security: and it is a settled rule that, neither in law, or equity, can you recover more than the penalty from a security.

2. If the judgment of August, 1797, was erroneous, Johnston had no right to complain, since it was for his benefit. (a) But the judgment was clearly right, and entered against Long only. The defendant, Long, acknowledged the plaintiff's action: "therefore judgment was entered against

(a) 1 Call. 560. *Hammett v. Bullett's Executors*; 1 Wash. 6. *Smith v. Harmanson*.

the said defendants." Here the word "defendants" evidently should have been "defendant." The letter a may be rejected as surplusage; and the entry should be considered as referring to Long only; as in the case of Moss v. Moss's Executor, last term. At a subsequent day, Ward moved to quash the execution as to him; because the judgment was against Long only. Johnston so considered *it: for he moved to be permitted further to prosecute against Ward. The County and District Courts both so considered it. Indeed, it was merely a clerical error in fact, not in law, and might have been corrected by a writ of error coram vobis. (a) There was then no error in quashing the execution against Ward: it was the duty of the Court so to do. Johnston excepted, it is presumed, only on the ground of costs: but the Court has a right to award costs where parties are heard in an adversary way on a motion.

3. The County Court did right in refusing to reinstate the suit, and permit Johnston to prosecute further against Ward. Judgment being confessed by Long, and no proceedings against Ward for nine months, there was a complete discontinuance, and both parties were out of Court. Ward was in Court for the purpose of moving to quash the execution, but not as appearing to the cause. If the Court could reinstate the suit after nine months, they might at any distance of time.

A motion to reinstate a cause ought always to be on some fact dehors the record. Here there was no fact dehors the record to authorize a reinstatement. On the contrary, a written agreement between the plaintiff and Long was produced, shewing that Ward, the security, ought to be considered as exonerated. In *Croughton v. Duval*, 3 Call, 69, the authorities on this subject are collected; (b) from which it appears to be the rule in equity, (and Courts of Law are governed by the same principle,) that by giving the principal further time for payment, without the concurrence of the surety, the latter is discharged. The motion, therefore, was against the justice of the cause; and Courts of Common Law always decide motions on principles of moral right.

4. The judgment of the District Court is altogether erroneous. The entry of proceedings is very confused; but it sufficiently appears that the supersedeas applied only to *the judgment of August, 1797; (1) yet the Court reversed the decision of May, 1798. Thus the supersedeas was to one judgment; and another

was reversed. There is now no judgment against Long upon which an execution can issue; and though the judgment was confessed by him, the whole is saddled upon Ward. (2)

Wirt, for the appellee, as to the 1st point, said, that in this case the action of covenant lay; and cited 6 Viner, 375, pl. 6; 381, pl. 21, 22; 376, pl. 4. Mr. Wickham's argument admits that covenant would lie if the condition contained an express stipulation: but from these authorities it appears, that an implied one will equally authorize the action: and here a stipulation was evidently implied that a title should be made to the land, or, in case of default in that, the money should be paid. Covenant would certainly lie against Long (the principal) upon this condition; and equally so against Ward, the security. (c) The justice of the case can as well be attained in covenant, as in debt. Besides, the defendants by their plea sanctioned the action; and it would now be a surprise to permit them to take advantage of this objection.

Both the defendants pleaded, and issues were joined. Both were then before the Court. The word "defendants"

51 *in the judgment of August, 1797, must, therefore, be considered as applying to both. Whenever a supersedeas is before the Court, the whole case is brought up; and the Court may look into it, and reverse for any other error as well as for that assigned in the petition. By some means, the Clerk and Counsel have amalgamated the proceedings of August, 1797, and May, 1798. The District Court seems to have considered them as the same; but reversed the judgment of May, 1798, which ought to be reversed. If the Court was right in considering the two judgments as connected together, and substantially the same, there is then no error in the judgment of the District Court. As to Long, the judgment of the County Court is in full force. The proceedings now in question have been against Ward only.

As to the point, whether Ward, as security, was exonerated, all the cases cited were in chancery. There are none such at common law. But if notice can be taken of such a circumstance in a Court of Common Law, it must be put in issue by plea; not introduced by motion. Besides, the cases all turn on varying the contract to the injury of the security. A mere enlargement of time for payment is not, of itself, sufficient; but there must, in addition, be some strong circumstances of great hardship: and no such circumstances exist in this case.

Wickham, in reply. I admit, if the security wishes to be relieved in a Court of Common Law, it must be by plea: but here the question occurred on the plaintiff's motion, which the Court was to grant, or deny, as might be equitable. On all extra-

(a) 2 Wash. 181, *Gordon v. Frazier & Cosbie*.

(b) Nisbet v. Smith, 2 Bro. Chan. Cas. 579; Rees v. Berrington, 2 Vesey, Jun. 540; 1 Eq. Cas. 79, citing 1 Vern. 190. See, also, 3 Atk. 91.

(1) Note. The writ of supersedeas described it as "a judgment obtained the 31st day of August, 1797, by which judgment the said County Court refused to continue the suit aforesaid (which as to the said William Ward had lain dormant) for further proceedings, to the intent that the said James Johnston might obtain judgment against him the said William Ward, ordered that the judgment against the said Long should be final, and awarded the said William Long and William Ward their costs of defending the motion of the said James Johnston:" thus blending the several decisions, and stating them all as of August, 1797.—Note in Original Edition.

(2) Note. It appears from the record, that the execution (which issued against Long and Ward, and was quashed as to Ward) was returned by the Sheriff "stayed by order of plaintiff." The date of that execution does not appear.—Note in Original Edition.

(c) 6 Viner, 376, pl. 4.

judicial motions, such should be the consideration.

The proposition which I lay down is, that a security is bound by the terms of the contract, and no other: if the creditor thinks proper, by an agreement with the principal, to vary those terms in so material a part as the performance, the security

is no longer bound. The cases cited by *me are not exactly the same in all their circumstances; but this principle may be extracted from them all.

Mr. Wirt misapprehended me on the subject of covenant. If a man articles to perform covenants, under a penalty, damages may be recovered to any amount: but on a bond with a collateral condition, (without any stipulation to perform the condition,) damages to the amount of the penalty only can be recovered. Is it of no consequence to the security that he sees the extent to which he can be bound? Debt, therefore, (in which no more than the penalty can be recovered,) and not covenant, (in which the damages may exceed the penalty,) was the proper remedy in this case.

The declaration being bad in substance, was not cured by the defendant's pleading to it; for, after pleading to a bad declaration, you may move in arrest of judgment.

The District Court erred in another respect. It reversed and annulled the judgment against Long, but did not direct what judgment was to be entered in lieu thereof.

Saturday, March 10. The Judges pronounced their opinions.

JUDGE TUCKER. 1. The first point made by Mr. Wickham was, that an action of covenant will not lie in this case against his client, Ward, as he was only a security, and so named in the condition of the bond, given by him and Long, the principal, for making a title to the lands in question: but I think the objection does not lie; for the condition is, that the bond shall be void, if Long, and Ward, his security, make unto the plaintiff, or his heirs, &c. a clear deed in fee-simple for the lands. Now Long and Ward might have been joint-tenants, or tenants in common, or coparceners in the land; in which case both must have joined in the conveyance, though one only had sold to the plaintiff; and since the condition imports that something is to be done by both the seller and the security, (and not by either of them singly,)

we must suppose it was understood *by the parties that something was necessary to be done by both. Therefore, an action of covenant, I conceive, well lay against both.

2. Another point was, that the plaintiff, Johnston, having accepted a confession of judgment against Long, the principal, with a stay of execution, the security was thereby exonerated. How far this may be the case in a Court of Equity, it is not for me to say at present; but at law, I concur with Mr. Wirt that it ought to have been pleaded as a plea puis darrein continuance; which was not done. And, if it had been, I am not prepared to say it would have had the effect contended for by Mr. Wickham; but, upon this point, I give no

opinion; nor is it necessary; since the terms upon which the judgment was taken do not appear upon the record, at the time of the judgment, August 31, 1797; nor at any time before. And I hold that all that was done in the County Court afterwards forms no part of the case; the writ of supersedeas referring expressly to the judgment rendered on that day, although the Clerk has confounded the judgment of that day, with subsequent proceedings six months after.

The entry of the judgment against both defendants, on the confession of one only, was clearly erroneous; and that error ought to have been corrected by the District Court; which, however, it has omitted to do. It is therefore incumbent upon this Court to do it. A majority of the Court I understand to be of opinion, that the District Court ought to have permitted the defendant to plead the acceptance of a confession of judgment by Long, with a stay of execution, as a plea puis darrein continuance. If he had offered to plead such a plea, I should have thought the Court ought not to have rejected it; as it might have been demurred to, and the question of law would then have been brought regularly before the Court: but I am not prepared to say that the Court erred in not giving a permission

which does not appear to have been asked. I submit, *however, to the opinion of the other members of the Court, as it may be the means of settling a question of general importance by a solemn decision hereafter.

JUDGE ROANE. The proceedings in this case are extremely loose and irregular: but it is evident, that the judgment of August, 1797, against both defendants on the confession of Long only, is croneous; and so are some of the subsequent proceedings of the County Court, which would neither permit the appellee to consider the judgment of August, 1797, as also extending to Ward, (and consequently to charge him by an execution,) nor permit him to go on, and get a judgment against him. I consider all these proceedings to have been brought up by the supersedeas, and that they should be reversed, (if it be necessary as to the latter,) and a judgment rendered against Long only, on his confession; retaining the cause also for trial against Ward in the District Court. But, as it judicially appeared to the District Court, on the bill of exceptions stated in the record, that the judgment against Long was in consequence of a new agreement to which the appellant, Ward, was no party, he ought to have been permitted by the District Court to avail himself of that circumstance, (if it would legally avail him,) and that, although the agreement, in fact, took effect prior to the confession of the judgment in the County Court.

I am, therefore, of opinion to reverse the judgment of August, 1797, rendered against both defendants; to enter one against Long pursuant to the agreement in his bond; and retain the cause for trial as to Ward, with liberty for him to change his plea, if he thinks it necessary.

JUDGE FLEMING. There is no difference of opinion as to the merits of the case.

One Judge only doubted whether there was error in not giving the appellant leave to plead the new matter by way of plea puis darrein continuance. *But a majority of the Court is in favour of the following judgment.

The judgment of the District Court of May 27, 1802, is to be reversed. "And this Court is further of opinion, that there is no error in so much of the judgment of the said District Court, rendered on the day of October, 1800, as reverses the judgment of the County Court of Greenbrier of the thirty-first of August, 1797, in favour of the said Johnston against William Long and the said Ward, and retains the cause in the District Court for a trial thereof to be had between the said Johnston and Ward. But a majority of this Court is of opinion, that there is error in the said judgment of the District Court in directing the cause to be tried on the issue already joined between the said parties in the said County Court, without giving leave to the said Ward to plead any matter subsequent to the original plea, or such other matters, in the nature of a plea puis darrein continuance, as he might be advised for his further defence. And this Court is also of opinion, that there is error in the judgment of the said District Court in not proceeding to render such judgment as the said County Court ought to have given upon the confession of the plaintiff's action in that Court by the defendant Long. Therefore, it is further considered, that the said judgment of the District Court of the day of October, 1800, and also that of the County Court aforesaid, be reversed and annulled, and that the said Johnston recover against the said Ward his costs in the District Court. And further it is considered, that the said Johnston recover against the said Long the sum of two hundred pounds, with interest thereon at the rate of five per centum per annum, from the thirtieth day of September, 1794, the sum agreed on as the measure of damages between the said Johnston and Long, according to the tenor and effect of the defendant Long's bond to the said Johnston; also his costs by him expended in the prosecution of his suit in the said County Court antecedent to the confession of judgment by the said William

*Long. And it is ordered, that a new trial be had in the cause between the said Johnston and Ward, with leave to the said Ward to plead any matter subsequent to the original plea, or such other matter in the nature of a plea puis darrein continuance, as he may be advised for his further defence."

Digges's Executor v. Dunn's Executor.

Tuesday, March 13, 1810.

1. Office Judgment—Entry—Clerical Misprision—Amendment.—A judgment at rules in the Clerk's office of a County Court ought to be entered as of the last day of the succeeding quarterly term:

*Judgments—Entry at Rules—Amendment.—In *Shelton v. Welsh*, 7 Leigh 178, it is said: "In *Digges v. Dunn*, 1 Munf. 56, the entries at the rules seem not only to have been regarded as amendable, but this court considered the record as if it had actually been amended as it ought to have been."

but, if it be entered as at rules only, it is merely a clerical misprision, and therefore amendable.

2. Same—Action on—Immaterial Variance.—In such case, if the judgment be declared upon as of a quarterly term, and the transcript produced be of a judgment at rules, (which ought to have been entered as of such quarterly term,) the variance is immaterial.

This was an action of debt by Ware, executor of Digges, against Croxton, executor of Dunn, in the District Court of King and Queen, on a judgment of the County Court of Essex. The declaration set it forth as a judgment against William Dunn, administrator of William Young, jun. deceased, rendered at August quarterly term, 1788, "as by the transcript of the record and proceedings thereof aforesaid here in Court produced manifestly appears." The defendant pleaded, 1. That he did not detain the debt in the declaration mentioned; 2. No such record; and, 3. That William Dunn had fully administered. The plaintiff joined issue to the first plea; to the second replied, that there is such record, &c. and this he is ready to verify by a transcript thereof; and he prays that the said transcript may now here be viewed and inspected, whereupon he prays judgment, &c. and demurred to the third plea; to which demurrer there was no joinder. At a subsequent District Court "came the parties by their attorneys, and the Clerk of Essex County Court appeared in Court, and produced for the inspection

Same—Failure of Officer to Enter—Effect.—The authorities generally hold that the statutes relating to the recordation of deeds and docketing of judgments are merely directory and the failure of the clerk or other officer to comply with their provisions cannot affect the rights of parties claiming under such deeds or judgments. Thus, in *Digges v. Dunn*, 1 Munf. 56, it was held that although the statute required that all judgments of the county court by default should be entered by the clerk as of the last day of the term, it was nevertheless a valid judgment, notwithstanding the failure of the clerk to make the entry. *Shadrack v. Woolfolk*, 32 Gratt. 713, 715. To the same effect, the principal case was cited in *McClain v. Davis*, 37 W. Va. 338, 16 S. E. Rep. 633, dissenting opinion of BRANNON, J.

In *Shadrack v. Woolfolk*, 32 Gratt. 715, it is said: "In the case of *Digges v. Dunn*, 1 Munf., already cited, an action was brought on the judgment, and although the clerk had not entered it up upon his order book, it was nevertheless treated as a valid judgment, as of the last day of the court, under the statute. The court considered the omission as a mere clerical misprision, which could not prejudice the party, and that the judgment was equally valid, as though the clerk had performed his duty in the premises."

Record—Clerical Errors—How Amended.—The correction of a clerical error belongs to the court whose officer committed it. The remedy is by motion to that court and not by appeal to a superior court. *Snead v. Coleman*, 7 Gratt. 800, citing the principal case; *Eubank v. Ralls*, 4 Leigh 308 (which also cites the principal case at page 318); *Shelton v. Welsh*, 7 Leigh 176.

On the question of the amendment of the record, see further, *foot-note* to *Price v. Com.*, 33 Gratt. 820; *foot-note* to *Freeland v. Fields*, 6 Call 13; *Goolsby v. St. John*, 26 Gratt. 158; monographic note on "Amendments" appended to *Snead v. Coleman*, 7 Gratt. 800.

tion of the Court the original papers filed in Essex Court, on which the judgment in the declaration is said to be rendered, together with the minute and record books as kept by the said Clerk of Essex; and the

57 Court having inspected the same, was of opinion that there "is not any such record, &c. as by the declaration is supposed." Judgment was therefore given for the defendant; from which the plaintiff appealed.

The transcript of the record of the County Court of Essex, which was "filed in this cause," shewed that the judgment rendered there was at Rules in the Clerk's office, July 22, 1798; the defendant having failed to plead.

Randolph, for the appellant. There was no variance between the judgment declared upon and that produced. The judgment being entered at Rules in July, was properly stated as of the ensuing quarterly term, at which it might have been set aside; and such, I understand, is the uniform practice.

Wickham, contra. The transcript said to have been filed in the cause is not to be regarded as a part of the record; not having been made so by a bill of exceptions. That paper, then, being thrown out of the case, there is nothing to shew upon what ground the Court decided. The Clerk of Essex produced the original papers, the minute and record books; and the Court, upon inspecting those documents, determined that, in point of fact, there was no such record. To this decision no exception was taken; and therefore this Court should affirm it; upon the principle that every Court must be presumed to have done right till the contrary appears.

Randolph, in reply. The transcript in question was regularly incorporated in the proceedings by a proferat. A bill of exceptions was therefore not necessary.

Thursday, March 29. The Judges delivered their opinions.

JUDGE TUCKER. Ware, as executor of Digges, brought an action of debt against Croxton, executor of Dunn, on
58 "a judgment alleged to have been obtained by him at a quarterly session Court, held in the County of Essex, in the month of August, 1788, against the said Dunn, in his life-time. The defendant pleaded no such record as by the declaration is supposed. The plaintiff replied that there is such a record; and this he is ready to verify by a transcript of that record, and prays that that may be seen and inspected by the Court: there is no similiter entered on the part of the defendant. This, however, was probably aided by there being a negative and affirmative in the pleadings, as in the case of *Brewer v. Tarpley*. (a) But, at a subsequent day, "came the parties, by their attorneys, and the Clerk of Essex County Court appeared in Court, and produced for the inspection of the Court the original papers filed in Essex Court, on which the judgment in the declaration is said to be rendered, together with the minute and record books, as kept by the said Clerk of Essex, and the Court having inspected the same, was of opinion, that there is not any such record as by the declaration

is supposed, as the defendant in pleading hath alleged," and thereupon gave judgment for the defendant, that the plaintiff take nothing by his bill, &c. from which judgment there is an appeal to this Court.

As the plaintiff did not think proper to spread the evidence upon which the Court grounded their decision upon the record, this Court must presume the judgment of the Court pronounced upon inspection of the records of the County Court of Essex to be correct. But, were this otherwise, the transcript of a record of a judgment entered at the Rules of July (were it certain that that entry was a confirmation of a formal conditional order, which is by no means clear in my opinion) would not verify a judgment had at the succeeding August quarterly term, as the judgment stated in the declaration is charged to have been. For these judgments might have been set aside at the succeeding August term by the defendant's appearance, and pleading

to the action; and, if it were not,
59 it was the duty *of the Clerk to have entered it as of that term, pursuant to the directions of the act. (b) But it stands in the transcript inserted in this record, as a judgment entered at the Rules in July, instead of a judgment of the succeeding term. I am therefore of opinion the judgment should be affirmed.

JUDGE ROANE. The declaration makes a proferat of a transcript of a record, and proceedings containing a judgment rendered at the Essex August quarterly term; and the transcript filed in the cause is to be taken as that transcript: the plea is, that there is not any such record. The plaintiff replies that there is such a record, which he is ready to verify by a transcript of the record; and prays that that transcript may now be viewed and inspected by the Court.

This would seem to tie down the judgment of the Court to be pronounced upon the transcript thus put in issue, and make the judgment of the Court as given upon the original papers irregular and improper. (c) The transcript thus referred to exhibits a judgment rendered at the Essex July Rules preceding the August term stated in the declaration, and corresponding in other respects with the judgment so stated; and the question is, whether this record sufficiently corresponds with that stated in the declaration. It was decided in *Hunt v. Wilkinson*, (d) that an office judgment is not to be considered as a judgment till the ensuing quarterly term has elapsed; that is, the operation of the general law, upon a judgment given at the Rules at a previous term, makes it, in effect, to have been given at such quarterly term. But the question still recurs, was it necessary to state all this, circuitously, in the declaration; or would it not suffice to take the more direct course of simply stating it to be a judgment of the quarterly term? Undoubtedly the latter course is sufficient: there are many instances in the law in which it is sufficient to state the purport of a deed or document according to its legal operation.

(b) 1 Rev. Code, c. 66, s. 42, and c. 67, s. 60.

(c) See upon this subject the case of *Burk v. Tragg*, 2 Wash. 215.

(d) 2 Call, 49.

(a) 1 Wash. 362.

60 In the case before us, there is no variance between *the transcript declared on, and that produced in evidence, that is not cured and remedied by the operation of a general law; there has been no omission in the declaration which is not justified on the ground of avoiding a useless and unnecessary circuitry.

With respect to the reference in the County Court law; (a) it only refers to the District Court law as to the manner and terms of setting aside office judgments: it does not render it indispensable to the validity of an office judgment that it should be entered by the Clerk as of the last day of the term, as is provided in relation to judgments in the District Courts. There is then no misprision in not having done this in the case before us; at least none which will prevent our considering the judgment as being a judgment of the August quarterly term.

I am therefore of opinion that the judgment of the Court, on the plea of nul tiel record, is erroneous; that it ought to be reversed, and the cause remanded for further proceedings as to the two remaining pleas.

JUDGE FLEMING. The only question in this case is, whether there be a record of such a judgment as is stated in the declaration? The plaintiff declared on a judgment recovered, at a quarterly session Court holden in the County of Essex, in the month of August, 1788, of William Dunn, (B.) administrator, &c. of William Young, jun. deceased, as well for a debt of 400l. specie currency, as 210lb. of tobacco, and 1s. 6d. for costs. The defendant pleaded that there is not any such record of the recovery, &c. as by his declaration is above supposed: and the plaintiff replied, that there is such record of the recovery aforesaid remaining in the aforesaid Court of Essex County, &c. and prayed that the transcript of the said record might be viewed and inspected by the Court, &c. And, at a subsequent day, in presence of the parties, by their attorneys, the Clerk of Essex County Court appeared in the District Court of King and Queen, where the suit *was pending,

61 and produce, for the inspection of the Court, the original papers filed in Essex Court, on which the judgment in the declaration is said to be rendered, together with the minute and record books, as kept by the said Clerk of Essex, which, to be sure, were of equal validity with a transcript of the record; and the Court, having inspected the same, was of opinion that there was not any such record of the recovery of the 400l., 210lb. of tobacco, and 1s. 6d. against the said William Dunn, as administrator of William Young, deceased, as by the declaration is supposed, and gave judgment for the defendant. From which judgment the plaintiff appealed to this Court. And a transcript of the record, inspected by the District Court, and on which judgment for the defendant was, in my conception, very improperly rendered, is filed in this cause, and is now part of the record before the Court; on inspection whereof it appears that, at the Rules held in the Clerk's office of Essex County, on the 22d day of July, 1788, judgment was granted to

the plaintiff Robert Ware, against William Dunn, (B.) administrator, &c. of William Young, deceased, for 400l. specie currency, for debt, and 210lb. of tobacco, and 1s. 6d. for costs, which is precisely the amount of the judgment stated in the declaration; but it is objected that it is there stated to have been recovered in the month of August, 1788, when it appears by the record to have been entered at the Rules in the month of July preceding. But let us see what the law says on the subject. By the act concerning County and Corporation Courts of 1792, c. 27, s. 29, (b) it is enacted, that where any final judgment shall be entered up in the office, &c. by default, execution may issue thereon, after the next succeeding quarterly Court, unless the same be set aside during such Court, in like manner as office judgments in the District Courts may be set aside. By the District Court law, c. 66, s. 42, (c) all judgments by default, &c. obtained in the office, and not set aside on some day of the next succeeding Dis-

62 trict Court, shall be entered *by the Clerk, as of the last day of the term; which judgments shall be final in actions of debt founded on any specialty, bill, or note in writing, &c. By the 69th section of the County Court law, the proceedings in the said Courts, in common law cases, shall, as nearly as may be, conform to the practice in the District Courts. (d)

This judgment, then, obtained at the Rules, in the office of Essex County, the 22d day of July, 1788, ought, according to the directions of the law, to have been entered by the Clerk, as of the last day of the succeeding quarterly term, which was in August following; because the defendant was at liberty, during all that term, to set the office judgment aside, by pleading to issue. And the Clerk, by not having so entered it, was guilty of a misprision, the meaning of which I take to be, a mistake, an oversight, an omission, or neglect, in entering up a record; and the failing, or neglecting, to enter the judgment before us, as of the last day of the August quarterly term, next succeeding the office judgment, was clearly, in my apprehension, a misprision; and the entry ought to have been amended, agreeably to the directions of the law; and, according to the plain construction of which, and to the decision in the case of Hunt v. Wilkinson, (e) the judgment was incomplete, and in abeyance, (nor could execution have been had thereon,) until the end of the August quarterly term next succeeding the office judgment. The plaintiff, then, in my conception, properly stated it, in his declaration, to have been a judgment recovered in the month of August, 1788. I am therefore of opinion, that the judgment of the District Court is erroneous, and ought to be reversed, and the cause remanded for further proceedings.

By the majority of the Court the judgment was reversed, and the cause remanded for further proceedings on the issue, which had not been tried, and on the demurrer, as to which there was no joinder.

(b) 1 Rev. Code, p. 88.

(c) Ibid. p. 80.

(d) 1 Rev. Code, p. 92.

(e) 2 Call. 49.

63

***Chinn v. Heale.**

Thursday, March 8, 1810.

1. **Bond—To Convey Land—Deficiency—Remedy.**—A bond being given to make a title to a particular tract of land "to contain a certain number of acres," but not binding the obligors to convey any other specific lands to make good a deficiency; the only remedy for such deficiency is a proportionable compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable.
2. **Chancery Practice—Joint Answer—Case at Bar.**—An answer filed in the name of one of three executors (the decree being in favour of the plaintiff) not to be taken as their joint answer, notwithstanding the Clerk in the transcript of the record says that they appeared by counsel and filed their answer, and no steps were taken to compel a further answer from them.
3. **Same—Specific Performance—Contract Relating to Land—Deficiency of Quantity.**—Where a plaintiff sues in Chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency of quantity; (relating to which deficiency he prays a discovery;) but, according to the contract, appears entitled to compensation in money, and not in lands, the Court, after decreeing the first mentioned conveyance, (the deficiency, and the sum to be allowed for it, being ascertained,) will go on to decree the compensation, without turning over the party to a Court of law.

This was a suit in Chancery brought in the County Court of Fauquier, by William Heale against Charles Chinn, Rawleigh Chinn, and John Chinn, executors of Charles Chinn, deceased.

The object of the bill was to compel a conveyance of a tract of land sold to the plaintiff by the defendants, under the will of their testator, "as containing two hundred acres," and an additional conveyance

***Chancery Practice—Specific Performance—Contract Relating to Land—Deficiency of Quantity.**—On this subject, see *Mills v. Bell*, 3 Call 320; *Chinn v. Heale*, 1 Munf. 63; *Grantland v. Wight*, 2 Munf. 179, and *Nelson v. Carrington*, 4 Munf. 332, cited in *Cabell v. Roberts*, 6 Rand. 582.

On the subject of specific performance, see generally, monographic note on "Specific Performance" appended to *Hanna v. Willson*, 3 Gratt. 243.

Chancery Jurisdiction—Full Relief.—*JOHNSON, J.* in delivering the opinion of the court in *Western, M. & M. Co. v. The Virginia Cannel Coal Co.*, 10 W. Va. 287, said: "I don't think there is any question better settled than where a court of chancery has jurisdiction for one purpose, it will not send the parties back to a court of law, but will retain the jurisdiction for all purposes, and do complete justice between the parties. *Havly v. Cramer*, 4 Cow. (N. Y.) 717; *Chinn v. Heale*, 1 Munf. 63; *Chichester v. Vass*, 1 Munf. 98; *Morrell v. Munn*, 38 N. Y. 137; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390; *Taylor v. Taylor*, 43 N. Y. 578; *Stuart v. Coalter*, 4 Rand. 74; *Cady v. Gale*, 5 W. Va. 566."

Where equity can do complete justice between the parties, it will not turn them out of court to pursue their remedy at law. *McComas v. Easley*, 21 Gratt. 81, citing the principal case and 5 Pet. U. S. R. 263. To the same effect, the principal case was also cited in *Baldenberg v. Warden*, 14 W. Va. 407.

See generally, monographic note on "Jurisdiction" appended to *Philpen v. Durham*, 8 Gratt. 457.

of part of the adjoining land, (held by the defendant Charles Chinn,) to make up a deficiency of quantity in the said tract, according to an alleged agreement between the defendants and the plaintiff. It appeared from the bill, answer and exhibits, that the plaintiff held (by deed from George Heale, his father, who bought of Rawleigh Shearman) two hundred acres of land devised to the said Shearman by the will of Rawleigh Chinn, deceased; adjoining to which lay the land sold as aforesaid by the defendants to the plaintiff; being other two hundred acres devised by the same will to Bryan Stott, under whom the testator of the defendants claimed. The several devises to Rawleigh Shearman and Bryan Stott were of so many acres of land out of a larger tract in Prince William County, (afterwards Fauquier,) and not by metes and bounds. The plaintiff contended that Shearman's land was laid off for him (after Rawleigh Chinn's death) in a manner corresponding with certain lines represented in a plat and certificate of survey made by a certain James Rount by order of the Court, and in presence of the parties, as the surveyor certified; (which order was

64 made, however, on the plaintiff's motion before his bill was filed;) that a certain green line, E. F., (designated in the said plat,) divided the same from the land devised to Bryan Stott, which lay on the west of that line, and was bounded as described therein; according to which plat there was a deficiency of quantity in the last-mentioned tract.

The plaintiff farther alleged that a private survey, by consent of parties, and in their presence, was made before he gave his bond for the purchase-money; by which survey the dividing line was run, nearly, if not entirely, as represented by the said green line and letters E. F., and (as he conceived) was settled without the necessity of further dispute; but accordingly to that survey the land fell short about 49 acres; that he then proposed to purchase from the defendants the land which had been devised to Bryan Stott, at 20s. per acre, agreeable to the said private survey; to which he was answered by the defendants that, if he would take 200 hundred acres at that price, he might have it; and the difference in quantity should be made up from the adjoining lands.

The defendant Charles Chinn in his answer declared he had understood that after the death of Rawleigh Chinn the whole four hundred acres above mentioned were laid off together in one undivided body; that he had never understood there was any division of the said land between Shearman and Stott; that he had searched several offices to find the said division, but never could; that, in a deed from Rawleigh Downman (who claimed under William Downman the purchaser from Stott) to Charles Chinn, the defendants' testator, the land devised to Stott was particularly described; that the boundaries therein mentioned contained two hundred acres, or rather upwards; and the defendant supposed, if there ever was a division, it must have been made according to the lines de-

scribed in that deed. He contended that the plaintiff now had the whole title of Shearman and Stott; and if there was a deficiency in the whole quantity of four hundred acres, it should be made up
65 *to him out of the residue of Rawleigh Chinn's tract, and not out of the estate of Charles Chinn. He denied that he ever agreed to make up any deficiency of the said two hundred acres out of his own land, or any now in his possession, averring that the bond for a conveyance referred to in the bill would show what land he was bound to convey; beyond which, he was advised he was not bound.

The bond last mentioned, dated September 29th, 1788, was from Charles Chinn, Rawleigh Chinn, and John Chinn to the plaintiff. They bound themselves "executors of Charles Chinn, deceased," jointly and severally, in the penal sum of five hundred pounds; subject to a condition reciting that "whereas, at a public sale of the land belonging to the estate of said Charles Chinn, the said William Heale purchased a lot thereof containing two hundred acres, being the land which Charles Chinn, deceased, purchased of Rawleigh Downman, which land had been willed by Rawleigh Chinn to Bryan Stott, and by the said Stott sold to William Downman, the said Heale having, of this date, passed his bond for two hundred pounds, the purchase money, now if the above bound Charles Chinn, Rawleigh Chinn, jun., and John Chinn convey to the said William Heale, by good and sufficient deeds of conveyance the aforesaid land, to contain two hundred acres, whenever the same shall be required of them, then the above obligation to be void," &c.

Before the answer was filed, a decree nisi was entered against all the defendants; and at May Court, 1796, (the record says,) "came as well the complainant by his counsel, as the defendants by their counsel, and the said defendants filed their answer to the bill aforesaid, which said answer is in these words, to wit: The answer of Charles Chinn, one of the defendants, to a bill of complaint exhibited against him and others, executors of Charles Chinn, deceased, &c.; to which answer of the said defendant the complainant replied generally, and commissions were awarded the parties to take depositions."

66 *Sundry depositions were taken; partly for the purpose of endeavouring to explain the written contract, by parol testimony; and partly relating to the lines and quantity of the land sold. The plaintiff, by the deposition of a certain William Metcalf, substantially maintained his allegation concerning the private survey, made by consent of parties, in September, 1788, the day before the contract was concluded; from which survey it appeared that, after allowing him the full quantity of two hundred acres for Shearman's tract, there would remain only 146 acres in Stott's tract.

The County Court, on the 27th of March, 1798, decreed and ordered that the complainant recover of the defendant thirty-six three-fourth acres of land to be laid off out of his lands adjoining the complainant, and appointed commissioners to lay off the

same; and, upon their report, decreed "that the defendant convey to the complainant by good and sufficient deeds in fee-simple the lands and premises in the bill mentioned, and in the plat and survey also mentioned, and described by the green letters E. F., &c., and the lands described in a survey made by Charles Kemper in this cause," (containing thirty-six three-fourth acres) "bearing date the 8th day of June, and referred to in the report of the commissioners of the same date, and that they pay to the complainant his costs." This decree was affirmed by the Superior Court of Chancery for the Richmond District in May, 1804; upon an appeal taken (as the Clerk stated in the transcript of the record) by the defendants; but upon bond and security given by Charles Chinn only; from which decree of affirmance the "appellants" appealed to this court.

Wickham, for the appellants. We contend there was no dividing line; and that Heale is not entitled to more than the quantity of land found in Stott's tract. But if he were, the decree is erroneous in having been entered against one defendant only, and subjecting him to make good the whole loss. The bill was taken for
67 confessed as to all the *defendants: the decree nisi does not appear to have been served upon any of them; and one only answered. Without any reference to the merits, the decree ought therefore to be reversed. But, upon the merits, the plaintiff was entitled to no relief; at any rate, not to the relief afforded him. No specific tract of land was contracted to be substituted for Stott's land, in case a deficiency: the only remedy was by a suit at common law for damages. An attempt is made to set up a parol agreement, (to make up the deficiency in land,) which, by the statute of frauds is not admissible, unless some fraud or mistake had been committed in drawing the bond. But the bill does not charge an agreement differing from the bond; nor, in fact, is any such parol agreement proved.

Botts, for the appellee. One executor, as the answer imports, answered for all. They all appeared by counsel, and put the fate of the cause upon that answer. (a) The act of co-defendants in recognising the answer of one, as their own, makes it obligatory upon them. (b)

The statute of frauds has nothing to do with this case. The appellee relies on the written contract; and that stipulates for two hundred acres, but does not mention how the deficiency is to be made up. In such cases, it should be in kind, if possible; for this is most consonant to justice, and the intention of the parties. (c)

As to the pretence that no dividing line existed, and that, in fact, there was no deficiency; the testimony sufficiently refutes it. Could it have entered into the minds of the parties that one was selling, and the other buying, an undivided portion of the estate?

Wickham, in reply. The answer itself is

(a) 1 Wash. 379. Barnett & Woolfolk v. Watson & Urquhart; 2 H. & M. 120, 121, Pollard v. Cartwright.

(b) 2 H. & M. 575. Freeholds v. Royall.

(c) Quesnel v. Woodlief, 2 H. & M. 173; Nelson v. Matthews, ib. 164.

in terms that of one defendant only. The Court must, therefore, understand the expression in the record that it was the answer of "the defendants," as a clerical error.

The authorities referred to by Mr. 68 Botts have no application. *The case from Washington was of one defendant coming in, and joining in defence. In Pollard v. Cartwright, the husband's answer was received for himself and wife; and in Freeland v. Royall the answer of one joint partner "in the name of both" was deemed sufficient.

But, whether the answer was that of all the defendants, or of one only, the decree was wrong; being against the lands of Charles Chinn individually; and not against the lands of the estate. If it was the answer of one defendant only, then the decree was erroneous, because the others were not before the Court. If it was the answer of all, then the decree was erroneous, because one only was decreed to make satisfaction.

Equity does not require compensation in land. Other land might be worth more, or might be worth less. The contract was, that this tract contained two hundred acres. Therefore, in case of deficiency, compensation in damages should be made.

Wednesday, March 14. The Judges pronounced their opinions.

JUDGE TUCKER. Charles Chinn, by his last will and testament, (whereof he appointed his sons Charles Chinn, R. Chinn and John Chinn, his executors, all of whom qualified,) directed all his lands in the Counties of Loudon and Fauquier to be sold by them. The executors, pursuant thereto, set up at public sale a lot thereof, "containing two hundred acres, being the lands which the said Charles Chinn, deceased, purchased of R. Downman, which land had been willed by R. Chinn to Bryan Stott, and by the said Stott sold to William Downman." Of this lot the complainant William Heale became the purchaser, and on the 29th of September, 1788, passed his bond for 200l. the purchase money; and, on the same day, the executors above named executed their joint and several bond to the said Heale, reciting the

69 premises, with condition to be void, "if the said *executors should convey to the said Heale, by good and sufficient deeds of conveyance, the aforesaid land, to contain two hundred acres, whenever they should be thereto required." The bill is brought for a conveyance; suggests a deficiency in the lot called Stott's land, and requires that the deficiency be made up out of the adjacent lands of the testator. And from an examination of the condition of the bond, as noticed above, the payment of the full sum of 200l. by the purchaser, and the acceptance of it by the executors, I have no doubt that, according to the spirit and intention of the sale, the plaintiff is entitled to have the full quantity of two hundred acres of land, if there were so much land in Bryan Stott's lot; and if not, out of any adjacent lands of the testator, which were to be sold pursuant to the directions of his will. There is, however, one or two errors in the decree of the County Court. First, either in proceeding to a final decree against all the executors

by whom the land was sold, although one only had put in an answer, without proceeding to take the bill for confessed against the others, in a regular course; (a) or secondly, in decreeing the supposed deficiency to be made up by the defendant Charles Chinn, who alone had answered, out of his lands, instead of the lands of his testator, if any there were, adjoining Bryan Stott's lot. Which of these is the error of the Court, and which the blunder of the Clerk, it is not easy to say. In the case of Freeland v. Royall, (b) one partner answered in the name of both; and the decree was in favour of the defendants, not against them, as it is here. Nor am I perfectly satisfied with the survey made in the cause, on the motion of the plaintiff, before the defendants' appearance, and even before the plaintiff had filed his bill; more especially as there seems to be no reference, in that survey, to the testator's title deeds; in one of which, (that of September 16, 1772, from R. Downman to Charles Chinn the testator,) boundaries are expressed to which the survey before mentioned bears no kind of relation, that I can discover; as the answer suggests that Charles Chinn

70 entered into possession and held "the land as long as he lived, according to those bounds, there is at least room to doubt whether the survey made, on the motion of the complainant, before the defendants were in court, and even before filing his bill, is altogether correct. I am therefore of opinion the decree was erroneous; and that the decree of the Superior Court of Chancery, affirming the same, ought also to be reversed, and the cause remanded to that Court for further proceedings therein to be had; with directions to make up the deficiency of two hundred acres (if Bryan Stott's lot shall be found not to contain that quantity) out of the adjoining lands of the testator, if any there be, to be laid off in the most convenient and equitable manner; but if there be no such lands adjoining which remain unsold by the executors, that a jury ought to be empanelled to assess the complainant's damages by reason of the deficiency; if it shall appear that the executors have, by their own act, put it out of their power to make up that deficiency, by disposing of the adjoining lands of their testator: if, however, there were no such adjoining lands of their testator, in that case the executors ought to refund to the complainant a ratable proportion of the purchase money paid by him, with interest on the same from the 29th of September, 1788, the date of his bond given on that account to Levin Powell, a creditor of the deceased Charles Chinn, at the request of his executors and in behalf of his estate.

JUDGE ROANE. The depositions in this cause, and particularly that of William Metcalf, prove satisfactorily, that whatever uncertainty or difference of opinion might have existed touching a line of division between the two tracts of land in question, at a prior time, the same was adjusted between the parties just before the sale by the executors; at which time the line was set-

(a) 1 Hen. & Munf. 206.
(b) 2 Hen. & Munf. 576.

tled to run as from the green letters E. F. on Routt's survey. The residue of the tract was that sold by the executors and purchased by the complainant. It was sold by the acre; so that if it fell short of 71 *200 acres, the purchaser was not to give his bond for so much, or, having given it, would be entitled to an abatement in case of deficiency. Thus the matter stood as at the time of the sale, and independently of the title-bond spread upon the record, and the circumstances, detailed by Col. Powell, at the time of entering into the bonds. It is not admitted that those circumstances (taken even independently of the appellant's answer, and exclusively of the title-bond) would vary the result as arising from that bond only. That document, however, is to be taken as containing the final agreement of the parties, (whose previous conversations were consequently merged therein,) and as shutting out that uncertainty and danger of perjury which it was the object of the act to avoid and prevent. That bond does not bind the executors to convey 200 acres of land, but merely the lot of land, (which it is also proved was alone offered for sale,) derived from B. Stott, "containing 200 acres." Again, the bond stipulates for a conveyance of the "aforesaid land" (i. e. Stott's) "to contain 200 acres." What is this, then, but a representation in the first case that this lot contains 200 acres, and in the second instance (more particularly) a covenant warranting it to contain 200 acres? This covenant makes the executors liable to make the purchaser amends in damages; but there is no specific and written agreement binding them to convey any specific land, ulterior to that contained in Stott's tract, much less the identical land decreed to be conveyed in the case before us.

With respect to the objection that the decree in this case does not extend to the executors other than Charles Chinn; it is expressly stated that the defendants (the two omitted ones included) appeared by their counsel and filed their answer; which answer, however, as set forth, is the answer of Charles Chinn, one of the executors. Nothing is more common or reasonable, than that the answer of one defendant should be adopted by another: if it was done in this instance, so as to bar the plaintiff of the benefit resulting from the oath of the other defendants, as he might have

72 objected *to the proceeding, and require an answer sanctioned by this solemnity, so he might waive that right and accept the answer in question. This he has done by replying generally, setting the cause for hearing, taking depositions, and failing to proceed against the other defendants for not answering in a more particular and special manner. The plaintiff has proceeded on the maxim "*quisquis potest renunciare juri pro se introducto*." The case of executors, in the present instance, is stronger than that of separate individuals; for one executor is competent to bind his testator, and nothing is more common than for one of several executors to do the whole business. In the case, however, of *Freelands v. Royall*, (a) it was

held that the answer of one joint partner in the name of both should be sufficient; on the ground of the complainant's having filed a general replication and taken no steps to compel an answer from the other. That case is, perhaps, less strong than the one before us; not only in the diversity before mentioned between executors and other individuals, but because, in that case, we had only the ipse dixit of one partner, who styled himself the sole representative of the firm, whereas, in this case, the residue of the firm themselves (the other executors) have appeared by their attorney, and put in an answer by adoption. In the case of *Freelands*, there was not only no oath, but no answer for the other partner; whereas, in this case, there is an answer, but the solemnity of an oath has been dispensed with by the plaintiff: one circumstance, however, is common to both cases, which was the governing one in the case of *Freelands*; and that is, the acquiescence of the plaintiff. It is true, in *Freelands*' case, the junior Judge of this Court objected to the decree for want of the answer of the other partner; but both the other Judges were of a contrary opinion, and such was the judgment of the Court; and it is remarkable that no objection was taken to the answer in that case, on this ground, by the able counsel concerned in it. It is, however, not only the spirit of this decision which governs me in the present case, but the fear

73 of overturning very many decrees, *and opening wide the door of litigation. I believe that, unless this objection is overruled in the present instance, the consequences cannot be foreseen nor estimated; whereas, if any injury has accrued to the plaintiff, it has been produced by his own acts and acquiescence.

My opinion is, that both decrees be reversed, and compensation made to the appellee, in proportion to the quantity of land deficient, at the rate of 20s. per acre. It would be wrong to turn over the appellee to a Court of law to recover damages, because he was competent to come into equity to pray a discovery; and, being there, that Court should make a final end of the case, as a certain criterion presents itself whereby that compensation can be estimated.

JUDGE FLEMING. On a critical inspection of this record, the merits of the cause seem to be comprised within a narrow compass. I put out of view the depositions of Welsh and Powell, which go to prove a promise of Chinn to make up in land any deficiency there might be in the land sold to Heale, (as being clearly within the statute of frauds and perjuries,) and confine myself to the written covenant, as stated in the condition of the bond for conveying the land to the purchaser; which was sold for 200 acres, at twenty shillings per acre. Heale, at the time of the purchase, had no other land than that called Stott's tract in contemplation, nor any idea that he had purchased any other land; but was doubtful whether it contained the quantity of 200 acres; and refused to give his bond until it should be ascertained by actual survey. At length on Heale's executing a bond for

2001., the purchase money, the executors of Charles Chinn the elder, under whose will the land was sold, executed a bond to Heale in the penalty of 500l. with a condition "that they would convey to the said Wm. Heale, by good and sufficient deeds of conveyance, the aforesaid land," (to wit, Stott's tract, and covenanted "that it contained 200 acres;" but on a survey, there appeared to be a deficiency, in quantity, of 36 3-4 acres; for *which Heale ought to have compensation, at the rate of twenty shillings per acre, with interest from the time his bond for the purchase money became payable. I am therefore of opinion, that the decree is erroneous in having ordered that compensation to be made out of the land of the defendant Charles Chinn, instead of a compensation in money pro rata, for the deficiency in the quantity of land as aforesaid.

Being doubtful whether the answer of Charles Chinn ought to be considered as the answer of the other defendants, I think it safest, and the most regular proceeding, to direct that it shall appear that the decree nisi has been served on the other defendants, before a final decree.

The following was entered as the decree of the Court.

"This Court is of opinion that the said decree is erroneous in having affirmed the decree of the County Court of Fauquier, rendered the 28th day of August, 1798, in which said decree of the County Court there is error in this, in affirming an interlocutory decree of the said Court passed the 27th day of March, 1798, in which it is decreed and ordered that the complainant recover against the defendant (Charles Chinn) 36 3-4 acres of land, to be laid off out of his lands adjoining the complainant, and appointing commissioners to lay off the said quantity of land accordingly, and report their proceedings to the Court for a final decree: and in having further ordered that the said defendant convey to the complainant the land described in a survey made by Charles Kemper in this cause, bearing date the 8th day of June, and referred to in the report of the said commissioners of the same date. And a majority of this Court are further of opinion, that the said County Court erred in proceeding to a final decree in this cause before the decree nisi had been duly served on the defendants Rawleigh Chinn and John Chinn, and a return of the service thereof made to the said Court.

75 Therefore, it is *decreed and ordered, that the decree aforesaid of the said Superior Court of Chancery be reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And this Court proceeding to make such decree as the said Superior Court of Chancery ought to have pronounced, it is further decreed and ordered, that the decrees aforesaid of the said County Court of the 27th day of March, and the 28th day of August, 1798, be also reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal in the said Superior Court of Chancery. And it is ordered, that the cause be remanded to the said Superior

Court of Chancery to be remitted to the County Court aforesaid for further proceedings to be had against the executors of Charles Chinn, deceased, who have not answered the complainant's bill; and that, at a final hearing of the cause, (unless the executors shew good cause to the contrary,) a compensation in money be made to the said complainant, at the rate of twenty shillings per acre, for the deficiency of 36 3-4 acres of land, with interest thereon from the 29th day of September, 1788, until payment."

76 *Meredith's Administratrix v. Duval.

March, 1810.

1. **Debt on Bond—Variance between Declaration and Bond—How Waived.**—In debt on a bond, if the defendant craves oyer, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond: and though the plaintiff declare against one of several obligors, without stating that they were severally bound; yet, if the bond appear to be joint and several, it is sufficient.

2. **Bond with Collateral Conditions—Assignment—Statute.**—An assignment, made after the act of 1795, by which bonds with collateral conditions were made assignable, is good, though the bond was dated before that act.

3. **Debtor within Prison Rules—Status.**—A debtor within the prison rules is still a true prisoner in the eye of the law: and, as such, should be transferred by the Sheriff to his successor in office.

4. **Prison Bounds Bond—How It Should Be Taken.**—A bond for keeping the prison rules should be taken to the Sheriff for the time being, and his successors in office; not his executors, administrators or assigns."

5. **Same—Assignment to Creditor.**—But such bond, though taken to the Sheriff, as such, and to "his executors, administrators, or assigns," may be assigned by him to the creditor; and a suit may be maintained upon it.

6. **Same—Same.**—Quære, Can such a bond, so taken, be assigned to the creditor by the succeeding Sheriff?

7. **Prisoner—Prison Fees—Security for Payment Thereof.**—The creditor of an insolvent prisoner.

***Prison Bounds Bond—Action Thereon—Curing Defects in Declaration.**—In *Vanmeter v. Giles*, 1 Rob. 344, the principal case was cited as one in which a flagrant and otherwise fatal error in the declaration was cured by reference to the bond sued upon, which had been made a part of the record by oyer thereof.

+**Bonds with Collateral Condition—Assignability—Statute.**—Bond, with a collateral condition, was not assignable before the Act of Dec. 1795: and, therefore, the assignee of such a bond, could not maintain an action on it. *Craig v. Craig*, 1 Call, 483; *Henderson v. Hepburn*, 2 Call, 233.

‡**Prison Bounds Bonds—Sufficiency of—Assignment.**—On the authority of the principal case, it was held in *Vanmeter v. Giles*, 1 Rob. 343, that a prison bounds bond taken payable to the sheriff, his heirs and assigns, was good; and that an assignment of such bond by the sheriff to the creditor—the prisoner having broken the bounds in the time of the same sheriff—was good and sufficient to render the obligors thereof responsible to the creditor.

See generally, monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

who has the liberty of the rules, is bound to give security for the prison fees: but the Sheriff cannot legally discharge him, unless he be actually insolvent, and, being so, the plaintiff having notice thereof, refused to pay his fees, or to give bond for the payment thereof.

8. Same—Illegal Discharge—Rights of Creditor.—If the prisoner depart from the rules by illegal discharge from the Sheriff, the creditor, having an assignment of the bond, has his election to bring suit upon it, or to sue the Sheriff.

9. Prison Bounds Bond—Action on—What Plaintiff Must Show.—In an action on such bond, the plaintiff is only required to shew a departure from the rules: the burden of proof then devolves on the defendant to shew that the prisoner was discharged by due course of law.

Anne Meredith, administratrix of John Meredith, deceased, who was assignee of John Cunningham, (being herself assignee of William Foushee, formerly Sheriff of Henrico County,) brought, in the Richmond District Court, an action of debt upon a prison-bounds bond against William Duval, one of the sureties of Daniel Duval.

The declaration described the bond as "a bill obligatory, sealed with the seals of the defendant and Daniel & Philip Duval, whereby they acknowledged themselves" (not saying jointly and severally) "to be held and firmly bound to William Foushee, Sheriff of the said County." It then proceeded to set forth the condition, and the breach by Daniel Duval's departing the bounds, on the 1st day of September, 1790,

"without being discharged by due course of law;" and, lastly, the assignment of the bond, on the 1st of March, 1790, "by the said William Foushee, formerly Sheriff as aforesaid, to the plaintiff, whereby an action accrued to her to demand of the said William Duval," (who alone was sued, notwithstanding there were two other obligors) the penalty of the said bond, &c.

The defendant cravedoyer of the bond, and pleaded conditions performed. By the copy of the bond, thus spread upon the record, it appeared a joint and several bond, taken to Foushee, as Sheriff, but payable to him, "his certain attorney, his executors, administrators or assigns;" not saying his "successors" in office. The assignment, endorsed on the bond, is dated March 1, 1796.

The Jury found a special verdict, the most material facts in which were, that, after executing the said bond, Daniel Duval had the benefit of the prison rules, and resided not in the prison, but in a house which he had rented (within the bounds) of a certain John Henry; but the rent was never paid; that Isaac Younghusband succeeded Foushee as Sheriff, and, at a Court held for Henrico County the 1st of February, 1790, received an assignment from the said Foushee of the prisoners in his custody, which was entered of record, and found by the jury in hæc verba; (in which assignment Daniel Duval was mentioned as one of the said prisoners at the suit of Anne Meredith, and the sum, with which he was charged, was set forth;) that the said Duval was then within the prison rules, and not residing within the prison;

that he never was actually in the custody of the said Younghusband, any otherwise than the law might imply, by reason of his being within the rules, and by force of the said assignment; that Younghusband required security for the prison fees from the plaintiff; "that the plaintiff had before given bond and security for the prison fees to William Foushee, the former Sheriff;" which bond was found at large in hæc verba, bearing date the 10th day of June, 1789, payable to him as Sheriff, his certain attorney, his heirs, &c.; not mentioning his successors; and that he objected

thereto *on account of the securities not being within the County; that on the 3d day of February, 1790, the said Isaac Younghusband, being Sheriff of the County aforesaid, discharged the said Daniel Duval from the prison bounds for want of security for prison fees, by a writing found also in hæc verba; "that the said Daniel Duval on the day aforesaid went at large out of the prison rules with the knowledge and consent of the said Younghusband, and without the consent of the plaintiff, and ever afterwards went at large out of the said prison rules; that he knew that the Sheriff's reason for discharging him was the nonpayment of the prison fees; that the plaintiff did not reside in the County of Henrico, either at the time of delivering the said execution to the said Foushee, or at the time of the discharge; nor did she name any person resident in the said County of Henrico, where the said execution was to be levied, for the purposes expressed in the act of 10 Geo. III. c. 3, s. 13."

But it was not found that notice was given to the plaintiff to give security for the prison fees, or that she failed to do so. (a)

The District Court, upon this special verdict, gave judgment for the defendant; and the plaintiff appealed to this Court.

This case was argued at June term, 1807, by Bennett Taylor and Williams, for the appellant, and Warden and Call, for the appellee; and again, at October term, 1809, by Williams and Wickham, for the appellant, and Nicholas, Warden, Call, and Randolph, for the appellee: but, as all the points in the case are so fully considered by the Judges in the following opinions, a just regard for brevity compels the reporter to omit the arguments of counsel.

Thursday, March 15, 1810. The Judges pronounced their opinions.

JUDGE TUCKER. (After stating the case as above.) One *of the exceptions taken to the declaration by Mr. Warden was, that the bond is therein called a bill obligatory. I doubt whether it would have availed him on a special demurrer, even if there had not been a recital in the declaration, of the condition: his second objection, that it was not alleged that the parties bound themselves jointly and severally, appeared to me to have much more weight, William Duval being sued alone: but Mr. Williams satisfied me upon that point: that, afteroyer, the bond becomes part of the record, and the court must judge upon the whole record, 5 Gwill. Bac. (tit. Oyer,) p. 438, citing 3 Salk. 119; Hob. 217;

(a) See act of 1773, c. 13, s. 1, Ch. Rev. 24.

Shew. Cas. Parl. 221; Carth. 513, says it becomes part of the declaration, and is not part of the plea. In *Leftwich v. Berkely*, (a) the Court took notice of the bond as part of the record, though no oyer was demanded: but the error there also appeared in the declaration; so that I lay no stress upon that case as to this point. Now here, by the oyer, it appears the bond was several as well as joint; and therefore, according to the principles established in that case, as well as in *Berkely v. Boxley*, (b) the suit might be maintained against either of the obligors alone, or against the whole jointly. The third objection made by Mr. Warden applies to the recital of the bond, and not to the refusal of payment, as alleged in the declaration, and is therefore unimportant. The fourth is contrary to my understanding of the record; since I can perceive a clear breach of the condition from the tenor of the verdict.

Mr. Call's objections appeared to me entitled to consideration. I doubted with him whether the bond, not being payable to the Sheriff and his successors in office, was in due form; but there is no form prescribed by the statute; and, as the statute gives the Sheriff a special power to assign the bond to the creditor, which has been done in this case, the assignment was sufficient to enable the plaintiff to sue upon it in her own name. Had not this been the case, *I should scarcely have doubted whether a court could have disregarded the error in the date of the assignment in the declaration, being truly found in the special verdict. (c) The reason given why the bond should have been taken to the Sheriff and his successors, and delivered to the succeeding Sheriff, that he may have notice that the party was entitled to the benefit of the prison bounds, seems inapplicable to the present case; for Young-husband has shewn under his hand and seal, that he knew Duval was entitled to them: having expressly so stated it in the instrument of discharge. Nor can I agree with Mr. Call, that the bond was taken for the benefit of the Sheriff, or for his indemnification: the recital in the act shews it to be for the benefit of the prisoner, whose health might suffer by a close confinement.

Upon the merits of this case I have never felt the smallest doubt, except as it has been excited by a difference of opinion from the Judges who pronounced the judgment in the District Court, and from those, with whom I have the misfortune to differ in opinion, in this Court. A prisoner who gives security for the prison bounds, is from thenceforward no otherwise in the custody of the Sheriff, than as may be sufficient to protect the Sheriff against any suit which the creditor may bring against him for not confining the debtor within the walls of the prison. He is in the eye and contemplation of the law, a true prisoner; being, as was said in the case of *Lysle v. Stephenson*, (d) in the custody of the law: but the Sheriff hath no longer any power over him, either to restrain him, or to dis-

charge him, if he reside not within the prison. If the prisoner should depart from the bounds within view of the Sheriff, he must apply for an escape warrant before he can retake him; and this he is required to do immediately; and, moreover, immediately to give notice to the creditor or his attorney, or agent, and to assign over the prison-bounds bond. A neglect in either of these particulars will render the Sheriff himself liable; but nothing else will, unless the security to the bond shall afterwards be found to have been insufficient to pay the debt when the bond was taken.

I have carefully examined the acts of assembly to discover what fees a gaoler would have a right to demand of a prisoner within the prison bounds; and I can find none except the fee of 1s. 6d.* per day for maintaining him in diet. Now, according to the principles established in the case of *Rose v. Shore*, 1 Call, 540, it ought to have been averred and proved that Duval was unable to pay that fee, before the sheriff could have a right to demand it from the creditor; a fortiori, it is equally necessary that that fact should be established, before the Sheriff could be authorized to discharge him out of his custody, and thereby deprive the creditor of the satisfaction which the law allowed him for his debt. I will go further; it being found in this case that Daniel Duval did, himself, rent a house within the prison bounds, and reside herein, and that he did not reside in the prison, the presumption (if any presumption were to be made) is, that he maintained himself: if, in fact, the gaoler had found him in victuals, it ought to have been so found in the verdict; and it ought, moreover, to have been found that he was unable to pay the gaoler the legal fee for so doing, and, without such finding, the creditor could not in this case be made liable to the Sheriff for it. If any presumption arises from this special verdict, it is, that Duval was able to pay his prison fees, since he had credit enough to hire a house within the prison bounds, although he never in fact paid any rent for it.

In whatever point of view I consider this case, the instrument of discharge has always appeared to me not to be a discharge by due course of law: and the voluntary departure of Mr. Duval from the prison bounds, (within which he actually rented and occupied a house for his accommodation, *instead of being shut up within the walls of the prison,) under colour of that discharge, was a breach of the condition of the bond, as much as if he had departed without one. I am consequently of opinion, that the judgment ought to be reversed, and entered for the plaintiff.

JUDGE ROANE. There are some preliminary objections in this case, which it will be first necessary to dispose of.

It is objected that this is an action against one of three obligors, on a bond,

(a) 1 Hen. & Munf. 61.

(b) October term, 1805. MS.

(c) Laws Virg. 1794, c. 76, s. 26.

(d) April term, 1806. MS.

*Note. But see 1 Rev. Code, c. 213, p. 368, 369, where the Courts are authorized to fix the fees of gaolers for the diet of prisoners, either committed for debt, or at the suit of the commonwealth; provided, that the allowance shall not exceed 34 cents per day. —Note in Original Edition.

which, as described in the declaration, is only a joint bond. The answer is, that this defect is cured by oyer, which has incorporated into the declaration a bond which is joint and several.

Again it is said, that the plaintiff's case is imperfect in this, that the departure by D. Duval is stated to have been on the 1st of September, 1790, and the assignment by W. F. on the 1st of March, 1790; so that it would seem that no breach had taken place at the time of the assignment to the appellant. The answer is, that this, in relation to the last date, is evidently an error arising from copying the figure 0 into the declaration, by mistake, instead of the figure 6. This is evident from the last date being stated to have been "afterwards," in relation to the first. But what is a more complete answer is, that the assignment itself on the back of the bond, is exhibited upon oyer, together with the bond; and is also found in the special verdict, and, in both instances, the assignment is shewn to have been made on the 1st of March, 1796; so that, whether we consider the case upon the declaration only, as aided by oyer, or on the special verdict merely, the assignment appears to have been long posterior to the breach.

To consider the merits: I have no doubt but that the creditor of an insolvent prisoner, who has the liberty of the rules, is as much bound to give security for the prison fees, as the creditor of one in close gaol. This was decided in the case of *Rose v. Shore*, (a) and is evident upon a general view of the law on this subject. Again, a prisoner of the *former description, is equally within the meaning of the acts authorizing a transfer of prisoners by a preceding to a succeeding Sheriff. He is equally a prisoner as to the purpose aforesaid, though, after giving a bond to keep the rules, it is lawful for the Sheriff (in favour of the prisoner's health) "to permit him to go out of the prison and return at his pleasure." (b) This idea, of his remaining still a prisoner as to the purpose of a transfer, is not destroyed by the change of the Sheriff's duty and liability in the event of an escape. That change was rendered necessary by the liberty of the rules thus granted, but does not render him the less a "true prisoner," in the language of the act upon this subject. The bond taken by the Sheriff, for keeping the rules, is as much a muniment of safety in behalf of the creditor, as the keys of the gaol are in relation to a prisoner in close custody; and, when legally taken according to the provisions of the act, would seem to me as much to devolve on a succeeding Sheriff, at the expiration of the preceding Sheriff's term of office, as the keys themselves; and this, although the act of 1764, c. 6, s. 1, makes it the duty of the Sheriff to assign over the bond "by him" taken: this word "him" (which in this place is used in the general) is inadequate to exclude the succeeding Sheriff from the power to assign the bond under the force of the foregoing principles. The bond devolves on the succeeding Sher-

iff on two grounds; 1st. For his own sake, in order to enable him to protect himself against the creditor, by the assignment of it in the event of an escape; and, 2dly. In behalf of the creditor, as that, before the act of 1795, was the only mean of his deducing a regular assignment of it to himself.

Prior to the act of 1795, allowing the assignment of bonds with collateral conditions, this was the only means by which a creditor could obtain an assignment of a prison-bonds bond; and this, possibly, may still be the case in relation to bonds duly taken under the act, payable to the Sheriff for the time being, and his successors. In relation to them, it might be argued that

the power of the preceding Sheriff
84 *over them ceased with the transfer of the prisoners to whom they relate, and whom they should accompany into the hands of the succeeding Sheriff. It is true the act authorizing bonds of this description is silent, not only as to the capacity in which it is to be given to the obligee, but also as to the party who is to be that obligee: but it results from all the foregoing considerations, that it ought to be taken payable to the Sheriff for the time being, and his successors in office.

But the bond before us is not made payable to the "successors" of William Foushee. It is made payable to William Foushee, Sheriff of Henrico, "his certain attorney, his executors, administrators and assigns." While these last words in the solvendum of the bond are controlled by those of the teneri, which only mention "William Foushee, Sheriff of Henrico," on the authority of the case of *Wilkinson v. M'Lochlin*, (c) and denote it to be a public bond, not a private one to enure to William Foushee's executors; this circumstance is nevertheless conclusive to show that the "successors" of the Sheriff were not intended to be embraced thereby: and, therefore, in deciding this case, it is not necessary to say that a bond given to a Sheriff simply, without words of limitation or restriction, does not enure to his successor, in the same manner as if his successors had been expressly named. This is a point on which I have formed no conclusive opinion: but this I say, that this bond being evidently a prison-bonds bond, and not a private bond, although it is defective in the foregoing particular, so as to intercept the power of the succeeding Sheriff, may still be sued upon by the creditor as at common law, since the commencement of the act of 1795, allowing the assignment of bonds with collateral conditions; and that there is nothing in the declaration tying down this proceeding to the act allowing assignments of bonds for the rules: the averment in the declaration may equally be taken to relate to the act of 1795, before mentioned.

It is here to be remarked, that the
85 act of 1795 took effect *from the 1st of March, 1796, inclusive, on which day the assignment in question was made. As, therefore, the assignment was made after the commencement of the act, although the bond bore date before, I infer that the action upon the assignment is

(a) Call, 540.

(b) Laws of Virginia, ed. of 1790, p. 196, s. 21.

(c) 1 Call, 50.

sustainable. I infer this on the authority of the decision of this Court in the case of *Craig v. Craig*. (a) In that case the suit was brought upon a bond dated in 1792, and the judgment was reversed because "the bond was not assignable at the time the suit was commenced." I infer that it was no objection to the action in that case, that the bond was anterior, if the assignment had been posterior to the commencement in operation of the act of 1795. Such a construction does not invade any vested right; for, while that act changes the remedy by giving a more direct recourse against the debtor, it neither affects nor increases his liability, nor prejudices the interests of the succeeding Sheriff.

With respect to the excuse set up in the case before us, the plaintiff has shewn every thing necessary on her part. She has exhibited the bond conditioned for keeping the rules, and shewn a departure therefrom. The defendant can only absolve himself by shewing that the prisoner was discharged by due course of law, or, in other words, was legally discharged. This necessarily involves the legality of the acts and proceedings of the Sheriff; and it is no novelty for one man to engage for the correct conduct of another. It was sufficient for the creditor, after having shewn what is before mentioned, to remain entirely passive. It was also incumbent on the defendant to shew that the prisoner was "insolvent," and that, being so, the plaintiff had refused to pay his fees, or give bond for the payment thereof. All these positions are entirely settled by the case of *Rose v. Shore*. (b)

Upon the whole matter, I am of opinion that, though this particular case may bear hard on the present appellee, yet that the condition of the bond has not been kept, and that the appellant, by a reversal of the judgment of the District Court, should be enabled to recover her debt.

86 *JUDGE FLEMING. Differing in opinion, in this important case, from a majority of the Court, I have taken a comprehensive view of the subject, and hope to be excused for taking more time than usual, in stating the grounds of my opinion.

The great question seems to be whether Daniel Duval (the principal obligor in the bond on which the suit was instituted) was discharged out of custody by due course of law? And this question may be considered under two distinct heads. First, whether Isaac Younghusband, into whose custody the prisoner was delivered over by William Foushee, a former Sheriff, had a right by law to discharge him, on the creditor's failing to give security for the prison fees? and if not,

Secondly, whether the written discharge of the prisoner, by the Sheriff, did not exonerate the securities from the penalty of the bond, given for his keeping within the prison rules; and leave the creditor to her remedy against the Sheriff only.

In order to decide the first point, it may not be amiss to take a short view of the

several acts of assembly so far as they apply to the case before us.

By the act of 1748, c. 4, s. 31, the justices of every county are required to mark, and lay out, the bounds and rules of their respective county prisons, not exceeding ten acres adjoining such prison; and every prisoner committed on civil process, giving good security to keep within the said rules, shall have liberty to walk therein; and keeping continually within the said bounds, shall be judged in law a true prisoner. By the act of 1764, c. 6, s. 3, it is enacted that the prison bounds shall not contain less than five acres.

By the act of 1748, c. 8, s. 28, it is provided that the prison fees of insolvent debtors be paid by the counties for the first 20 days, and afterwards by the creditors.

I conceive that Daniel Duval, after having executed the bond for keeping within the prison rules, stood precisely 87 *in the same situation (as far as it can affect this controversy) as if he had been confined in the debtor's room of the county gaol; the place and extent of his confinement being only changed by the lenity and humanity of the law, as extended to all unfortunate debtors. But in the argument, it was contended by the appellant's counsel, that, after the bond was given for keeping the prison bounds, the prisoner was out of the jurisdiction, or control, of the Sheriff, who had no further concern or right to meddle with him; but it is presumed that this part of the argument would have been omitted, had the counsel either adverted to the reason of the case, or to the law itself, which says that "such person shall be judged in law a true prisoner;" and, if not the prisoner of the Sheriff, they should have explained to the Court whose prisoner he then became, and on what conditions, and by whom, he could have been legally discharged out of custody. The creditor neither resided, nor had an agent, in the county.

The counsel indeed say, that "on Duval's having given bond to keep within the prison rules, he became the prisoner of the law, and the Sheriff had nothing further to do with him: but can the law execute itself? must it not have an agent or ministerial officer, to execute it? can it feed an insolvent debtor, unable to purchase an ounce of food to sustain life, without an active agent to procure it for him? And who, let me ask, is the agent or ministerial officer of the law on such occasions, but the Sheriff?

By the act of 1748, c. 6, s. 16, it is enacted that "the delivery of prisoners by indenture between the old sheriff and the new, as practised in England, or the entering upon record in the County Court, the names of the several prisoners, and causes of their commitment, delivered over to the new Sheriff (the mode pursued in the case before us) shall be sufficient to discharge the late Sheriff from all suits or actions, for any escape that shall happen afterwards;" and after the transfer in this case, (remaining on the records of Henrico County Court,) in which it is stated

88 that *Daniel Duval was a prisoner at

(a) 1 Call, 484.

(b) 1 Call, 548.

the suit of Anne Meredith, administratrix of John Meredith, deceased, for the quantity of 40,914lb. crop tobacco including interest, &c.; and also 400lb. of gross tobacco, and 3 shillings for costs in the General Court, which was a sufficient description of the cause of his commitment, as required by law. Duval was as much the prisoner of Younghusband as he had before been of the preceding Sheriff. Could there ever have been a doubt as to the debtor being the prisoner of the Sheriff, it appears to me that it must have been removed by a fair construction of the act of 1764, c. 6, s. 1, wherein it is enacted that, when any prisoner shall escape out of the prison rules, the Sheriff of the County where such prisoner was in custody shall apply to a justice for an escape warrant, to retake such prisoner, and immediately to give notice to the creditor, his attorney or agent; and to assign over, and deliver the bond taken for the prison rules. If such prisoner be retaken on the escape warrant, it would be the duty of the Sheriff to commit him to close prison, and the assignment of the bond, directed, is to enable the creditor to bring an action for a breach of the condition.

And with respect to the prison fees, the laws make no distinction between those who are in close confinement, and those who have liberty of the bounds.

By the position of the appellant's counsel, the prisoner could not have been discharged, had he tendered to the Sheriff the full amount of the debt and costs—and why? because, say they, "after the prisoner had given bond for keeping within the prison rules, the Sheriff could have no further concern with him." And who, let me ask, but the Sheriff, who has the execution in his pocket, or returned it to the office, is to know when its full amount is tendered by the prisoner? The creditor is without an agent and out of the county, nobody knows where!

By an act of 1764, c. 6, s. 10, it is enacted that, where the debtor shall have remained in execution twenty days, it shall be lawful for the Sheriff or gaoler to give notice to the attorney who prosecuted the suit, and to demand security of him for the prison fees that shall arise after the expiration of 20 days, and, if he shall fail or refuse to give such security, then to discharge such prisoner out of custody. And, by an act passed in 1769, c. 3, s. 13, after reciting that it is unreasonable for Sheriffs to go out of their Counties to give notice to creditors, at whose suit any person may be in custody of such Sheriff, or to pay money levied by executions, it is enacted, that such creditor shall name some person resident in the County where such execution is to be levied, to be his or her agent, &c.; and, in case of failure in appointing such agent, the Sheriff shall not be obliged to give notice previous to the discharge of such prisoner, either for want of security for his prison fees, or upon his taking the oath of an insolvent debtor; but such prisoner may be discharged in those cases respectively without any notice being given to the creditor.

It was under this act that Younghusband,

(then Sheriff of Henrico county,) in February, 1790, discharged the prisoner Daniel Duval; because the creditor had appointed no agent within the County to whom he could have given notice of the prisoner's being in his custody; and of whom he might have demanded security for the prison fees; the Sheriff, under those circumstances, standing precisely in the same situation in which he would have been, had he given actual notice to the creditor who had refused or neglected to give the security required by law.

As to the bond, found by the verdict to have been executed by Mrs. Meredith, the creditor, and rejected by the former Sheriff, because the security was not a resident of the County, Younghusband could not be affected by it, being (for any thing that appears to the contrary) without his knowledge, and was executed and payable to the former Sheriff (Foushee) before the debtor became Younghusband's prisoner.

By the act of 1772, c. 13, s. 1, so much of the act of 1748, as directs the prison fees of insolvent debtors for the 90 *first 20 days to be paid by the Counties; is repealed, and the Sheriff or gaoler may demand and receive of the creditor all such fees as become due until the creditor shall release such prisoner; and if the creditor, upon notice to him or her, his or her agent or attorney, shall refuse to give security to the Sheriff or gaoler for the payment of such prison fees, or shall fail to pay the same, when demanded, it shall be lawful for such Sheriff or gaoler to discharge such debtor out of prison.

Thus stood the several acts of assembly on this subject prior to the revolution, so far as they apply to the case now before us; holding up the idea throughout, according to my conception, that the creditor, in every case, was to stand between the Sheriff and insolvent prisoner, with respect to the prison fees.

In the act of October, 1777, for establishing a General Court, c. 17, s. 72, it is enacted that the keeping of the public goal shall constantly attend the General Court, and execute the commands of the Court from time to time; and take or receive into his custody all persons by the Court to him committed on original or mesne process, or in execution in any civil suit, or for any contempt of the Court, and him or them safely keep until thence discharged by due course of law; but where such prisoner is so poor as not to be able to subsid him or herself, in prison, the gaoler shall be allowed by the public one shilling per day for the maintenance of every such poor prisoner, &c. The same clause with a little variation is re-enacted in the act of 1788 for the establishing District Courts, s. 98, and retain in the act of 1792, except that in the latter 17 cents, instead of one shilling, per day, is allowed for the maintenance of every such poor prisoner.

Why the law made a distinction between those imprisoned by order of the General Court and by process of the District Courts and others, seems immaterial to be considered here, as the case now before us cannot be affected by it.

*From this view of our different

acts of assembly on the subject, one general system seems to have been formed; and, taking the whole together, I must give them such a construction as appears to me most consonant to reason, and to the views of the respective legislatures, at the different periods when they were enacted; and that they may not clash one with another. One general principle seems to pervade the whole, that every person imprisoned for debt shall, if able, bear the charges of his or her maintenance; and if not, that the creditor, at whose suit such person may be in confinement, (except in the cases just above noticed,) shall be responsible, and immediately give security to the Sheriff, or gaoler, for the prison fees, or submit to the discharge of the debtor.

And here a difficulty, and a difference in opinion seems to arise, respecting the true and just construction of the law; how, and at what time, the inability of the debtor to pay the fees, or to maintain him or herself in prison, must appear, before the creditor can be made answerable for them, or be compelled to give security for their payment. It is contended, however, that it is incumbent on the Sheriff to ascertain, and prove, the insolvency before he can legally call on the creditor for security; but, in my conception, neither the letter, spirit, nor reason of the law, warrants such construction; which, besides the delay, would often involve the unfortunate prisoner in still deeper distress: and who, let me ask, is the most likely to be acquainted with the circumstances of the debtor, one who had dealings with, and trusted him for the amount of the debt; or the Sheriff, who, perhaps, never saw or heard of him till a process was put into his hands; which has been the case, in numberless instances; as many of the insolvent debtors are fugitives from their creditors; and, if there must be a risk, or a loss, to one or the other, the law, and, in my conception, reason and justice, all declare it ought to fall on him who imprudently trusted the debtor beyond his ability to pay. And this is no hardship on the unwary creditor, as the law provides

92 that, if such insolvent debtor shall afterwards acquire *property, he shall still have his remedy against him for the prison fees. Should a contrary construction of the law prevail, which should oblige the Sheriff to prove actual insolvency before he could demand security of the creditor for the prison fees, it will, in my apprehension, render the acts of 1764, 1769, and 1772, which forms a regular system, almost nugatory, and so many dead letters; and be productive of much litigation, great injustice to Sheriffs, and further distress to many unfortunate debtors.

In what manner, and before what tribunal, it may be asked, is a Sheriff to prove the insolvency of an imprisoned debtor to the satisfaction of the creditor, before he can legally demand of him the security required by law, which, since the act of 1772, gives the Sheriff a right to demand such security, the moment the debtor is committed to prison?

From the general tenor of those acts, it appears to me that the legislature justly presumed, (until the contrary should ap-

pear, as in the case of Rose and Shore, to be further noticed hereafter,) that every person confined in gaol for debt was unable to pay the prison fees; and the proof of solvency ought to be on the creditor: 1st, Because he is the occasion of the debtor's being confined, which is supposed to be for his own benefit; in consequence of which the law calls upon him immediately to give security for the prison fees; 2dly. Because an affirmative is more easily proved than a negative; and, 3dly. Because the Sheriff, being an executive officer, is obliged to execute all legal process put into his hands by the creditor; and whose commissions upon executions for small sums, where the debtors are imprisoned, are very inadequate to his services; and therefore ought not to be delayed, run any risk, or put to extraordinary trouble without due compensation.

The case of Rose and Shore has been much relied on, as decisive in favour of the appellant here; but in my conception it is the reverse; as the case appears to be essentially different.

A Mr. Claiborne was imprisoned 93 for debt, within the *bounds, at the suit of Shore; who, agreeably to the requisition of the law, upon a presumption that Claiborne was insolvent, gave bond as usual, to Rose, the gaoler, for the prison fees; who, from time to time received them from Shore, at 1s. 3d. per day for upwards of 15 months. Shore having afterwards discovered that Claiborne was possessed of a considerable estate, brought an action of assumpsit against Rose for so much money had and received to his use. On the trial there was a special verdict, in which the Jury expressly found "that Claiborne was, during all that time, possessed of sufficient property, and able to maintain himself in prison, without the aid of the said fees; and that he was not maintained by the said defendant; whereupon the District Court gave judgment for the plaintiff; which, on an appeal, was affirmed by the unanimous opinion of this Court, upon the ground (so far as my opinion concurred) of the special finding of the Jury above stated. But there is no such finding, nor any thing similar, in the case before us. On the contrary, the Jury here find that Duval resided in a house distinct from the the prison, but within the rules; for the rent of which he contracted with John Henry, the proprietor, but the rent never has been paid: which finding of the Jury was more than nine years after Duval was discharged out of custody: from whence a strong presumption arises, that he really was insolvent, being impliedly found so by the verdict; more especially as debts, for rent are recoverable in a summary way by distress.

And in order to assimilate this case to that of Rose and Shore, the Jury ought here to have found that Duval was possessed of sufficient property, and able to maintain himself in prison, and that he was not maintained by the Sheriff or gaoler.

If Younghusband discharged Duval as an insolvent debtor unable to pay the prison fees, when he was not so, he thereby made himself liable for the debt: and suppose this had been a suit to compel

94 him to pay it, what would *have been the gist of the action? the ability of the prisoner to pay the fees, or to maintain himself in prison, which the plaintiff must have averred and proved. (as in the case of Shore against Rose,) before he could have had a verdict in his favour.

What was the principle point in controversy between Shore and Rose? the ability of Claiborne to pay the fees, or to maintain himself in prison; which being proved to the satisfaction of the Jury, they so found the fact specially, and the Court very properly gave judgment for the plaintiff. So, on the same principle, if a Sheriff brings suit against a creditor on a bond for payment of the prison fees of his insolvent debtor, he must aver and prove the insolvency of the prisoner before he can recover; but he is not bound to prove such insolvency before he has a right to demand the security required by law; for he has a right to make the requisition immediately on the prisoner's being confined.

The proof of the solvency or insolvency of an imprisoned debtor, in my apprehension, rests on circumstances as the case may be. Where the creditor brings an action against the Sheriff or gaoler, to subject him to the payment of the debt, for having discharged the prisoner, as unable to pay, or to maintain himself in prison, when he was not so; or to recover money wrongfully paid for the maintenance of such prisoner, (as in the case of Shore against Rose,) the proof of the solvency of the prisoner lies on the creditor: And where a sheriff or gaoler brings suit against a creditor for the fees of his imprisoned debtor, the proof of the insolvency of the prisoner lies on the Sheriff or gaoler.

On these grounds I am of opinion that Your husband was justified by law in discharging Duval out of custody; but, lest I be mistaken on this point, I proceed to consider the other, to wit, Whether the written discharge of the prisoner, by the Sheriff, did not exonerate the securities from the penalty of the bond for his
95 keeping within the *prison rules, and leave the creditor to her remedy against the Sheriff only?

I am to consider this point, then, on a presumption that the Sheriff had not a legal right to discharge the prisoner, but that he did so in his own wrong, and at his peril; and became immediately liable to the creditor or the amount of the debt: and he being so liable, why vex and distress an innocent security for the malfeasance of a public officer, of ability to answer for his own misconduct, instead of having immediate recourse against him? The appellee bound himself, his heirs, &c. with condition that the prisoner, Daniel Duval, should keep within the prison rules until thence discharged by due course of law; and being discharged by the Sheriff, in whose custody he was, that may well be considered as a discharge in due course of law; as the Sheriff was the only executor of the law, he was the only person who could of right discharge the prisoner in any event.

Suppose the Sheriff in the written discharge, instead of saying it was for want of security for the prison fees, had stated

that the prisoner had paid him the full amount of the debt and costs, would not that be considered as a discharge by due course of law, whether the money had, or had not, been paid to the Sheriff? or would the securities have been bound to prove an actual payment of it? I confidently conceive not; nor were they, as the case stood, bound to prove the insolvency of the prisoner.

Mr. Williams, though, contended that "if the debtor had tendered the whole debt and costs to the Sheriff, he would have had no right to discharge him!" Miserable, indeed, would be the case of every prisoner confined for debt, should that be adjudged to be law!!

As to the recital in the discharge, that Duval was a prisoner within the bounds of the prison as laid off by the General Court, (noticed in the argument by Mr. Williams,) I believe it to be correct. The County gaol of Henrico has been used as the public gaol, ever since the removal of the
96 seat of government *to Richmond; and by several acts of assembly, passed from time to time, the Judges of the General Court were empowered to superintend and regulate the public gaol; and the bounds laid off by direction of that Court, under the authority of one of those acts, have always been considered and used as the prison bounds of Henrico County; unless they have since been altered by order of the District Court. But, be that as it may, the circumstance, in my apprehension, does not affect the merits of this cause.

Let us consider what was the true nature, intent, and spirit of the undertaking of the securities? It was that Daniel Duval should not escape, nor voluntarily depart out of the prison rules; but they did not mean to be responsible for the misconduct of the Sheriff (with whom they had no privy, and who was the only person, I conceive, that in any event had a right to discharge the prisoner) in case he should discharge him without legal authority. The Sheriff had the same right over the prisoner, so far as respects his legal discharge, as if he had been confined in the debtors' room of the gaol, and the key in the pocket of the Sheriff, who, at the time of his admission to office, had given ample security for the due and faithful performance of his duty; and against whom for misfeasance or malfeasance in office, any person aggrieved by his misconduct, had a prompt and legal remedy by action on the Sheriff's bond.

A Sheriff who discharges a prisoner contrary to law, makes himself liable for the debt, but cannot subject the innocent securities, who have no control over him, to loss or damage, by his own acts or default; for the Sheriff's and prisoner's securities cannot, or ought not, to be both answerable at the same time, to the creditor for an escape; as that would be making them securities for each other, without the consent of either; and would deter many from acts of benevolence and kindness towards unfortunate persons imprisoned for debt, in becoming their securities for the prison bounds.

From the evidence and circumstances

97 disclosed in this *record, I have a conviction that Daniel Duval was truly insolvent, unable to pay the prison fees, or to maintain himself in prison; or, on a supposition that he might have been so, (which is the case of many unfortunate debtors,) what was he to do when the Sheriff told him "he was no longer his prisoner," and gave him a discharge in writing, in which he stated his reasons for doing so? Was he to answer the Sheriff, "that he had no right to discharge him, and that if he would not maintain him in prison, he must and would lie there and perish for want of sustenance?" Such a determination would neither have been consistent with human prudence, nor within the utmost effort of human fortitude: and, if persisted in, of what advantage would it have been to the creditor? None at all; but, on the contrary, would have been a sure and certain means of the loss of the debt, at best, very doubtful; but at that time almost desperate: but by obeying the mandate of the Sheriff, it made him, if he acted illegally, liable for the debt; against whom

the creditor ought immediately to have proceeded for the recovery of it: but, instead of doing so, she lies by for upwards of six years, and then brings suit against an innocent security, who had done her no injury.

Besides all this, the law never supposes a poor prisoner a proper judge of the official duties of an executive officer; or under what particular circumstances he may be legally discharged by the Sheriff, before the debt be paid; but those things remain altogether with the Sheriff; who, at his peril, is to conduct himself according to law.

On these grounds, I am of opinion that the judgment of the District Court is correct, and ought to be affirmed. And I am authorized to say that the late venerable and enlightened President of this Court, who heard the cause very fully and ably argued, was of the same opinion. But as a majority of the Court, now present, is of a different opinion, the judgment of the District Court is to be reversed, and judgment entered for the appellant.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS OF VIRGINIA,

AT THE TERM COMMENCING THE 15TH DAY OF APRIL, 1810.

IN THE THIRTY-FOURTH YEAR OF THE COMMONWEALTH.

JUDGES,

WILLIAM FLEMING, ESQUIRE, *Pres't.* SPENCER ROANE, ESQUIRE.

ST. GEORGE TUCKER, ESQUIRE.

ATTORNEY-GENERAL,

PHILIP NORBORNE NICHOLAS, ESQUIRE.

98 *Chichester's Executrix v. Vass's Administrator.

Tuesday, March 18, 1810.

1. Chancery Jurisdiction—Discovery—Full Relief.*—

In cases where it is proper and necessary to go into equity for a discovery, the Court (having possession of the subject) will proceed to decide the cause, without turning the parties round to a

*Equity Jurisdiction—Discovery—Full Relief.—It is now established that, though the matter be one proper for the law court, yet, where a proper case for discovery is presented, a bill asking both discovery and relief is maintainable; and the court having jurisdiction for one purpose—discovery—will not tell the party after getting it to go into a court of law, but will go on to give relief. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 580, 23 S. E. Rep. 796, citing *Chichester v. Vass*, 1 *Munf.* 98; *Lyons v. Miller*, 6 Gratt. 428; *Hotchkiss v. Plaster Co.*, 41 W. Va. 387, 23 S. E. Rep. 576. This proposition grows out of the more general rule, which seems established beyond controversy, that where a court of chancery has jurisdiction for one purpose, it will not send the parties back to a court of law, but will retain the jurisdiction for all purposes, and do complete justice between the parties. *Western, M. &*

Court of Law, notwithstanding (if such discovery had not been necessary) relief might originally have been had at law.

2. *Promise in Consideration of Marriage—What Constitutes—Case at Bar.*—If A. promise B. that, if he and A.'s daughter marry, "he will endeavour to do her equal justice with the rest of his daughters, as fast as it is in his power with convenience;" and the marriage be afterwards had with his consent; the promise is sufficiently certain and obligatory.

3. *Same—Performance—Must Be in Reasonable Time.*—In such case, A. has not his life-time to perform it in; but, in a reasonable time after the marriage, (taking into consideration his property and other circumstances,) is bound to make an advancement to B. and wife, equal to the largest made to his other daughters.

4. *Same—Beneficiaries—Case at Bar.*—A promise in

M. Co. v. Virginia Cannel Coal Co., 10 W. Va. 287, citing the principal case; *Stuart v. Coalter*, 4 Rand. 74, and *Cady v. Gale*, 5 W. Va. 566.

For further information, see monographic note on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457; monographic note on "Bills of Discovery" appended to *Lyons v. Miller*, 6 Gratt. 437.

†*Contract in Consideration of Marriage—Benefi-*

the above mentioned terms enures to the joint benefit of the husband and wife; and is not to be satisfied by a conveyance of lands to the wife. The husband (to whom the promise was made) has his election to consider it a personal contract; and if he survive the wife, may sue in his own right to recover damages for a breach.

5. **Husband and Wife—Personal Ante-Nuptial Contract with Wife—Action by Husband.**—A husband surviving his wife (or in case of his death, afterwards, his executor or administrator) may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate.

After the decision of the Court of Appeals in the case of *Chichester v. Vass*, (for which see 1 Call, 105,) a *new suit was brought by Vass, in the late High Court of Chancery, against Sarah Chichester, widow, devisee and executrix, and others, children and grandchildren of the said Richard Chichester, deceased.

The case was this. Dr. Vass having paid his addresses to a daughter of Col. Chichester, on the 10th of April, 1789, wrote to him to ask his consent to their marriage. In his letter he says, "Should you disapprove of the matter, we shall endeavour to bear the disappointment with all possible fortitude; being determined to do nothing that may create the least uneasiness or anxiety to you."

Col. Chichester, in answer to that letter, on the 12th of April, 1789, says, "he has no reason to doubt his daughter's understanding and prudence; that, if it be her choice in full consideration, his approbation will not be withheld; that his circumstances are such that his daughters cannot expect large fortunes, but he shall endeavour to do them equal justice, as fast as it is in his power, with convenience;" and concludes with repeating "that he should not object to his daughter's determination, but give his approbation."

The marriage shortly after took effect. On the 5th of January, 1790, in answer to a letter from Dr. Vass, offering some objections to settling in Alexandria, Col. Chichester writes thus: "Your observations respecting Alexandria carry reason with them. Nothing in my power, without distressing ourselves, shall be wanting to assist you in settling to your satisfaction."

Claries—Enforcement in Court of Equity.—On this subject, the principal case and *Tabb v. Archer*, 8 Hen. & Munf. 399, are cited in *Paynes v. Coles*, 1 Munf. 390.

Post-Nuptial Settlement—Consideration—Ante-Nuptial Parcel Contract.—See the principal case cited in a discussion of the question by THOMPSON, J., in his dissenting opinion in *Hayes v. Jones*, 2 Pat. & H. 603.

For further information on this subject, see monographic *note* on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348; monographic *note* on "Consideration" appended to *Jones v. Obenchain*, 10 Gratt. 259.

Husband and Wife—Contracts with Wife—Suit by Husband's Executor.—On this point, the principal case is cited in *Templeman v. Fauntleroy*, 8 Rand. 439.

See generally, monographic *note* on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

He then adds, "if a plantation in the upper parts of the country would be more agreeable than a settlement in town, perhaps I can with propriety get off the contract made with Stewart for that tract of land in the county of Shenandoah; but, when I contracted with him," (for the sale, it would appear,) "I did not expect any of my family would be pleased with that part of the world for a settlement; which was my only reason for attempting to sell it. If Colchester or Dumfries would be more agreeable, I will endeavour to

100 *procure a lot for the purpose in fee-simple, or will do any thing in my power, in any place you think most agreeable."

On the 24th of February following, Col. Chichester wrote a letter to Col. James Gordon, in Lancaster, which begins thus: "Our friend and connection Dr. Vass and myself concur in opinion that in the neighbourhood of your Courthouse is a good and proper stand for a physician;" and then proceeds to inquire whether a small tract of land with a house on it can be bought in that neighbourhood on reasonable terms; speaks of several which he is informed are for sale; says that two or three hundred acres of tolerable land, with a sufficiency of wood, and a small comfortable house, will be quite enough; mentions a particular plantation on which there is no house "and how it would suit the Doctor to build, he cannot determine." He then adds, "that his late advancement for his daughter Lee put it out of his power to make immediate payment for the lands before mentioned to be bought, but that he expected about 50l. could be paid in May following, and the balance at two annual payments after. If it could be of any material advantage in the purchase, perhaps the whole balance may be advanced in May or June, 1791;" which was the succeeding year. In a post-script he says, "I do not wish any contract confirmed until I receive your answer, but conditionally secure for my approbation."

The bill stated, that Mrs. Vass dying in child-bed before any advancement was actually made, her father shewed no farther inclination to give any thing to the complainant, and actually refused to do so, although he had before made some very considerable advances to the husbands of his other daughters; that the complainant thereafter brought an action at law against Chichester, and obtained a verdict for 500l. damages; but the judgment thereupon was reversed in the Court of Appeals; that, pending the appeal, Chichester died, leaving the defendant, his widow, his executrix; as also a very large estate devised and bequeathed to her and the other defend-

101 ants; *and called for a discovery of what advances their father in his life-time had made to his daughters severally, and of what value they were, and when made to them respectively; and that they should state the value of the several devises and bequests to their children respectively; and that, such discovery being made, as well as a discovery of the other estate of the said Chichester, there might be decreed to the complainant as much as came to the share of any of the said daughters,

or the children of any of them, &c.; concluding with a prayer for general relief.

The executrix demurred to so much of the bill as seeks for redress, by decree of the Court of Chancery, on the promise charged in the bill to have been made by her testator to the complainant, and shewed for cause of demurrer, that it appeared, by his own shewing in his bill, that he had not any equity or title whereon such a decree can be grounded; and that the validity of such promise is a matter properly triable at law, and the remedy thereon is at law, and not in equity.

She then proceeds to answer the allegations of the bill generally; and, from her answer and those of several of the other defendants, (the daughters and their husbands,) it appeared, that Col. Chichester had made some considerable advances to the husbands of two of them; from one of whom he took a bond in the penalty of 3,000*l.* with condition that the husband should leave the wife lands of the value of 500*l.* for her life, in case she should survive him; that, on the marriage of a third with Mr. Hancock Lee, he laid out 500*l.* in land, and settled the same on Mrs. Lee and the children of the marriage; and that, some time after the marriage of his daughter Sarah M'Carty Chichester with Thomson Mason, he gave to the said Thomson Mason, as her portion, 500*l.* a negro girl, and a horse and saddle.

The will of Chichester, (which was among the exhibits,) dated the 10th day of October, 1793, (while the suit at common law brought by Vass against him was pending,) contains a variety of devises and be-
102 quests to his sons and *daughters and his grandchildren, with as great a variety of limitations and contingencies; the property given to his daughters being in general expressly limited to them for life only, with remainders over. But, in one part of the will, this caution seems to have forsaken the testator: for after devising and bequeathing a very considerable portion of property, in lands, slaves and personals, to his wife Sarah, the executrix, "for and during the term of her natural life, with a power, either by deed or deeds in her lifetime, or by a last will and testament, to give, devise and bequeath the said lands and slaves, and all other mentioned property, or any part thereof, to any one child or children, or any one grandchild or grandchildren, of her's and his in fee-simple and absolute property, or for any lesser estate," &c.; he gives and bequeaths ("for want of such disposition of any part of the said land and slaves and other property mentioned) said personal estate to be divided among his three daughters," (naming them particularly,) "to them and their heirs and assigns respectively for ever." In another part of the will (having bequeathed to his wife a considerable number of slaves so long as she should remain a widow) he directs that, in case of her marriage, those slaves, with their increase, are to be equally divided into six parts; one equal sixth part whereof he gives to his daughter Sarah M'Carty, with all their increase, to her and her heirs for ever. There are some other limitations, in fee-simple, of slaves

to his daughters, upon certain contingencies; and, finally, by a residuary clause, he gives all his estate, real and personal, not before disposed of, to all his children, by name, to them, their heirs and assigns for ever.

The Chancellor (overruling the demurrer) decreed that the executrix, out of the estate of her testator, should pay to the complainant 565*l.* "being the supposed value of the marriage portion of Sarah M'Carty, the wife of Thomson Mason, and the advancements to her, (and which value should have been ascertained by a Jury, if the 103 parties would have consented *to it,) with interest thereon at the rate of six per centum per annum from the last day of October, in the year 1791:" from which decree an appeal was taken by the defendant Sarah Chichester, and, having abated by the death of Vass, was revived against Robert Dunbar, his administrator.

Wickham and Randolph, for the appellant.

Williams, Warden and Botts, for the appellee.

The cause was argued at great length on the merits; and especially on the question whether a Court of Equity had jurisdiction to give the relief sought by the bill.

1. On the question of jurisdiction; the counsel for the appellant contended that the face of the bill presented a mere legal case. (a) If the agreement was to convey personal estate, a bill for specific performance would not lie, in general, (b) though, perhaps, in this country, it might lie for slaves. Neither could the jurisdiction be sustained on the ground of discovery. It is not enough for a party to allege that he wants a discovery: it must be proved to be wanting. And here, in fact, it appears unnecessary; for all the evidence to shew what Chichester had done for his other children was to be found in his last will and testament and deeds; copies of which could be procured from the several Clerks' offices.

But, even if a discovery had been requisite, the case, after such discovery had, was clearly proper for a Court of law. The bill, therefore, should have prayed for the discovery only, and not for relief thereupon; a bill for discovery being always at the costs of the plaintiff, 1 Harr. 145. The general rule in such cases is, that the plaintiff, having obtained the discovery sought for, must bring his suit at law: (c) and it is now settled that if the bill seek relief, where the plaintiff is only entitled to
104 discovery, a general demurrer *will be sustained. (d) Indeed, the case of a lost bond seems an exception to this rule; because, originally, in that case, there was no relief at law; a profert according to the old decisions being necessary; (e) and,

(a) *Banister's Executors v. Shore*, 1 Wash. 173; *Long v. Colston*, 1 Hen. & Munf. 111; *Pollard v. Paterson*, 3 Hen. & Munf. 67.

(b) *Cud v. Rutter*, 1 P. Wms. 570.

(c) *Mitt. 52*; *Hinde's Pr. Ch.* 36; *Harr. Ch. Pr.* 139, 151; 3 Bro. Ch. Cases, 61; *Geach v. Barber*; 1 Vesey, 345; *Walmesley v. Child*; *Ibid.* 821; *Piers v. Piers*.

(d) 4 Bro. Ch. Cases, 480; *Collis v. Swaine*; *Cowp. Eq. Pl.* 188, 189. *Ibid.* 58; 3 Vesey, jun. 4; *Loker v. Rolle*; 2 Bro. Ch. Cases, 280; *Fry v. Feun*; *Ibid.* 319; *Price v. James*.

(e) *Coop. Eq. Pleadings*, 120, 130.

therefore, the Court of Equity having obtained jurisdiction, still gives relief, though the reason for doing so has ceased, since, according to the modern authorities, a profer is not necessary. at law, where the bond is averred to be lost. (a) But this concurrent jurisdiction as to relief does not extend to the case of a lost promissory note.

It may be said that 2 Fonb. 494, (b) observes, that "there are some cases in which, though the plaintiff might be relieved at law, a Court of Equity having obtained jurisdiction for the purpose of discovery, will entertain the suit for the purpose of relief." But the cases he cites do not support his position; for in 1 P. Wms. 496, Bishop of Winchester v. Knight, there was certainly no remedy at law; and the same observation applies to 2 Atk. 630, Story v. Lord Windsor. The case of Lee v. Alston, 1 Bro. Ch. Cases, 194, was also a proper case for a Court of Equity; because, in England, the tenant for life is considered as bailiff for the reversioner, and may be compelled to account. Fonblanque, indeed, seems to have been at a loss to strike out the distinguishing principle upon which Courts of Equity in such cases have proceeded: but it is evidently this, that, wherever the case, independently of the discovery, is proper for a Court of Equity, there the discovery and relief will both be granted; but where, in itself, it is proper for a Court of Law, equity will grant the discovery only. If the doctrine were otherwise, even actions of assault and battery and slander might be brought in Chancery.

In answer to this, it was said, that the uniform decisions in this country were otherwise. The oldest practitioner of law cannot point out an instance where a discovery has been had in equity, and the party then sent to law for relief. 105 *The cases of Carter v. Carter, (c) Foster v. Foster, (d) Pryor v. Adams, (e) Barrett v. Floyd, (f) and Chinn v. Heale, (g) decided in this Court, and Taylor v. Ewell, decided by Chancellor Taylor, in February, 1810, together with Burnley's case, shortly after the revolution, (h) were relied upon as in point.

On no principle ought a party to be sent to law for relief, after obtaining a discovery in equity. The maxim of equity is to prevent circuity of action; and, therefore, when the Court can determine the matter, it should not be a handmaid to the other Courts, nor beget a suit to be ended elsewhere. (i) The modern practice in England, in violation of this principle, is founded on an arbitrary dictum of Lord Thurlow's, (k) and ought not to overrule the more equitable decisions of our own Courts. (l) In many instances the practice of this country differs from that of

England; as in the case of a bill to foreclose a mortgage, the decree there is simply that the mortgagor be foreclosed of his equity of redemption, and that the mortgagee have the absolute right of property: but here the practice is to decree a sale.

The objection that, if relief attached on discovery, actions of assault and battery and slander might be brought in Chancery, is altogether groundless; for Courts of Equity never assist in cases of torts, even to compel a discovery. As to other cases of a merely legal nature, there is no hardship in giving relief upon the discovery; for the plaintiff lays himself at the mercy of the defendant, relying on his conscience; and the decree is founded on his own admission.

But, in this case, the bill on its face presented a proper case for a Court of Equity, for it prayed an account, and the matter in controversy was a proper subject for an account. It was also a proper case for abatement and contribution by the legatees.

There was certainly a necessity for going into equity to obtain the discovery; for at law the distributees might, on the ground of interest, have objected to giving evidence. The plaintiff could not prove

106 a negative; that he did not *know what Chichester had advanced to the other children: but, from the nature of such transactions, it was sufficiently evident that he had not the knowledge requisite to enable him to proceed at law. Had land only been given, information might have been obtained, but as to money it was impossible, it never being the usage in transactions of this kind to call on witnesses to take notice what a father gives his son-in-law.

But the question, whether a discovery was necessary or not, was closed by the defendant's demurring, instead of pleading to the jurisdiction. On a demurrer, the allegations in the bill are considered as true. (m) The defendant, therefore, cannot now deny that the necessity actually existed as alleged in the bill. If she meant to say that the plaintiff had no need of such discovery, but that the statements in the bill were only colourable to give jurisdiction, she should have put in a plea to that effect; (n) for the ground of a demurrer must always appear on the face of the bill; and if you intend to take advantage of any thing not on the face of the bill, it must be by plea. (o)

In reply it was observed, that Mr. Pendleton's MS. opinion in Carter v. Carter proves nothing. The appeal was dismissed, because, perhaps, the appellant's counsel, or the rest of the Court, were of a different opinion. Foster v. Foster was a case where negroes were claimed, of which the plaintiff had never been in possession, but to which he was entitled by executory contract. Neither detinue nor trover would lie: but a bill in equity lay for specific performance.

In Pryor v. Adams (it was contended) the Court evidently mistook the law. It is

(a) Ibid. 180.

(b) Book 6, c. 3, s. 6, note (p).

(c) In 1784, (according to a MS. of the late JUDGE PENDLETON.

(d) MS.

(e) 1 Call. 332.

(f) 3 Call. 681.

(g) Ante, p. 63.

(h) JUDGE PENDLETON'S MS.

(i) 2 Fonbl. 494.

(k) 2 Bro. Ch. 519.

(l) See also, contra, Brandon v. Sands, 3 Ves. jun. 514.

(m) Cowp. 111; Mitf. 172.

(n) Mitf. 175; 2 Ves. jun. 123; Mundy v. Mundy, 4 Bro. Ch. Cas. 264, S. C.; Coop. Eq. pl. 292; Mitf. 222.

(o) Mitf. 14; 1 Ves. 245.

not true that this case depends upon the more modern authorities in England: all the old books of practice lay down the doctrine that where relief was prayed in a bill for discovery, the part praying relief might be demurred to, though the defendant was still compelled to answer as to the discovery. The only difference between the old and modern authorities is, that lat-
 107 terly the doctrine *has been established in that, in such case, the whole bill may be demurred to, and no answer is necessary. Here the answer was to the discovery; the demurrer to the relief; exactly according to the old rules of practice. In the case of Pryor v. Adams, there was no argument on this point; and, that decision being against the authorities, had this Court a right to change a law? Other instances were mentioned in which this Court had been mistaken, and had had the magnanimity to acknowledge its errors; for example, as to its jurisdiction relative to appeals from interlocutory decrees, (a) and to criminal cases. (b)

In Chinn v. Heale, the bill was for specific performance, and the ground for relief in equity clear. Authorities in this country, therefore, do not appear to differ with those in England on the point in question.

The ground taken, that the matter in this bill is of equitable cognisance, is entirely untenable. The plaintiff could not call for specific performance; for he could not point out any particular land, or slaves, and demand a conveyance. His only remedy was for damages for breach of contract; and he ranked only as a simple contract creditor.

There was no ground for contribution against the legatees; for all the advancements were made in Chichester's life-time, and there was no pretence of a deficiency of assets in the hands of the executrix; without which the legatees could not be sued. And, as to the ground of relief for the sake of an account; a bill in equity for an account lies only where the old action of account lay; in cases of mutual trust and confidence, as between guardian and ward, principal and factor, &c.; not in common cases, where there is no such trust and confidence; for, if it could, a merchant would have nothing to do but to bring suits in Chancery on all his store accounts.

Upon the merits, it was contended by the counsel for the appellant, 1. That the promise made by Chichester was too indefinite and uncertain to be obligatory in law or equity. It was a mere declaration

108 of an intention to do *equal justice to all his daughters, according to his own convenience; of both which he was himself the best judge. The letter of Vass merely asked his consent to the marriage, without any proposition for a portion, and therefore takes the case out of the class of marriage agreements. (c)

2. If the promise was binding at all, Chichester had his whole life to perform it in. (d)

3. It might have been satisfied by a conveyance of lands to Mrs. Vass, the contract having been for her benefit only; in which case, upon her death, the lands would have reverted to her father, as heir at law; and her husband would not have been entitled, even as tenant by the curtesy; since there was no issue born alive. Of course, Mrs. Vass being now dead without issue, her father ought not to be compelled to make a conveyance to her husband, for whose benefit the contract never was intended.

4. Vass had no right to bring the suit as representative of his wife; having never administered on her estate.

In answer to the first and second points, the opinion of three Judges of this Court, in the case of Chichester v. Vass, (e) were relied upon as in favour of the validity of the promise; Judge Lyons alone seeming to incline against it, but expressly reserving the point, for future argument, if the case should ever occur again. (f) The other Judges acted on a review of all the British cases, among which Wankford v. Fotherly (g) is nearly in point; to which may be added Allen, 36; Roll. Abr. 347, and Sid. 25.

The suit at common law went off altogether upon the defect in the declaration; and no such point was decided by the Court, as that Chichester had his whole life to perform his promise. If the Court had seen there was no promise at all, or that no action could have been brought against Chichester, in his life-time, they would not have sent Vass back with encouragement to bring a new action.

The case in 1 Viner, 292, is in favour of the appellee. The promise ought to be understood as to be performed
 109 *in a reasonable time after the marriage; for the purpose of maintaining Vass, and his wife and children, if he should have any. This could not be satisfied by postponing performance until after Chichester's death. So, with respect to a promise to pay money when convenient, it is settled that it must be in reasonable time. (h) But, in fact, this point is of no great importance; for this suit was not brought until after Chichester's death.

3. The contract could not have been satisfied by a settlement of land on Mrs. Vass. The case in Viner, and that of Chichester v. Vass, before cited, prove this. (i) Contracts are to be understood according to their intent and subject matter. A promise of this kind (in case of ambiguity) is to be taken most strongly against the party promising, and most beneficially for the person to whom the promise was made. Here that person was Vass; and it must be understood as intended to enure to his benefit, as well as that of his wife. If Chichester had his election to convey lands, he has not done it; and he lost that election when the convenient time (to be judged of by the Court) expired.

(e) 1 Call. 88.

(f) Ibid. 108.

(g) 2 Vern. 322.

(h) 6 Co. Rep. 81; 1 Co. Rep. 25; Porter's case, Co. Litt. 208; Roll. Abr. 486, 487; Cro. Eliz. 798; Moor. 473; Hardr. 10.

(i) See also 8 Bac. Abr. (Gwill. edit.) 709, tit. Obligation, letter F.

(a) M'Call v. Peachy, 1 Call. 55.

(b) Bedinger v. The Commonwealth, 3 Call. 461.

(c) 1 Vin. 292, citing Poph. 148; Sylvester's case, 1 Bac. Abr. 264; (Gwill. edit.) same case cited more correctly. Banister v. Shore, 1 Wash. 173.

(d) 1 Call. 88, Chichester v. Vass.

4. The compensation for breach of a contract is a personal, not a real property, and belonged to the husband; either as administrator of the wife, if he had administered, or as sole contracting party. In equity he had a right compounded of these two; and might bring his suit as sole distributee of his wife. (a) If any other person had been the administrator, such administrator could only have sued upon contracts made with the wife: but here the contract was with the husband.

If the husband does not administer, he still has the right of representation in equity. (b) The cases of *Robinson v. Brock*, (c) *Dade v. Alexander*, (d) *Drummond v. Sneed*, (e) and *Hord v. Upshaw* (f) were all instances in which the husband sued without administering; and those above cited affirm the proposition that, if administration were sought on Mrs. Vass's estate, Dr. Vass's representatives
110 *would be entitled, and, if any other person should get administration, such person would be merely a trustee for his representatives.

Friday, April 20th. The Judges pronounced their opinions.

JUDGE TUCKER stated the case; in the course of which he observed that the defendant, Sarah Chichester, by answering the allegations of the bill generally, without confining herself to the matters a discovery of which was sought, might, perhaps, according to some authorities, (g) be considered as waiving the benefit of her demurrer. He was inclined, however, when sitting as a Judge of a Court which professes to soften the rigours of the law, not to refuse to a party the same latitude of defence which our statutory law now indulges in Courts of Law.

He then proceeded as follows:

The principal point relied on by the counsel for the appellant is, that a Court of Chancery has no jurisdiction over this case, and, therefore, that the decree is erroneous in overruling the demurrer and granting relief: for although the complainant might have been entitled to the discovery sought, he was not entitled to any relief. And, among the arguments urged on this point, it was more than once insisted on that Mrs. Vass being dead, and the promise being literally to do equal justice to all his daughters, as fast as it should be in his power with convenience, no suit or action either at law or in equity will lie upon this promise. And a further reason for this objection was, that Mr. Chichester might have given his daughter land, if he had chosen so to do; in which case, as she died without ever having a child, Doctor Vass could not even have a life estate therein; and moreover, that Chichester had his whole life to perform his promise in; and having survived his daughter, and being moreover her next heir, it would be do-

ing a vain thing to compel him to make a conveyance which would be of no benefit to the complainant under these circumstances.

111 *It will not, I presume, be denied, that a promise to do a moral action founded upon a good and sufficient, or valuable consideration, actually given or performed in pursuance of such promise, is binding upon the party making the same, and may be enforced, according to the nature of it, either in a Court of Law or Equity. Of course, if the law cannot equity ought to enforce it. Taking then the position, that an action at law cannot, under the circumstances of the present case, be maintained upon this promise, as contended for, I will consider whether this promise contains such ingredients as that a Court of Equity ought to grant the relief sought.

The following principles appear to me to require no comment or illustration.

1st. That a promise made by a father to a person, who seeks an alliance with his daughter is a promise made in consideration of marriage, if the marriage be afterwards had with his consent.

2d. That although such promise may literally import a provision to be made for the daughter; yet, being made to the intended husband, it must be construed to be one which shall enure to the benefit of both, unless there be some special reservation to the contrary; manifesting a clear intention to preclude him from participating in the benefit thereof.

If these principles be correct, the letter of the 12th of April, 1789, must be considered as a promise made by Mr. Chichester to Doctor Vass in consideration of his intended alliance with his daughter, which, according to the expressions contained in the Doctor's letter to him of the 10th of April, depended upon Chichester's consent, the young couple being determined to do nothing that might create the least uneasiness or anxiety to him; but to bear their disappointment with all possible fortitude. No repugnance to this consent is expressed by Mr. Chichester, nor any terms or settlement at any time hinted at, in any
112 of his letters to the Doctor, *or others on the subject. It must therefore be taken as a promise to enure to the benefit both of the future husband and wife. Even when Mr. Chichester had it in contemplation to purchase a plantation, or a lot and house in Colchester or Dumfries, or to give a plantation which he had in Shenandoah County, not a word is said which conveys the most distant hint that he meant to make the conveyance to his daughter, separately, or to require a settlement from Doctor Vass, before he should give his daughter anything. In his letter of January 5th, 1790, he tells him nothing in his power, without distressing himself, shall be wanting to assist the Doctor in settling to his satisfaction. In the same letter he offers to purchase a lot in Colchester or Dumfries in fee-simple, or do any thing in his power in any place the Doctor should think most agreeable. Surely these expressions manifest an intention to do something that should enure to the Doctor's benefit, and must be referred to the origi-

(a) 1 Wils. 168.

(b) 1 P. Wms. 378, *Squibb v. Wyer*; Ib. 381, citing the case of *Cart and Rees* in 1718; 3 Atk. 527; *Harg. Co. Litt.* 351, note (1).

(c) 1 H. & M. 213.

(d) 1 Wash. 30.

(e) 2 Call. 491.

(f) Cited in 1 Wash. 30.

(g) *Mitf.* 171; 3 P. Wms. 80; 2 Atk. 157.

nal promise, and as manifesting the intention of it. And, though it should be true (which it is unnecessary to decide) that Mr. Chichester had his whole life to perform any part of that promise, since it was made to depend upon his convenience; and that he might have given his daughter land, only, and not money, or other personal property, yet if he had such an election, he made no use of it, and the promise ought to be enforced in such a manner as may be most beneficial to the person to whom it was made, having regard to the measure of his bounty to his other daughters, to determine that which was due to the others. As this was a matter not within the privity of Doctor Vass, if the performance were refused upon the ground that the contract was not obligatory, (as seems to have been the case according to the testimony of one witness,) or remained unperformed at the time of Mr. Chichester's death, a Court of Equity was certainly the proper tribunal to resort to for a discovery of the advances made by Mr. Chichester to his other daughters, as the standard by which to ascertain the measure of the

113 benefit claimed by *his son-in-law; as also for a discovery of the funds out of which the relief sought was to be given; for, if Mr. Chichester had died leaving no estate whatsoever undisposed of, but it should appear that, after the promise made to Doctor Vass, he had given property to his other daughters, would not that property be liable to contribution, as far as it would go, to make the portion of Mrs. Vass equal to that of her sisters? Or, if he had died intestate, leaving only lands into which the daughters or their husbands had entered as his heirs, would not those lands be liable to such a contribution for the portion promised the remaining daughter? Again, the nature and quality of the property or estate given to the other daughters, with the conditions (if any) under which it was given to the other daughters, might form a proper subject of inquiry in a Court of Equity, in order to enable that Court to do, what Chichester promised to do, "equal justice" among all the daughters. A discovery of all these things was therefore very properly required; and until that discovery were made, the Court could not possibly judge whether the complainant was entitled to relief, or not. The case exhibited by the bill does not therefore furnish, in my opinion, any proper or reasonable ground for the demurrer, which is confined to the relief sought; of the propriety of granting or refusing which the Court could not possibly judge until the merits were brought before it by the answer and other evidence in the cause. I therefore think the Court decided properly in overruling the demurrer. That obstacle once removed, the complainant's right to relief, either as an original party to the contract, or as the administrator of his wife, was unquestionable.

I have before said that if a promise be made to two persons of different sexes, in consideration of a marriage to be had between them, if they marry, the promise shall enure to the benefit of both. And this upon the principle of that unity of persons

which the law establishes between them upon their marriage, and that upon the 114 principles of the common *law; for, by that, if a reversion be granted to a man and a woman, and their heirs, and before attornment they intermarry, and then attornment is made, the husband and wife shall have no moieties: so, if a feoffment be made to a man and a woman, with a letter of attorney to make livery, and then they intermarry, and livery is made secundum formam chartæ, in that case also it is said they have no moieties. So, if an estate were made to a villein, and his wife being free, and to their heirs, although they have several capacities, viz. the villein to purchase for the benefit of the lord, and the wife for her own, yet, if the lord of the villein enter, and the wife survive her husband, she shall enjoy the whole land; because there are no moieties between them: (a) and that this is the true reason of the law, appears from this; that if a joint estate be made to a husband and wife and to a third person, in that case the husband and wife have in law but one moiety, and the third person shall have the other moiety. (b) And Judge Blackstone, speaking upon the same subject, says, that if an estate in fee be given to a man and his wife, they are neither properly joint-tenants nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties; but both are seised of the entirety, per tout and non per my; the consequence of which is, that neither the husband nor wife can dispose of any part without the assent of the other, but the whole must remain to the survivor. (c) The case of *Back v. Andrews*, 2 Vern. 120, is to the same effect. (d) According to these authorities, and particularly the latter, it would appear that if there be a specific promise of lands to a man and a woman, in consideration of their intended marriage, and they afterwards marry, and the conveyance be not made according to the promise; the survivor, in whom the whole interest and estate would have vested if there had been a conveyance made during the life of both, would be well entitled to come into a Court of Equity for a conveyance of the whole estate to himself or herself. How far the second section of the act concerning joint rights 115 *and obligations, (e) may be considered as operating on this case, so as to destroy the principle of entirety, is a matter which may hereafter deserve great consideration. But, should it be determined in the affirmative, still it would seem that the survivor might well come into a Court of Equity for a conveyance, if not of the whole, at least of a moiety. Judge Pendleton, in delivering his opinion on this very case, when before this Court on a former occasion, speaking of the promise contained in Col. Chichester's letter, says, "If it were considered merely as a promise of a personalty, that right would vest, as a joint interest, in the husband and wife, until reduced

(a) Co. Litt. 187. b.

(b) Litt. sect. 291.

(c) 2 Bl. Com. 182.

(d) *Prev. In Ch. 1. S. C.*; 2 *Eq. Ca. Abr.* 230, *S. C.*

(e) 1 *Rev. Code, c. 24.*

into possession, and go to the survivor, if either died before that happened." This perfectly accords with what I meant to advance upon this subject. In the case of *Elliott v. Collier*, (a) where a bill was brought by the representative of a husband, who died without administering to the personal estate which the wife had in her own right, for the wife's share of her father's customary estate, as a citizen of London, Lord Hardwicke declared that the plaintiff was entitled to a decree for the same, notwithstanding the husband had not taken out letters of administration. (b) From these authorities, strengthened by our own act concerning wills, &c. which expressly establishes the priority of the husband's right to administer on the estate of his wife, and exempts him from making distribution of it, (c) I conceive it was not necessary for Doctor Vass to administer upon his wife's estate, in order to entitle him to bring this bill; and that, upon the whole, the decree overruling the demurrer, and giving relief, as prayed for, ought to be affirmed, after correcting the error in the rate of interest, which, perhaps, was the effect of inattention.

JUDGE ROANE. Having heretofore given my opinion upon the merits of this case, I shall not enter into them at present. On those merits I am content to affirm the decree; merely making the change which has been suggested in relation to the interest. With respect to the jurisdiction 116 *of the Court, under the actual circumstances of the case, and the allegations of the bill before us, we are undoubtedly justified in sustaining it, by the decisions in this Court, if not by those of England. The case of *Pryor v. Adams* is a stronger case than the present on the point of jurisdiction, and is perhaps fully justified, among others, by the case of *Atkins v. Farr*, 1 Atk. 287.

JUDGE FLEMING. On the decision of the action at law, between the same parties, and on the same subject, by this Court, all the Judges seemed of opinion that there was sufficient evidence of a marriage promise, on the part of the appellant, to bind him to fulfil it; but, that the appellee failed in his suit, from an incurable defect in the declaration; in omitting to aver that the appellant had made advances to some one, or more, of his daughters, to a certain amount; and that it was convenient for him to make the like advancements to the wife of the plaintiff.

The counsel for the appellant in the present case, stated several points for the consideration of the Court. First, that a Court of Equity had no jurisdiction, it being a proper subject for a Court of Law; but if the suit be sustainable, as a bill of discovery, the plaintiff, having obtained the discovery sought for, ought to have gone into a Court of Law for relief. And with respect to the merits, it was contended, 1st. That there was no proof of a promise, binding either in law or equity; 2. That if the

letter of the 12th April, 1789, should be construed to amount to a promise, the appellant had his whole life to perform it in; as the letter is qualified with the expression that he would endeavour to do his daughters equal justice as fast as it should be in his power, with convenience; 3. That an advancement to the daughter in land, would have been a complete fulfilment of the promise, and that, had such an advancement been made, the land would have immediately descended to the appellant, 117 on the death of the daughter, *without having issue, born alive, to entitle the husband to hold the land, as tenant by the curtesy.

The case has been so fully and ably discussed by the Judges who have preceded me, particularly by Judge Tucker, that I shall add but little to what has been already said on the subject.

With respect to the jurisdiction of the Court, this is clearly a bill of discovery, to ascertain what advances had been made to the other daughters by the father, either in his life-time, or by his last will and testament: and, that discovery being made, the only remaining question is whether the complainant was bound to dismiss his bill, and seek redress by a new suit, in a Court of Law? Mr. Wickham cited some English authorities that seem to favour the doctrine; but I believe the uniform practice in this country has been otherwise; especially where the subject matter is within the cognisance of a Court of Equity, and there be no latent facts, to be inquired of by a Jury, necessary to be found, in order to enable the Court to give a correct decision. And, even in such a case, the general practice is, for the Court of Chancery to direct an issue to try any particular uncertain fact that may be thought material in the cause. In the present case there was sufficient disclosed in the answer of the defendant to enable the Court to determine what sum would place the deceased wife of the complainant, or her representative, who was her surviving husband, on an equality with the other daughters of Richard Chichester.

As to the first point, on the merits, I have no doubt but that the letter of the 12th of April, 1789, amounted to a marriage promise; but, say the counsel, Richard Chichester had his whole life to perform his promise in: but that position is not admitted. His promise was, that he would do equal justice to all his daughters, as fast as it was in his power with convenience; the true meaning of which was, that he would do it in a reasonable time, taking into consideration the circumstances of his 118 estate, and the length of *time that elapsed between the marriages of his other daughters, and his advances to them respectively. But we find that he never performed it at all, not even by his last will. And, as to his having the right to make the advancement in land, that is not denied, provided it had been in value equivalent to the advancements to his other daughters. But, not having made such, nor any other advancement to Mrs. Vass, except a negro girl, and some other trifles, I concur in the opinion

(a) 3 Atk. 526.

(b) 1 Wils. 168; 1 Vern. 15. S. C. 1 P. Wms. 380. 381; S. P. Harg. Notes on Co. Litt. 361. S. P.

(c) Laws Virg. 1794. c. 92. s. 27, 28; 1 Call. 1. Cutchin v. Wilkinson.

that Vass was entitled to recover a sum of money equal in value to the advances made to the other daughters.

But there seems to be an error in the decree, in giving six instead of five per cent. interest on the sum decreed; the decree must be reversed, and corrected so far as respects the interest, and affirmed as to the residue.

119 *Hooper and Wife and William Savage v. Royster and Wife.

April, 1810.

1. Appellate Practice—Certiorari—Transcript of Record in Another Suit.—In a suit in Chancery, the bill having referred to the proceedings in another suit, "as now remaining of record in the same Court;" and the answer having admitted that such a suit was brought, and such a decree as stated in the bill, existed; the Court of Appeals will award a writ of certiorari for a transcript of the record referred to, and receive it as evidence, so far as admitted by the answer.

2. Guardian and Ward—Payment of Money to Guardian—Competency of Witnesses to Prove.—An administrator, to whom a credit for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in Chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian; though the latter was no party to the decree.

3. Samet—Board of Ward—Declaration That No Charge Will Be Made Thereof—Effect.—Proof of the parol declarations of a guardian that she did not intend to charge her ward for board is admissible to repel a charge for board in her life-time, exhibited by her representatives after her death. But, in such case, she ought not to be charged with interest on a sum of money received for the ward, unless such interest would exceed the amount of a reasonable compensation for board.

4. Samet—Allowances—Schooling—When Allowed from Principal.—A guardian may be allowed for moneys paid and advanced for the clothes, schooling and other necessary expenses of the ward, out of the principal of such ward's estate; if it appear that, from extraordinary circumstances, such disbursements were unavoidable without culpable neglect on the part of such guardian; otherwise such allowance ought to be made out of the profits only.

5. Samet—Payments to Guardian—Scaling.—Money received by a guardian for a ward, during the paper money times, ought to be reduced by the scale of depreciation; to be applied as on the last day of the year in which it was received.

6. Samet—Investments—Reasonable Time Allowed Thereof.—A reasonable time ought to be allowed a guardian to put the money of a ward out at interest; and, in this case, six months were considered as such reasonable time.

7. Samet—Payments to Guardian—Scaling.—If money was received, by a guardian for a ward, within

***Appellate Practice—Certiorari.**—On this subject, see monographic *note* on "Appeal and Error" appended to *Hill v. Salem, etc., Turnpike Co.*, 1 Rob. 263.

†**Guardian and Ward.**—On matters relating to the subject of guardian and ward, see monographic *note* on "Guardian and Ward" appended to *Barnum v. Frost*, 17 Gratt. 398.

‡**Same—Support of Ward—Declaration That No Charge Would Be Made Thereof—Effect.**—In *Arm-*

six months previous, to the 1st of January, 1777. (when the scale of depreciation commenced,) it should be reduced according to the scale, as at the end of six months from the time when received.

8. Appellate Practice—Interlocutory Decree—Want of Proper Parties.—On an appeal from an interlocutory decree, if proper parties to the suit appear to be wanting, the Court of Appeals will not leave it to the Chancellor, but will itself direct such parties to be made.

9. Contribution—Suit Therefor against Legatees—Parties.—In a suit for contribution against legatees or distributees, the executor or administrator, or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party; unless it appear that the account of such executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees.

Upon an appeal from an interlocutory decree of the Superior Court of Chancery for the Richmond District, in a suit brought by Littleberry Royster and Nancy his wife, late Nancy Farris, orphan of Sherwood Farris, deceased, against William Savage and Elizabeth Gathright, administrators of Joseph Gathright, Jane Gathright, administratrix of Miles Gathright, and Anne Whitlock, administratrix of Benjamin Gathright, deceased.

The bill stated that the complainants, together with Mitchell Farris, being the distributees of Sherwood Farris, deceased, had instituted a suit in the same Court against William Farris, administrator of the said Sherwood Farris, "to compel a settlement of his administration account; that, in the progress of that suit, William Farris claimed a credit for the sum of 158l. 15s. 10 3-4d. paid Anne Gathright as guardian for the complainant Nancy, and, to support the claim, produced a receipt for that sum, dated August 2d, 177-, signed "William Gathright, jun. for Anne Gathright;" that the Court directed an issue to try whether the payment

strong v. Walkup, 9 Gratt. 372, 375, it was held that a guardian of infants is entitled to compensation for their support, though he may have promised their friends that he would not make any charge for it, and in fact kept no accounts against them. *SAMUELS, J.*, in delivering the opinion of the court said, as the guardian "was under no previous obligation to support and educate them (i. e., the wards) at his own expense, a promise to do so was made without consideration, and would not be binding on him. The office he held made it his duty to take care of the persons and property of his wards, and to provide for their support and education out of the profits of their estate. A mere promise to persons having no authority to contract on the subject, and for no consideration, does not affect the rights of the guardian to have compensation. *Hooper v. Royster*, 1 Munf. 119." To the same effect, the principal case is cited in *Hurst v. Hite*, 20 W. Va. 205. In fact, this last case quotes the excerpt given above from *Armstrong v. Walkup*, 9 Gratt. 375.

§**Decrees.**—See generally, monographic *note* on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

‡**Legatees—Suits against.**—See monographic *note* on "Legacies and Devises" appended to *Early v. Early*, Gilim. 124.

was made to William Garthright as stated, and whether he was empowered by Anne Gathright to receive such payment; the Jury found that the money was paid, and that William Gathright, jun. had authority to receive it; in consequence of which a decree was rendered establishing the credit; "all which would more fully appear, reference being had to the record of the said suit now remaining in the said Court;" that Anne Gathright had never accounted for this sum; that she died about the year —, leaving property of considerable value; but whether she left a will or not the complainants could not certainly say; that her property was divided on her death among her three sons Joseph, Benjamin and Miles, of whom the defendants were the legal representatives; and concluded with praying a decree against them for the said sum of money with interest, and for such other relief as might be consistent with equity.

The joint and several answer of the defendants admitted the intestacy of Sherwood Farris, the administration of William Farris, the guardianship of Anne Gathright, and the suit instituted against William Farris, as stated in the bill: but neither admitted or denied the validity of the receipt for 158l. 15s. 10 3-4d., but called upon the plaintiffs for proof according to law; alleging, however, that "if the said receipt were genuine and authorized by the said Anne Gathright, still her representatives had a claim against the complainant Nancy for a much larger sum, namely, for ten years' board, schooling and clothing, furnished by Anne Gathright to the said Nancy; that the said Anne Gathright made

a will; (of which a copy was exhibited; 121 ited;) that the said will disposed of several negroes (particularly two named Major and Frank) which belonged to her deceased husband William Gathright, sen. and were not at her disposal, except under his will; that, therefore, the defendants required the plaintiffs to show her title to the said property; that, supposing, however, that all the slaves and other property mentioned in her will belonged to her, (which the defendants did not admit,) her distributing the same on a belief that it would go according to her will was an evidence of her opinion that she was exempt from any liability for the said receipt; the said Anne Gathright having been a woman of great economy and justice in her dealings; and that if, contrary to the expectation of the defendants, they should be decreed to account for such portions of her estate as had come to the hands of those whom they represent, they prayed that it might be in proportion to what each had received. The will of Anne Gathright dated November 28, 1780, (referred to in this answer,) appears to have devised her landed property to her sons William and Benjamin, and her slaves and personal property in various proportions to Benjamin, Miles and Joseph, her daughters Jane Anne Gathright, and Anne Whitlock, her grandson Mitchell Farris, and her granddaughters Anne Gathright and Anne Farris; appointing her two sons Miles and Joseph executors: but whether they qualified as such, or the will was ever admitted to record, does

not appear. Sundry depositions were taken to support and repel the credit claimed by the defendants for the board, schooling, and clothing of the complainant Nancy, during the time of her residence in the family of Anne Gathright; from which it appeared that the said Nancy had lived, and been genteelly entertained there, 8 or 9 years; that she went to school part of the time, and was well clothed; but that Anne Gathright had repeatedly declared she did not intend to make any charge for her board.

With respect to the validity of the receipt for the 158l. 15s. 10 3-4d.; it was proved by the deposition of John Farris, 122 *that he always understood that William Gathright transacted the chief of his mother's business in the time of her being guardian for her granddaughter Nancy Farris; that he verily believed that Anne Gathright was herself incapable of "transacting the duty" which her guardianship required; and that he always understood that she was guardian to Nancy Farris, in the year 1777. It was also proved by the deposition of William Farris, (the administrator of Sherwood Farris,) that he took a receipt (without saying for what sum) of Anne Gathright, as guardian of Nancy Farris, for her proportional part of the money due her as orphan of the said Sherwood Farris; and that William Gathright did the business for Anne Gathright, as guardian of Nancy Farris, with the said deponent.

A transcript of the record in the suit referred to in the bill, was not inserted in the record sent to the Court of Appeals, but was afterwards brought up by certiorari; from which it appeared that a verdict had been found, (on an issue directed in that suit,) setting forth, "that the receipt in the following words, 'Received August 2d, 177—, of William Farris, 158l. 15s. 10 3-4d. for Anne Farris, orphan of Sherwood Farris, deceased, to remain without interest till January next, as the interest is settled till then.

'William Gathright, jun. for Anne Gathright.

'John Warriner, jun.' was the proper hand-writing of the said William Gathright, jun.; and that he was empowered by Anne Gathright to receive money for her ward Nancy Farris, orphan of Sherwood Farris, deceased;" and a decree had been thereupon pronounced, allowing William Farris credit for the said sum of 158l. 15s. 10 3-4d. in the settlement of his account as administrator of the said Sherwood Farris.

The late Chancellor (on the 29th of September, 1803) "being of opinion that the plaintiff Nancy was not chargeable with board, nor entitled to interest for the use of the money claimed by the bill during such time as she abode in her grandmother Anne Gathright's family, adjudged and 123 *decreed that the defendants, out of the goods and credits of their intestates respectively, pay to the plaintiffs 158l. 15s. 10 3-4d., with interest thereon, at the rate of five per cent. per ann. to be computed from the time when she ceased to be longer a member of that family: br

forasmuch as data for exactly measuring that period are not supplied, and the defendants are understood not to have admitted the things bequeathed to their intestates by the said Anne Gathright to have been her property, the Court directed one of the Commissioners to inquire into these matters, and report them, as they shall appear to him, to the Court, with the value of that property;" from which decree the defendants William Savage and Hooper and wife prayed an appeal, which was allowed them.

Nicholas and Randolph, for the appellants.

Wickham, for the appellee.

On behalf of the appellants four points were made; 1. That Anne Gathright was never chargeable with the money decreed; in support of which it was observed that the present defendants not having been parties to the suit against William Farris, the record in that suit was not admissible evidence in this; independently of which record, there was nothing to prove the payment of the money but the deposition of William Farris, who was clearly an interested witness;

2. That, if she was ever chargeable, the credit claimed for board ought to be allowed; her declarations that she did not intend to charge it, not being sufficient to bar her right;

3. That if the receipt were allowed, its true date was probably in the paper money times, and therefore the scale of depreciation ought to be applied, according to the cases *of Granberry v. Granberry, (a) and Call v. Ruffin; (b)

and, 4. That all the proper parties were not before the Court; as was evident from Anne Gathright's will.

In answer to the first point, it was said that the record in the first suit was not introduced as absolute or conclusive testimony, but merely as introductory to, and explanatory of, the deposition of William Farris; that a copy of that record would have been no evidence before the Chancellor, since the papers being in his own Court, he should have looked into the originals. In the case of Burk's Ex'r v. Tregg's Ex'r, (c) such was the principle established on the plea of nul tiel record: and it would have been the same, if the copy in question had been incidentally produced as evidence to the Jury. In this cause, the bill referred to the papers in the other suit, as now remaining of record in the Court. This made them part of the bill, and authorized the giving them in evidence, so far as by the rules of law they were evidence; viz. to shew that such a suit had been brought, and such a decree existed; whereby it appeared that William Farris was disinterested; the decree in his favour having settled the matter as to him.

Even if the record was not read in the Court below, (as it should have been,) the Court here ought to inspect and receive it as evidence; this being an interlocutory decree, and this Court having obtained pos-

session of the transcript by writ of certiorari; as, in Alexander v. Morris, (d) where the decree was interlocutory, depositions, taken after the allowance of appeal, were, nevertheless, admitted to be read in the Court of Appeals.

2. As to the board, the Chancellor has been liberal enough. Since it was evident that Mrs. Gathright never intended to charge the plaintiff Nancy with board, and held a considerable sum of money belonging to her, for many years; he, very properly, refused to make the one party liable for board, and the other for interest. Besides, if the profits of the orphan's estate were not sufficient for her maintenance, her *guardian had no right to consume the principal in expenses, but should have had her bound out according to law. (e)

3. Whether the scale of depreciation ought to be applied, or not, does not appear. But, admitting that paper money was paid, the decree not being final, it will not be too late for the Chancellor to apply the scale hereafter. So also,

4. Proper parties may be introduced at any time before the final decree.

In reply, it was urged that a mere reference to another suit does not make it part of the bill, unless the record be filed, or made an exhibit; that the evidence necessary on the plea of nul tiel record is very different from that required in Chancery suits; that copies there are always received, and, indeed, are most proper, because the papers, and those only, which were before the Court below, ought to be inserted in the record to be sent to the Court above.

William Farris was not a competent witness; for, notwithstanding the decree was in his favour, he was not altogether discharged, since a bill of review might be obtained, and, therefore, he might, eventually, be interested.

As to the question of depreciation, the Chancellor will never allow for it, if this decree be affirmed; for he could not have got to the sum of 158l. 15s. 10 3-4d. without disallowing the depreciation.

Mr. Wickham's suggestion, that proper parties may be made hereafter, ought not to prevent this Court from now directing them. Is a man to be condemned unheard, because he may be heard hereafter? Principles are now to be settled. If this Court affirm the decree, its decision will be understood as declaring that all the proper parties are already made.

Friday, May 18. The Judges delivered their opinions.

JUDGE TUCKER. The first question in this cause respects the proof of the payment of the sum of 158l. 15s.

*10d. by William Farris, administrator of Sherwood Farris, deceased, to Anne Gathright, as guardian of the complainant, Nancy Royster, who was a daughter of the said Sherwood Farris. And the proof rests entirely upon the deposition of William Farris the administrator, by whom the payment is alleged to have been made. As it is short, I shall transcribe the whole as it appears in the record.

(a) 1 Wash. 246.
(b) 1 Call. 333.
(c) 2 Wash. 215.

(d) 3 Call. 89.
(e) 1 Rev. Code, p. 173, s. 11.

"Question by the plaintiff. Did you, or did you not, take a receipt of Anne Gathright, as guardian of Nancy Farris, for her proportional part of the money due her as orphan of Sherwood Farris, deceased, you being administrator of the said Sherwood Farris, deceased?"

"Answer. I did take a receipt, and I was the administrator."

"Question by the plaintiff. Did William Gathright do the business for Anne Gathright, as guardian of Nancy Farris, with you?"

"Answer. He did. And further he saith not."

Were there no objection to the competency of the deponent as a witness, I am clearly of opinion that this deposition, standing alone and unsupported by the receipt which he says he took for the money, (the amount of which is not mentioned, nor even hinted at,) ought to be wholly rejected as proof of such payment to the guardian.

But the objection to his competency appears evident upon the face of the deposition; for, as administrator of the father of Nancy Farris, he was chargeable to her for any legacy or distributable portion of her father's estate in his hands, and, consequently, could not be permitted to discharge himself by his own oath, only, that he had paid it over to her guardian.

But to remove that objection, the plaintiffs resort to a record in a suit between themselves and this witness, as administrator of S. F. in which the Chancellor directed an issue to be made up between the parties, to try whether Anne Gathright, (who was not a party in that suit,) on the second day of August, 1777, was the guardian of the plaintiff "Nancy, and also to try whether an exhibit in these words, "Received August 2d, 177-, of William Farris 158l. 15s. 10 3-4d. for Anne Farris, orphan of Sherwood Farris, deceased, to remain without interest till January next, as the interest is settled till then." (Signed) "W. Gathright, jun. for Anne Gathright," was undersigned by the said W. G., jun. with his proper hand; and also to try whether the said W. G., jun. was empowered by the said A. G. to receive money due to her ward; on which trial those facts were both found in the affirmative; which record is in part recited, and is referred to in the complainant's bill, in this suit, as then remaining in the same Court of Chancery. But that record was not made a part of the record in this suit, when sent up from the Court of Chancery, neither doth it appear that it was read in evidence there at the hearing. Mr. Wickham, however, contended, upon the authority of *Alexander v. Morris*, (3 Call, 104,) that, this being an appeal granted from an interlocutory decree, this Court would allow that record to be read; more especially as, being a record of the same Court, it was probable the Chancellor had inspected it previous to pronouncing his decree. But I have very great doubts of the propriety of such a practice, as it may be productive of great inconvenience and injury to suitors in general. For can it be thought reasonable, that a party, by referring in a general way

to a suit between other persons, although in the same Court, should put his adversary to the trouble and expense of hunting for, and taking copies from the papers in a suit, or perhaps a dozen suits, determined twenty or fifty years ago, and, after all, perhaps not meeting with the papers referred to, when the party making the reference might have produced an authentic copy, and annexed it to his bill or answer, without further expense than paying for a copy of so much as he himself might deem material to his own cause. Or, suppose a person (against whom a decree may have been pronounced in any of the other

128 Chancery District Courts) *to apply to a gentleman of that bar for his advice whether to appeal from a decree or not. He produces the record certified by the clerk, and the counsel, upon examining it, discovers manifest error, and advises an appeal. If, upon an exhibit which shall afterwards be brought up by certiorari, as in this case, the Court shall affirm the decree, (although such exhibit was probably never produced in the Court below,) the defendant will be liable to pay damages at the rate of ten per cent. per ann. which he would never have incurred if the exhibit had been made a part of the record originally. I therefore think the practice too dangerous to be countenanced by this Court: more especially as, in the present case, the defendants have not admitted the payment, but called for proof to be made of it.

But, if it were admitted that this record might be read here for the purpose of shewing that the administrator is no longer liable to the plaintiff Nancy, and therefore a competent witness to prove the payment of her distributive part of her father's estate to her guardian, still I am of opinion it ought not to be admitted for any other purpose. Now the amount of the money paid to William Gathright, jun. as the agent of Anne his mother, nowhere appears but in that record. This Court certainly will not admit it for that purpose; for Anne Gathright, not being a party in that suit, had no opportunity to cross examine the witness; and, if we look into that record, he contradicts his own evidence in this cause; for there the money appears to have been paid to the son, who gave a receipt for it, and here the witness says that he took a receipt from (not that he paid the money to) the mother.

Again, if we are to inspect that record, it affords a presumption, at least, that the money was paid to the guardian during the period when paper money was the only circulating medium in this country; if so, it ought to be scaled according to the value, as established by the act of Assembly, within a reasonable time after the time of the payment.

129 *I also think the defendants are entitled to a reasonable allowance for board, as well as clothing and schooling, notwithstanding the generous intention of the guardian not to charge any. For the plaintiffs coming to ask for equity, ought to do it. Loose declarations are not to be attended to.

But, whether this be correct or not, she certainly has not waived her claim for

moneys paid and advanced for clothes, schooling, and other necessary expenses, (board excepted,) an account of which ought to be taken, and all just and reasonable disbursements allowed out of the profits of the ward's estate, if sufficient for that purpose; but, if those profits, during that period of the ward's infancy when she was too young to be bound out as an apprentice, shall prove insufficient to compensate the guardian for such just, reasonable, or necessary disbursements, the balance ought to be made good out of the principal of her estate. But for advancements subsequent to that period, no allowance beyond the profits of the ward's estate ought to be made, unless it shall appear, that, from extraordinary circumstances, such disbursements were unavoidable without culpable neglect on the part of the guardian: in which case the same ought to be allowed out of the principal of the ward's estate, (if the profits thereof shall be found insufficient,) with interest on the same from the end of each year. And that, for any balance which may be found due to the ward at the period when she ceased to reside with her guardian, interest at the rate of five per cent. per annum ought to be allowed to the ward. And, in settling and adjusting the accounts, all payments and receipts of money, between the first day of January, 1777, and the first day of January, 1782, are to be considered as made in paper money, unless the contrary be proved; and the account stated in paper to the time of the last payment; and the balance either way reduced by the scale of that month, and carried to the account of subsequent specie articles if any there be. (a)

Upon the whole, I am of opinion
130 that, upon the record *now before us, there is neither evidence of the amount of any payment, nor of the time of any payment, nor even of the certainty of any payment made by W. Farris the administrator to A. Gathright the guardian; that the decree be therefore reversed, and the cause sent back to be proceeded in, in such manner as upon further evidence, if offered to the Court, may be consonant to equity.

JUDGE ROANE observed that the decree of the Court, about to be read, contained his sentiments, and he did not wish to add any thing to it.

JUDGE FLEMING. The difference in the opinions of the Judges being on two points only, I shall be short in my remarks, and confine them to these two points. 1. With respect to the sufficiency of the evidence to prove the receipt of the 158l. 15s. 10 3-4d. by Anne Gathright, guardian of the appellee, Nancy Royster, as in the proceedings mentioned. It appears to me that the record in the suit between Farris and Farris, in which the present appellees and another were plaintiffs, to call Wm. Farris, administrator of Sherwood Farris, deceased, to render an account of his administration of that estate, and in which the said administrator had a credit for the said 158l. 15s. 10 3-4d., having been particularly referred to in the bill, and by the answer admitted to be truly stated therein,

I have no doubt but that record was proper evidence in this cause. I am also of opinion, that Wm. Farris was a competent witness to prove the payment of the said 158l. 15s. 10 3-4d. to Wm. Gathright, as agent of Anne Gathright, guardian of the appellee, Anne Royster: he, being exonerated from any liability for the same, by the decree in the suit of Farris v. Farris, was a disinterested witness, and no exception was taken to his deposition.

2. With respect to the board of the appellee, Anne Royster, during her residence with her grandmother and guardian Anne Gathright, the latter was repeatedly
131 heard to declare *she did not intend to charge her ward with board. And our act of assembly concerning guardians and orphans, (b) declares that where the profits of an orphan's estate are not sufficient for his or her maintenance, such orphan, if a boy, shall be bound out until the age of 21 years, and if a girl, to the age of 18 years.* I am therefore of opinion, that the charge for board, beyond the profits of her estate, ought not to be allowed.

The following was entered as the decree of the Court.

"A majority of the Court is of opinion that there is no error in so much of the decree rendered in this cause as exempts the appellee Nancy Royster, from the charge for board, during the time of her residence in the family of Anne Gathright, deceased, her guardian and grandmother, in the proceedings mentioned, and provides for the ascertainment of the time when such residence ceased; nor in so much thereof as disallows to the appellees interest upon the money claimed by the bill, during the time of such residence; nor in so much thereof as decrees to the said appellees the sum of 158l. 15s. 10 3-4d., with interest thereupon, at the rate of five per centum per annum, to be computed from the time when such residence ceased; (subject, nevertheless, to any deduction which may result from the effect of the principles and provisions declared by this decree;) the receipt of the said money not having been denied by the answer, and being established by the testimony.

"The Court is also of opinion, that there is no error in so much of the said decree as provides for the ascertainment of the several and respective proportions of the estate of the said Anne Gathright, deceased, with the relative values of each, which came to the hands of the respective intestates of the appellants, chargeable with payment of the debts aforesaid, in order to a just and ratable contribution
132 *between them, severally, to the sum decreed. But inasmuch as it is not proved that the said guardian ever agreed to waive her claim for moneys paid and advanced for the clothes, schooling, and other necessary expenses of the said Anne Royster, during her residence with her as aforesaid, this Court is of opinion, that the same ought to have been ascertained and allowed to the appellants, in so far as

(b) 1 Rev. Code, 173.

*Note. See also, *Ibid.* p. 322, s. 12.

(a) *Tallaferro v. Minor*, 3 Call, 196.

such advances were suited to the estate and condition of the said Anne Royster, and did not, after she came to an age to be bound out, in the event of the profits of her estate being inadequate to her support, exceed those profits: unless it shall appear that, from extraordinary circumstances, such disbursements were unavoidable, without culpable neglect on the part of her said guardian; in which case the same ought to be allowed out of the principal of the said Nancy's estate, if the profits thereof shall be found insufficient, with interest on the same from the end of each year. And that there is error in so much of the said decree as omitted to direct such ascertainment and allowance; subjecting the same, if need be, to the operation of the scale of depreciation.

The Court is further of opinion that, although the payment of the said 158l. 15s. 10 3-4d. to the guardian is established as aforesaid, the particular date of such payment is not ascertained, and that if, on inquiry, it shall be found to have been made between the last day of December, 1776, and the last day of December, 1781, the same is liable to be reduced by the scale of depreciation, to be applied as on the last day of the year in which such payment shall be found to have been made; and, as a reasonable time ought to be allowed a guardian to put the money of a ward out at interest, six months from the time of the receipt of the said 158l. 15s. 10 3-4d. is hereby allowed for putting the same out at interest; if it shall be found that the same was received prior to the first day of January, 1777, and that the said six months from the receipt thereof will extend to the year 1777, when the scale of depreciation commenced, the *same shall be scaled at the rate of depreciation existing at the end of the said six months, from the time the same was received by the agent of the said Anne Gathright; and that the said decree is also erroneous in not having provided for such ascertainment, and eventual reduction, as aforesaid.

"The Court is further of opinion that, as by the will of the said Anne Gathright, made an exhibit in this cause, her sons Miles Gathright and Joseph Gathright were made her executors; and as it does not appear that their accounts of such executorship have ever been regularly made up, and the estate delivered over by them to the legatees mentioned in the said will; the said decree is also erroneous in not having made those who succeeded the said Miles and Joseph Gathright, now deceased, as executors of the said Anne Gathright, parties to this suit: and also, inasmuch as it appears by the said will that Jane Gathright, Anne Gathright, (now Whitlock,) Anne Gathright, the granddaughter, as also Mitchell Farris, (to whose rights the appellees have succeeded,) and the appellee Anne Royster, were also legatees in the said will, there is further error in the Court's having proceeded to a decree before the first three were made parties to the suit; and in not making the last, in her own right, and as representing Mitchell Farris, to be also contributory to the sum decreed."

"It is therefore decreed and ordered, that so much of the decree aforesaid as is above declared to be not erroneous, be affirmed; and that the residue thereof be reversed; that the appellees pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here: and the cause is remanded to the Superior Court of Chancery for the District of Richmond, to be proceeded in pursuant to the principles herein before declared, in order to a final decree."

134

*Alexander v. Greenup.

April, 1810.

1. Land Patent—Grant of Escheated Land—Effect.*—

A patent from the commonwealth, containing a recital "that the land was escheated from a certain J. M. dec'd;" and granting the same, "by virtue of an entry made in the office of the late Lord Proprietor of the Northern Neck; and in consideration of the ancient composition of 11. 6s. sterling paid by the grantee into the treasury;" is illegal and void, and not to be received as evidence of title on the general issue in ejectment.

2. Escheated Lands—What Necessary to Grant Thereof.

—The Commonwealth, under the existing laws, cannot grant escheated lands, without a previous inquest of office, and then not, (as waste and unappropriated lands,) upon entries and surveys; but upon sales by the escheators.

3. Land Patent—Defects Apparent on Face—Effect.†—

A patent may be declared void, for defects apparent on its face: without the necessity of resorting to a scire facias to repeal it.

4. Same—Repeal Thereof.—Quære, whether, and from what Court, a scire facias to repeal a patent can issue in Virginia?

*Land Patent—Grant of Escheated Land—Effect.—

A patent granting escheated lands is void at law, if the fact appear upon the face of the patent. In such case, the subject of the grant is not waste and unappropriated land. It has ceased to be so, by having been withdrawn by the just proprietor, by his patent, from the class of the unappropriated domains of the commonwealth. *French v. The Successors of the Loyal Co., 5 Leigh 673.*

See generally, monographic note on "Escheat" appended to *Sands v. Lynham, Escheator, 27 Gratt. 291.*

†Same—Collateral Attack.—For, while the commonwealth's grant cannot generally be collaterally attacked, yet, if it be void on its face, it may be. *Jarrett v. Stephens, 36 W. Va. 448, 15 S. E. Rep. 178, citing 2 Lomax Dig. 388; Patterson v. Winn, 11 Wheat. 380; Alexander v. Greenup, 1 Munf. 134; Bledsoe v. Wells, 4 Bibb 329.*

To the point that a patent carrying on its face the evidence of its own nullity cannot avail the party exhibiting it, the principal case is cited in *Norvell v. Camm, 6 Munf. 288.*

But, in the case of an actual and perfect patent, there is no remedy but to set it aside in a court of equity, or in some other proceeding having that for its direct end and object. It cannot be done in the ordinary progress of a trial at law, on evidence which the party had no means to know would be relied on, and therefore could not be prepared to meet. In other words, one cannot go behind a patent in a trial at law: the patent alone must prevail. *Norvell v. Camm, 6 Munf. 288, citing Witherinton v. McDonald, 1 Hen. & M. 306.*

The points in controversy in this case (which was originally an action of ejectment, by Greenup v. Alexander, in the District Court of Dumfries, for 205 acres of land, lying in Loudoun County) are set forth in a bill of exceptions filed at the trial; the most material parts of which are as follows: "Memorandum, on the trial of this cause the plaintiff's counsel produced and offered in evidence a writing purporting to be a patent to the plaintiff's lessor for the land in the declaration of ejectment mentioned, in these words: 'Beverley Randolph, Esq. Governor of the Commonwealth of Virginia, to all, &c.; Know ye, that by virtue of an entry made in the office of the late Lord Proprietor of the Northern Neck, bearing date the 6th day of April, 1778, and in consideration of the ancient composition of one pound five shillings sterling paid by Christopher Greenup into the Treasury of this Commonwealth, there is granted by the said Commonwealth unto the said Christopher Greenup a certain tract or parcel of land, containing &c., by survey bearing date the 17th day of March, 1788, lying and being, &c.; which said tract or parcel of land was escheated from a certain Jonathan Monkhouse, deceased; bounded, &c.; to have and to hold, &c.;" dated the 8th day of December, 1788; and endorsed, "Christopher Greenup is entitled to the within mentioned tract of land. John Harvie Re. L. Off." And the plaintiff produced no other title paper or writing in support of his title; whereupon the counsel for the defendant prayed the opinion of the Court whether the said writing or patent was not
135 void; and also whether it ought *to be permitted to go to the Jury as evidence of the plaintiff's title.

But one of the Judges was of opinion, and so instructed the Jury, that the recital contained in the plaintiff's patent above mentioned and referred to, was conclusive evidence that a title had accrued to the Commonwealth, by virtue of an inquest of escheat taken upon the death of Jonathan Monkhouse in the patent named; but permitted the defendant to give evidence of any title in himself, or those under whom he claims, paramount to the title of the said Jonathan Monkhouse; reserving the point of law, upon such evidence, (if offered and found by the Jury to be true,) for the further consideration of the Court: and the said Judge further instructed the Jury that the said patent was likewise conclusive evidence of a title derived to the plaintiff under the Commonwealth, unless the defendant should shew in evidence to the Jury a better title in himself, or those under whom he claims, derived from the Commonwealth since the said escheat in the plaintiff's patent mentioned happened; reserving the point of law upon such evidence, (if offered and found by the Jury to be true,) likewise for the further consideration of the Court.

The other Judge permitted the said patent to go in evidence to the Jury, on the question whether such patent was valid; with this instruction, that if they found that any part of the land contained within the bounds claimed by the plaintiff had been

granted to pay other patentee by an elder patent, they should state it; "reserving the question of law arising from that fact, as to the validity and effect of such second grant to Monkhouse, as operating, or not, on such grant to another person."

And thereupon, the counsel for the defendant further prayed the opinion of the Court, whether the recital in the aforesaid patent, that the land therein mentioned was escheated from Jonathan Monkhouse, deceased, is conclusive evidence, against the defendant, that the land was duly and legally escheated, and sold according
136 to law, without producing *the proceedings, or a copy thereof, of the escheat. To this the junior Judge answered, that he had already fully delivered his opinion upon that point. The other Judge instructed the Jury that the recital of the escheat from Monkhouse ought not to be considered as conclusive evidence of such escheat, or the best evidence that such escheat had been legally executed.

Verdict and judgment for the plaintiff; whereupon the defendant appealed.

This cause was argued, at October term, 1808, by Botts and Randolph for the appellant, and Wickham for the appellee; and, again, by the same counsel, at March term, 1810.

On the part of the appellant, it was contended, 1st. That the grant was void in itself; because, admitting the land to have escheated, an entry could not legally have been made for it as waste and unappropriated land; nor could the consideration money have been the ancient composition of 1l. 5s. sterling, but the sum for which the escheator sold it; neither did the act of 1785, c. 67, (a) authorize grants by the Commonwealth of lands which had escheated; but only of waste and unappropriated lands.

2d. It was competent to the Court to adjudge it void without a scire facias. Fraud (which is a circumstance de horsa) will vitiate a patent; and evidence of fraud may be given on the plea of not guilty. A fortiori, then, the Court may take notice of a defect apparent on the face of the patent. It is questionable, indeed, whether a patent can be repealed by scire facias in this country. In England the scire facias to repeal patents is a prerogative writ; and issues from the same authority from which the grant issued; that is, the patent is from the Chancery, and the Chancery repeals it. (b) But, in Virginia, what Court could issue the writ? The executive alone could repeal its own act; first, because the acting power is the natural one to repeal
137 the *act; and secondly, because the judicial department would not be distinct, if it could mingle with the executive to repeal a grant from the governor. But repealing, and adjudging void, are different acts, with different effects.

If a scire facias could issue, there would be no benefit, or policy in requiring it; being a tedious and expensive remedy, and coming after the evil has had its effect. For, if Greenup recovers, a scire facias and

(a) 2 Rev. Code, App. No. V. p. 60.

(b) 6 Bac. 111; Gwilll's edit. & note there.

repeal of the grant will not restore possession to Alexander.

Any other illegal act of the executive, or of the register, can be inquired into collaterally. Why not, therefore, this? Even an act of the Legislature may be so adjudged void, on the ground of its being unauthorized by the constitution. Why then should not a patent be avoided on the ground of its being contrary to law. One of the cases fit for scire facias is where a junior patent issues for the same thing. (a) Yet every day's practice is to declare the junior patent void, incidentally. (b) So, in England, if a patent authorize a nuisance, the nuisance is subject to prosecution, before the repeal. (c)

3. If the patent was evidence that the title of Monkhouse was extinct, it was not conclusive evidence; for, at any rate, a judgment in favor of Monkhouse upon an inquisition of escheat would have falsified the recital. Neither was it legal evidence of that fact, which ought to have been shewn by the verdict of a Jury, upon such inquest.

4. The diversity of opinion between the Judges in the District Court did not take away the erroneous instruction by one of the Judges.

On the other side, in answer to the first point, it was said that the whole argument was founded on a mistake. These were not lands escheated to the Commonwealth, but to Lord Fairfax. If he allowed them to be treated as waste and unappropriated lands, the Commonwealth had no right to claim any thing more. The act of 1785

138 conveyed a *complete title to all persons claiming under Lord Fairfax. The entry was made in his office, and must be presumed lawful at the time. The patent having been granted, every circumstance to give it validity ought to be presumed. A man, claiming title under the Commonwealth, and producing a grant, is not bound to go farther back, and shew his entry and survey. It has been decided, again and again that Lord Fairfax had a right to lay down regulations for his office. He might have had one rule as to lands which had been cultivated and improved, and another as to lands which never had been cultivated.

The land here might have been waste and unappropriated, for it does not follow, from its having escheated from Monkhouse, that he had ever occupied it; or that the legal title had ever been vested in him: he might have had a merely inchoate right, as an entry, or survey; and such right might have escheated.

But, though not waste, the land might have been unappropriated; and that is sufficient; for, though the word waste is mentioned in the preamble to the 4th section of the act of 1785, c. 67, it is dropped in the enacting clause, which speaks of unappropriated lands only; and, according to 6 Bac. 381, words in a preamble are not necessarily to be extended to the enacting clause. The word "unappropriated," applied to all lands not specifically appro-

priated to the use of Lord Fairfax; as is evident from the act of compromise, passed December 10th, 1796; (d) and all the laws on this subject are to be taken together, so as to expound one of them by another. (e)

What law prohibited Lord Fairfax from granting out lands that had before granted, if escheated? The Commonwealth had no right; because the title was acquired from him. If a grant then, from him would have been good, merely on payment of the ancient composition money, (if he chose to accept that as full satisfaction for the escheated land,) why should not a grant from the Commonwealth be equally good?

By the entry with Lord Fairfax, the 139 appellee *obtained an inchoate right, and was entitled to perfect it, on paying the ancient composition money; (f) and, if the land was not improved, there was no reason to demand more. Whether this entry was made in the proprietor's office, or with the county surveyor, and returned to that office, makes no difference; under the act of 1782, c. 33, s. 3. (g)

The appellee, in this case, has the right of the Commonwealth, and of Lord Fairfax also. What preferable title can there be in the appellant?

Argument in reply. The plaintiff in ejectment is bound to make out a complete title; which has not been done in this case. It is said that the patent, of itself, proved his title. But we say, he should have shewn more than the mere exercise of power. The right in 1778 was in Lord Fairfax. It should have been shewn in what manner it travelled from him to the Commonwealth. Where the act of 1785 authorizes a grant of Lord Fairfax's land, it must be on a survey made and "returned into the late proprietor's office." (h) The case of Pickett v. Dowdall, (i) shews that the Lord Proprietor made a variety of regulations in his office, differing from those in the land-office of Virginia. Among others, there was one, that, if no survey was made in six months after an entry, the benefit of the entry was forfeited. Yet nothing is said in this patent about a survey; an entry only is mentioned.

Why did the law require the grants to be on surveys returned to the proprietor's office? Certainly, that it might be shewn whether the order had been renewed by the proprietor. What could not have been set up as a demand against Lord Fairfax cannot be a just title under the Commonwealth. In this case, the entry had run out when the Commonwealth came to operate upon this land; for the survey was seven years after the proprietor's death.

A patent is never good without reciting the consideration for which it issues.

140 The act of Assembly expressly *requires this; that all who look at a patent may judge of its original validity. But, here, the recital was altogether defective. It did not state that any inquest of

(d) 2 Rev. Code, App. No. V. p. (71) (72.)

(e) Pickett v. Dowdall, 2 Wash. 106; Johnson v. Buffington, Ibid. 116; Curry v. Burns, Ibid. 131.

(f) Ch. Rev. p. 92, Acts of 1779; May session, c. 12, s. 6.

(g) Ch. Rev. p. 180.

(h) Act of 1785, c. 67, s. 4.

(i) 2 Wash. 106.

(a) 6 Bac. 111.

(b) Haywood's Rep. (N. C.) 128, 375, 497.

(c) 6 Bac. 111.

office had determined the land to have escheated; nor that it was sold as escheated land; so as to give a title to a purchaser.

Under the regal government, would any man have said the King could grant escheated land without an inquest of office? There was an escheator who held his inquests in every County. The governor gave a preference to the person applying for an escheat warrant: but every patent recited the inquisition and proceedings thereupon. This was a great security to the rights of the citizens; that their freeholds were not to be taken away but by verdict.

Was there any difference between the Northern Neck and the other parts of Virginia? This charter, which infringed the rights of the people, and sprang from nothing but an intrigue, ought not (above all others) to be favoured. Would the people of the Northern Neck have permitted the proprietor to seize their lands without an inquest? Would they yield that their rights should be different from those of the rest of the people?

In this case, the defendant, if he could have shewn himself the heir of Monkhouse, might have defeated the plaintiff. An heir may bring ejectment against a person holding by an escheat patent. Yet the Court instructed the Jury that the title under the patent was conclusive, unless the defendant could shew a title paramount to that of Monkhouse!

Curia adv. vult.

Saturday, June 2. The Judges* delivered their opinions.

JUDGE ROANE, after stating the case. With respect to the general question in this case, I take it to be clear that although a patent, perfect on its face, is only to be vacated for matter dehors the patent, by

a proper and regular proceeding,
141 *yet that a patent may carry on its face intrinsic evidence of its own nullity, and be considered void, when exhibited in the progress of a trial. I will put the case of a patent obtained "for land now holden in fee by A.;" or "for escheated land," (at this day under the Commonwealth,) in the ordinary way, as if it were waste and unappropriated land: in either case, it does not want extraneous evidence to shew, that the Commonwealth has been deceived in its grant, or rather has granted that which was not grantable at all in the first case, or, in the second, in that mode, or for that consideration, which the law of the country justifies. The recognition of a principle going to defeat patents perfect as upon the face thereof, on the ground of extraneous and latent defects, by a regular proceeding, does not conflict with another principle, that a patent which is defective per se, is to be held void, in the first instance.

In the case before us, admitting for the present, that the act of 1785 applies, for the purpose of perfecting entries for escheated land made in the time of Lord Fairfax; the question is, whether this patent is not void, as on its face; 1st. On the

ground that it does not state that the escheat preceded the entry; and, 2dly. That it does not state that the escheat was regularly made by an inquisition. This last question is important; and I shall not now decide it, as there are other and plainer grounds on which I hold the judgment of the District Court to be evidently erroneous. On the one hand, it may be argued that the officers of the Commonwealth should be intended to have granted the patent on the proper documents only; and, on the other, it is a principle of our law, certainly not to be relaxed in favour of a Lord Proprietor, and greatly for the liberty of the subject, that the King cannot enter upon the lands of a subject upon mere surmises, nor without the solemn inquisition of a Jury.

As to the 1st objection, it is only stated that the land escheated from Jonathan Monkhouse, deceased. There is nothing in the patent to shew that this escheat
142 happened *prior to the date of the entry; and the patent would be satisfied, if in fact that escheat had accrued after the entry, and before the date of the patent. I admit that my own opinion is, that, on a liberal scale of construction, the escheat must be taken to have been prior to the entry: but it is a rule, on the other hand, that patents are always to be taken in a sense most favorable for the King, and against the party. (a) Again, it is worthy of observation that the Junior Judge in the District Court considered that the escheat had accrued to the Commonwealth, and therefore accrued after the entry; and, if so, the entry, on which the patent is grounded, was made at the time without authority; at a time when the land was actually holden by Monkhouse. This is at least sufficient to shew that the patent is uncertain in this particular; so uncertain as that one of the Judges of the Court below expounded it, as to the time of the accruing of the escheat, in a sense which is equally in conflict with the ground taken by the appellee's counsel in this argument, and derogatory to the right of the Commonwealth to have granted the land by this patent; nothing being more clear than that lands accruing to the Commonwealth by escheat are to be granted away under a regular inquisition, and sale by the escheator, only, and in consideration, not of the ancient composition money, as in this case, but of the actual price for which the same has been sold by the escheator. In the case of *Pickett v. Dowdall*, (b) it was said by Judge Pendleton, that, in subsequent grants, the prior forfeiture of a former grant should be recited: and the reason of this was given by Mr. Marshall, one of the counsel: it is, that, if the prior forfeiture were not recited, the former grant might prevail over the latter. But it is doing nothing to make that recital, unless it appears that the forfeiture not only preceded the second grant, but also preceded the foundation on which the second grant was erected. In the case before us, if the escheat be taken to have accrued at a time posterior to the entry on which the grant is

*JUDGE TUCKER, having been one of the Judges in the District Court, did not sit in this cause here.—Note in Original Edition.

(a) 2 Bl. Com. 347.

(b) 3 Wash. 106.

143 founded, although the grant in question *(having recited a forfeiture by escheat prior to its date) would prevail (*ceteris paribus*) against the original grant to Monkhouse, yet it does not follow that it would prevail against a grant to a third person, the inception as well as consummation of which, originated after the escheat had accrued; it does not follow that, as against other persons than those claiming under Monkhouse, it conveys any title; and, therefore, in an ejectment, in which the party recovering must shew a complete title, the grant was not on this ground proper to be given in evidence. Greenup ought not to have recovered against Alexander, when there might have been another person behind entitled to recover against him: the possession of Alexander ought only to have been devastated in favour of the true owner.

I have thus considered this case as if the act of 1785 related to entries for escheated lands: if it did, and the escheat could, on this patent, be taken to have been anterior to the entry, the title of the appellee would have been complete: but my opinion is, that that act relates only to unappropriated and ungranted lands.

This is evident both from the preamble and body of the act, taken in a general view. The preamble states the mischief contemplated to be remedied, to be, that no mode existed for granting out the unappropriated lands of the Northern Neck. It is argued, however, that the general term "entries," in the 4th section, (a) enlarges its operation so as to go beyond unappropriated lands, and to embrace entries for escheated lands. While it is admitted that the words of an enacting clause may go beyond the case stated in the preamble, it is the more natural construction, *ceteris paribus*, to consider them as merely coextensive therewith; as commensurate with, and calculated to remedy, the evil which gives rise to the act. But in the case before us, we do not stand merely on this general ground: admitting that the sense stated in the preamble was thus enlarged by the term "entries" as aforesaid standing singly, that term is again restrained by the following circumstances:

144 "1st. In using the said term "entries," the same clause speaks of "surveys" founded thereon: therefore entries for unappropriated lands must be meant, since surveys are not necessary on entries for escheated lands or lots. 2dly. The clause says that the grants on the entries and surveys made in the life of the late proprietor shall be made out in the same manner as is by law directed in cases of other unappropriated lands. This term "other" undoubtedly imports that the lands to which the entries in question relate, are also unappropriated lands. 3dly. The 5th section, which is confined expressly to unappropriated lands as to future grants, shews that the former section which related to past entries, is to be taken under the same restriction. 4thly. When it is considered that the same session put into force, in the Northern Neck, the act concerning escheators, by which the escheated lands, in

that territory also, were to be sold for full value, the provision in the 6th section of the act in question shews that the land required by the entries mentioned in the act must mean unappropriated land; and, 5thly. The same inference is drawn from the provision in the 5th section respecting caveats, which, as well as surveys, are, by the general land laws of this Commonwealth, confined to unappropriated lands, and do not apply to escheated lands.

Upon the whole, while I doubt extremely (to say the least) whether this patent is not void, for the reasons assigned, supposing the act of 1785 to extend to entries of this character, (for escheated lands,) I am clearly of opinion, that the act applies only to unappropriated lands for which entries had been made; and being thus confined, I am of opinion that the instruction of the Court below was erroneous; that the patent ought not to have been received as evidence of the appellee's title; and that therefore the judgment be reversed.

JUDGE FLEMING. The principal questions in this case are, whether the recital contained in the appellee's patent, 145 *dated the 8th day of December, 1788, was conclusive evidence, that a title had accrued to the Commonwealth by virtue of an inquest of escheat taken upon the death of Jonathan Monkhouse, in the patent named; and whether the said patent was likewise conclusive evidence of a title derived to the plaintiff, under the Commonwealth, unless the defendant should shew, in evidence to the Jury, a better title in himself, (or those under whom he claims,) derived from the Commonwealth, since the said escheat in the plaintiff's patent mentioned happened? Such being the instruction given to the Jury at the trial in the District Court, as stated in the bill of exceptions.

On examining the records of the late proprietor's office of the Northern Neck, now in the register's office, I find, that, formerly, there was great solemnity used in obtaining patents for escheated lands; an instance of which I shall notice, in the case of land that escheated to the proprietor, on the death of Frances White, alias Lampton.

On the 3d June, 1729, Dr. Thomas Turner gave information by letter to Thomas Lee, the proprietor's agent, that one Frances White, alias Lampton, had been seized of about 50 acres of land in the County of Richmond, now King George, and died without heirs, or having disposed of the same; and prayed to have the preference of a grant thereof.

On the 7th of April, 1720, Thomas Lee issued his warrant to Edward Barrow, surveyor of Richmond County, empowering him to survey the said land, and return the survey and plat to the office, in the customary time; in which warrant the agent recited that Turner had obtained a certificate, and published and returned the same, according to the rules of the office. At the foot of the warrant there is a direction to Turner that "when you return your survey you must bring Mrs. White's title." signed Thomas Lee.

Next in order is a survey, and plat of the land, made by J. Warner, surveyor of

King George County, the 27th
 146 *of September, 1727, accompanied
 with White's title papers, to wit, a
 deed for the land from Wm. Marshall to
 Thomas White, late husband of the intestate
 Frances, dated the 24th of October,
 1713, and the will of Thomas White, dated
 the 20th of April, 1715, in which he devised
 the land to his wife Frances White; who
 afterwards married one Lampton. Then
 follows the warrant of inquest from Robert
 Carter, agent of the proprietors, and escheator
 of all the lands in the Northern
 Neck, directed to George Eskridge, deputy
 escheator, dated the 9th of May, 1729, directing
 to take an inquest of office on the
 said land; which was duly executed by the
 said deputy escheator, on the 4th of February,
 1732, and returned to the proprietor's
 office. After which, a grant for the land
 issued to Thomas Turner, in which the
 foregoing proceedings are recited, as follows:
 "Whereas it hath been set forth to the
 proprietor's office by Thomas Turner, of the
 County of King George, that Frances White,
 alias Lampton, late of Richmond, now King
 George County, died seised of a parcel of
 land, situate, &c. without heirs, or making
 legal disposition thereof, which land is
 part of a tract granted unto Wm. Marshall,
 by deed out of the proprietor's office, dated,
 &c. for 268 acres, and was by the said
 Marshall sold unto Thomas White, by deed,
 dated, &c. and by the said White, by his
 last will, bequeathed unto his wife, the
 said Frances White, (afterwards married to
 one Lampton,) to her proper use and behoof
 for ever; whereupon the said land, for want
 of heirs of the said Frances, escheated to
 the proprietors; the said Thomas Turner
 moving to have the preference to a grant
 thereof, and an inquisition concerning the
 same being since taken, and returned to our
 said office, bearing date, &c. under the
 hand and seal of George Eskridge, gent.
 deputy escheator of our said proprietary; and,
 upon the oaths, and under the hands and
 seals of twelve lawful freeholders of the
 said County of King George, viz. Thomas
 Berry, &c. who brought in this verdict,
 viz. We do find that Frances White,
 alias Lampton, aforesaid, died seised of
 thirty-five acres of land;
 147 *that she left no heir, nor made any
 disposition thereof in her life-time that we
 know of, and that she was no alien at the
 time of her death, and therefore we find the
 said thirty-five acres of land escheat to the
 honourable proprietors of this Northern Neck,
 as by the said inquisition doth, and may
 more fully appear. Know ye, therefore,
 that for divers good causes, &c. we have
 given, granted, &c. unto the said Thomas
 Turner, &c. the said 35 acres of land, &c.
 lying, &c. and bounded as followeth; to
 wit: Beginning, &c. to the beginning. Together,
 &c. To have and to hold, &c. yielding
 and paying, &c. Provided, &c. Given at
 our office in Lancaster County, &c. Witness
 our agent and attorney fully authorized
 thereto, dated, &c."

By this it appears that in the time of the
 proprietorship of the late Lord Fairfax,
 great ceremonies were deemed necessary,
 and were used in obtaining patents for es-

cheated lands in the Northern Neck, but I
 have not been able to procure the form of
 an escheat patent, without that territory.
 It appears, however, that, in the times of
 the proprietorship of Lady Culpeper and
 Lady Fairfax, less ceremony was used in
 obtaining such patents, than in later times;
 as they had sometimes been used without a
 prior inquest of office; but still there was
 a particular recital of previous ceremonies
 having been observed, according to the
 rules of the office; as appears by the pre-
 amble of a patent issued to Edward Turber-
 ville; which is as follows: "Marguritte
 Lady Culpeper, Catharine Lady Fairfax,
 Proprietors of the Northern Neck of Vir-
 ginia, To all, &c. Whereas Edward Turber-
 ville, of the County of Richmond, hath set
 forth to our office, that Randolph Daven-
 port died seised of 115 acres of land in the
 County of Westmoreland, and left no heirs
 behind him, nor did dispose thereof by will;
 whereupon the same escheats to us the said
 proprietors; and thereupon a certificate ac-
 cording to the rules of the office issued to
 make the same public, which being returned
 with an endorsement and under the hand
 of Thomas Sorrell, Deputy Clerk of the
 said County, certifying that the same
 148 was duly *published, and no person
 appearing to dispute the title to the
 said escheat, and the said Edward Turber-
 ville moving to be preferred to escheat the
 same, Know ye, therefore, &c. that for
 divers good causes, &c. we, &c. have
 granted, made over, &c. unto the said Ed-
 ward Turberville, &c. all our right, title, &c.
 in and to the said 115 acres of land, &c.
 situate, &c. and bounded, &c. To have and
 to hold, &c. yielding and paying, &c. Pro-
 vided, &c. Witness, &c."

In the patent before us there is a bare
 recital, "that by virtue of an entry made
 in the office of the late Lord Proprietor of
 the Northern Neck, bearing date the 6th of
 April, 1778, and in consideration of the an-
 cient composition of 11. 5s. sterling paid by
 Christopher Greenup into the treasury of
 this Commonwealth, there is granted to the
 said Christopher Greenup, 235 acres and 30
 poles of land, by survey, bearing date the
 17th day of March, 1788, lying, &c. which
 said tract or parcel of land was escheated
 from a certain Jonathan Monkhouse, de-
 ceased, and bounded as followeth, to wit,"
 &c. and the plaintiff produced no other title
 paper, or writing, in support of his title.

And all the evidence, that the land in
 question had escheated from Jonathan
 Monkhouse, is an assertion in Greenup's
 entry, that the said Jonathan Monkhouse
 dying intestate, and without any known
 heir, the said land, part of a tract of 625
 acres granted to John Hough, escheated to
 the Lord Proprietor.

In the margin of the entry (as appears by
 a copy from the register's office) there is a
 note: "Advertisement issued, and entry
 and advertisement fees paid."

What were the rules in the proprietor's
 office, at the time Greenup's entry was
 made, we are not informed. But I find that
 on application at the office for a grant of
 escheated land, the first step was to adver-
 tise the same.

What further steps were necessary (accord-

ing to the rules of the office) to entitle the petitioner to grant we have no information. But, in the case before us, it does not appear that there was any publication
149 whatever, or any *other step taken by Greenup, between the date of his entry in 1778, and the survey in 1788, about eight months before he obtained a patent, which appears to me too defective to support his title to the land in controversy; and therefore that the instructions given to the jury, as stated in the bill of exceptions, were erroneous.

Judge Blackstone, in the 3d volume of his Commentaries, page 259, when speaking of the inquests of office, in England, observes, "that they were devised by law, as authentic means to give the king his right by solemn matter of record, without which he, in general, can neither take, nor part from any thing. For," says he, "it is part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon, or seize any man's possessions, upon bare surmises, without the intervention of a Jury."

If that be a sound general principle in England, where many of the people's rights must yield to prerogative, how much more forcibly does it apply in our republican government?

Upon the whole, I concur in the opinion that the judgment be reversed.

Judgment reversed, and new trial awarded, with a direction, that "upon such trial, the Court below do not permit the patent to be given in evidence."

150 *Fitzgerald, Executor of Jones, v. Jones.

Tuesday, April 17, 1810.

1. **Executors—Account—When Vouchers Excused—Case at Bar.**—An executor having delivered up the estate generally and the management thereof to one of the residuary legatees, for his benefit and that of his co-legatee;—nine years and ten months having afterwards elapsed before he was summoned to render an account: the greater part of his executorship having moreover been during the revolutionary war; and the settlement taking place after his death; it was held unreasonable rigour to exact vouchers for many items in his account which appeared probably just, though not supported by proof.

2. **Same—Same—When Not Liable for Interest.**—

Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree: neither in such case ought interest to be allowed him on payments to the legatees before the decree; though made in bonds which carried interest.

3. **Same—Same—Compensation—Commissions*—**

***Executors—Compensation—Commissions—On What Property Allowed.**—In Virginia and West Virginia, the usual mode of compensation to an executor or administrator for his services is by a commission on the amount of the receipts, but where that affords no basis, some other process is allowable, but generally a per centum, greater or less, on receipts will answer all purposes. *Kester v. Lyons,*

Rate.—Under circumstances a commission of 7½ per cent. may be allowed an executor on all his receipts and disbursements: the real and personal estate having, in obedience to the directions of the will, been kept together and managed by him.

40 W. Va. 161, 20 S. E. Rep. 934; *Farneyhough v. Dickerson*, 2 Rob. 582; *Hoke v. Hoke*, 12 W. Va. 429; *Estill v. McClintic*, 11 W. Va. 309; *Buxton v. Shaffer*, 43 W. Va. 206, 27 S. E. Rep. 320.

But commissions have, under certain circumstances, been allowed on disbursements. See *Fitzgerald v. Jones*, 1 Munf. 150; *Boyd v. Oglesby*, 23 Gratt. 674.

See further, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

†**Same—Same—Same—Rate.**—The amount of commissions to be allowed to an administrator or executor is not fixed by law, and though five per cent. on receipts is generally allowed, yet this allowance may be increased; and the court of probate is the most competent tribunal to make the allowance; and the court of appeals will be disinclined to disturb the allowance, especially after a long acquiescence in it by the distributees of the estate. *Boyd v. Oglesby*, 23 Gratt. 675. And in *Estill & Eakle v. McClintic*, 11 W. Va. 411, it is said: "It is true that ordinarily the proper commission to be allowed an administrator is five per cent. on his receipts, and that a larger commission ought not to be allowed, unless under peculiar circumstances; *Triplett v. Jameson*, 2 Munf. 242. But under peculiar circumstances he is allowed more, as where he has unusual trouble in collecting debts and is put to extraordinary expense in employing clerks and agents; or in case of an executor, where he has had the management of real estate, and has had the care and education of the testator's children imposed upon him by the will. In *Fitzgerald v. Jones*, 1 Munf. 150, a personal representative was allowed a commission of seven and one-half per cent. and in *Cavendish v. Fleming*, 3 Munf. 108, and *McCall v. Peachy*, 3 Munf. 297, ten per cent." In this case (*Estill & Eakle v. McClintic*) it was held that, though the record in the case did not disclose any peculiar circumstances that would justify the allowance of more than five per cent. commissions to the administrator, yet, as two different commissions had settled his accounts, and each of them had fixed his commission at seven and one-half per cent. and the lower court had confirmed in this respect both of these reports—no objection being made by any creditor on this account, though there were many exceptions based on other features of the report—the court of appeals was bound to presume that the commissioners found in settling this account such peculiar circumstances as justified them in allowing the commission of seven and one-half per cent.

To the point that five per cent. on the actual receipts is the compensation usually allowed an executor or administrator, in the absence of peculiar circumstances attending the settlement of the estate; but that seven and one-half and even ten per cent. may be allowed where the personal representative is subjected to great and unusual trouble, the principal case is cited in *Cavendish v. Fleming*, 3 Munf. 108; *McCall v. Peachy*, 3 Munf. 298; *Gregory v. Parker*, 87 Va. 456, 12 S. E. Rep. 801; *Wallis v. Neale*, 43 W. Va. 529, 27 S. E. Rep. 227. In this last case, the commissioner allowed the guardian ten per cent. for his trouble in looking after and managing the estate of the ward. The lower court approved the finding of the commissioner and the court of appeals sustained its decision.

4. **Willst—Education of Legatees—Case at Bar.**—A wealthy testator having bequeathed pecuniary legacies to three of his daughters, to be paid them. "If the money could be raised by his estate by the time that either of them should marry, or come of age;" (without saying any thing about their maintenance or education:) It was held that they were entitled (notwithstanding their legacies) to maintenance and education out of the estate: at least while the legacies were not sufficiently productive.

5. **Chancery Practice—Account—Decree for Balance against Plaintiff.**—On a settlement of account in a Court of Equity, a decree will be rendered against a plaintiff for a balance of account appearing due to a defendant.

In a suit in the late High Court of Chancery, brought May 31, 1793, on behalf of Edward & Richard Jones, against Daniel Jones, executor of Daniel Jones their father, for a settlement of the accounts of his executorship, (which suit, having abated by his death, was revived against Francis Fitzgerald, his executor,) Master Commissioner Rose, to whom the said accounts were referred, reported a balance due to the estate of 479l. 4s. 10d. June 30, 1790; and subjoined the following observations: "Upon the foregoing account your Commissioner begs leave to remark that, after great delay, and much personal trouble to the defendant in procuring testimony, the accounts are submitted in their present form, though not so complete as could be wished; but, when it is considered that upwards of 27 years have elapsed since the defendant's testator qualified as the executor to his father's estate, as also the situation of the country during the greater part of the time he acted in that capacity; to which may be added his being unacquainted with keeping regular accounts; it may appear rather surprising they should be so correct as they really are. The plaintiffs, by letter to your Commissioner, have excepted as follows: 'We object pointedly to every 151 voucher that is not agreeable *to law; also to the price of the board; also to the maintenance and schooling of our sisters, as the will does not provide for the same, and also to the charge he (Daniel Jones) made for his services; and, in fact, we object pointedly to every thing but what the law allows.' All the charges supported by regular vouchers are marked thus ||. Many of the others are satisfactory from the affidavits herewith filed; and many of the items could not be expected, from the nature of them, to be accom-

panied with any voucher. There are others, for which it is probable vouchers have been taken, but in the confusion of the times may have been lost or destroyed, and which the testator of the defendant, if living, could supply by other testimony, which the defendant cannot procure, not knowing where to apply for it: a circumstance which he flatters himself will be considered deserving the attention of the Court. The charge for services objected to above is made by the testator as follows: 'To the management of the estate and the plantations lying forty or fifty miles, seventy-five pounds per year, and I acted as executor ten years and four months;' which would amount to 775l. As this charge is not supported by any testimony, it is rejected, and a commission of five per cent. allowed on the receipts in lieu thereof; but, as this is no more than what is commonly allowed for receiving and paying money, your commissioner is of opinion, that a further allowance of at least 2 1-2 per cent. more ought to be made. The defendant's testator gave up the estate and the management thereof to the plaintiff, Edward Jones, on the 23d of August, 1782, which is stated for the information of the Court, to determine at what period interest ought to commence on the balance due to the estate."

To this report a great number of exceptions were taken by the plaintiffs; among which the most remarkable were, in substance, as follows:

1. That no vouchers were produced for many items in the account, which might and should have been (as they contended) supported by vouchers.

152 2. That sundry debits of moneys paid for the board, support, and education of three daughters of the testator, who were pecuniary legatees, (no provision for such board, &c. having been made in the will,) should have been deducted from their legacies, and not charged to the estate generally, so as to diminish the residuum bequeathed to the plaintiffs; though they did not object to what was charged for the use of two other daughters who had specific legacies given them in negroes, which continued with the estate until they married; because (the estate having been kept together under the management of the executor) those negroes were profitable by their labor.

3. That the tobacco made on the estate in the years 1779, 1780, and 1781, was short credited, being only 9,747lbs.; whereas it should have been at least 60 or 70,000lbs. more than that quantity.

The will, (admitted to record in June, 1772,) besides directing all the testator's just debts to be paid, and devising several large and valuable tracts of lands to the plaintiffs, bequeathed to his daughter Sarah five negro girls, so soon as they could be purchased by means of the profits arising from his estate; (without specifying or limiting the prices to be paid;) to his daughter Mary, nine, and his daughter Martha, eight, negroes by name, and sundry articles of personal property; to his three daughters Rebecca, Elizabeth and Prudence 500l. each; to be paid them if the money could be raised out of his

For further information, see monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

†**Wills.**—See generally, monographic note on "Wills."

‡**Legatees.**—See generally, monographic note on "Legacies and Devises" appended to Early v. Early, Gilm. 124.

[**Chancery Practice—Account—Decree for Balance against Plaintiff.**—Where a bill is brought for an account, and a balance reported in favor of the defendant, the court will decree in favor of the defendant for the balance. *Payne v. Graves*, 5 Leigh 569, citing *Hill v. Southerland*, 1 Wash. 184; *Fitzgerald v. Jones*, 1 *Munf.* 150; *Todd v. Bowyer*, 1 *Munf.* 447.

estate by the time that either of them should marry, or come of age; if not, then all the negroes not already bequeathed, with all their future increase, to be equally divided between his three last-mentioned daughters and his two sons the plaintiffs: but, if the money were raised by his executors for his three daughters, then the estate not already bequeathed to be equally divided between the said two sons only. The testator also desired that his son Daniel Jones (the executor) should keep all that he had already given him; also 20 head of cattle, 10 head of sheep, and two feather beds and furniture.

153 *On the 13th of March, 1801, the cause being heard, the late Chancellor, Mr. Wythe, delivered this opinion: "From the defendant's testator, who is reported to have given up the estate, and the management thereof, in August of the year 1782, to one of the plaintiffs, for the use, undoubtedly, not of himself only, but of his other brother also, and who doth not appear until nine years and ten months thereafter to have been summoned to render an account of his administration, the plaintiffs are with unreasonable rigour exacting vouchers, upon failure to produce which are founded many exceptions; especially when to circumstances, noticed by the Commissioner, may be attributed loss of papers, and when, too, some debits were of such a kind that, probably, they were incurred because, otherwise, the plaintiffs' property might have been sold for satisfaction of public demands, and for services performed on their estates for their benefit.

"The sisters of the plaintiffs were entitled to maintenance out of their father's estate, notwithstanding their legacies; at least until the legacies were sufficiently productive, which doth not appear to have happened during their brother's administration: towards which maintenance was exempt from contribution every part of what had been given to him by his father; except the additional legacies of cattle and sheep; of which the sisters (whilst they, with their brothers, were one family) are presumed to have shared the profits.

"The debits on account of James Sturdivant, and for the hire of slaves, (to which the plaintiffs have excepted,) are justified, one by the affidavits of John Gooch, Richard Hayes and Richard Jones, and the other by one of the exhibits, and by the affidavit of Thomas Jones.

"Exceptions to prices, alleged to be excessive, paid for slaves bought to satisfy legacies; to payments for corn and wheat alleged to have been provided unnecessarily; to sundry pretended miscellaneous omissions; are not sustained.

"The defendant's testator is not entitled to compensation over the customary commission; and interest upon what is due from him ought not to commence before the final sentence shall be pronounced.

"He ought to be debited with more than five hogsheads of tobacco in the year 1779, and the two next following years, if the affidavits of Jeremiah Brown and Daniel Wilkes are to be credited. With how much

more he ought to be debited, a Jury (to be impanelled and charged before the District Court of Petersburg, upon trial of an issue to be joined between the parties), this Court doth direct to inquire and say; whose verdict shall be certified by the Clerk of the said District Court."

On the trial of the issue thus directed, the Jury returned a verdict "that the whole crop of tobacco made by Daniel Jones, the executor of Daniel Jones, deceased, on the plantation of the testator, devised to the complainants, in the year 1779, amounted to 30,450lbs. of Petersburg tobacco; that the whole crop made by him as aforesaid in the year 1780 amounted to 49,000lbs. like tobacco; two hogsheads of which, estimated at 2,300lbs. were destroyed by the British troops, at Col. Brooking's, in Amelia County, in the year 1781, and before it was inspected; that the whole crop made by the said executor as aforesaid, in the year 1781, amounted to 40,500lbs. like tobacco; that, therefore, in these three years, the said executor ought to be debited 119,850lbs. Petersburg tobacco, which exceeds the five hogsheads mentioned in the Chancellor's decree the quantity of 114,100lbs. Petersburg crop tobacco."

Upon this verdict a report was made by Master Commissioner Hay, by direction of the Court; in which he valued the tobacco found by the verdict at 861l. 18s. 10d. charged the executor with that sum, and with the balance of 579l. 4s. 10d. stated by the former report; credited each of the plaintiffs with half the amount of the balance due by the estate of the defendant's testator; and applied the payments which Francis Fitzgerald had made to each, according to certain documents produced, shewing a balance due to Edward Jones of 424l. 19s. 10d. and that Richard

155 *Jones had been overpaid his share of the estate 36l. 2s. 6 1-2d. The Commissioner observed, that, "as the defendant was not to pay interest on the balances stated in the decree, but from the date thereof, he had not added interest on the payments to the plaintiffs, though most of them were evidenced by bonds bearing interest."

The Chancellor, on the 6th of October, 1804, confirmed this report, and decreed, accordingly, "that the defendant, out of the goods, &c. of his testator, pay to the plaintiff Edward Jones, 424l. 19s. 10d. with interest thereupon at the rate of five per cent. per ann., to be computed from that day until paid; that the plaintiff Richard Jones pay to the defendant 36l. 2s. 6 1-2d. with like interest thereon; and that the parties bear their own costs;" from which decree the defendant appealed.

Hay, for the appellant.

Call, for the appellee.

Wednesday, April 25th, 1810. The Judges pronounced their opinions.

JUDGE TUCKER. Mr. Hay, for the appellant, made the following objections to the decree.

1. Because certain payments made by the executor of Daniel Jones, to the complainants, pendente lite, in bonds on which interest was due, ought to have been

credited as the amount of principal and interest due at the time of the assignment or payment. This objection ought certainly to have availed the appellant, if the Chancellor had allowed interest on the sum decreed, pendente lite; but, as he did not, and the bonds all bear date posterior to the institution of the suit, I think there is no error on this point. And, though it appears that this mode of applying the credit was done by the Commissioner without any previous direction from the Court, yet being approved 156 and sanctioned by the *Court, it must now be regarded as the act of the Court, and not of the Commissioner.

2. Because Daniel Jones, the executor and manager of the plantations, ought to have been allowed something as manager as well as executor. And I very much incline to think that, where the management of an estate is thrown upon an executor, and the care and education of a family of children with it, that an executor ought to have a more liberal allowance than a bare commission of 5 per cent. upon his receipts or expenditures. In the present instance the testator left five children, apparently minors, who remained so many years. He charged his whole estate with the payment of his daughters' legacies, if it could be effected out of the profits before either of them married or came of age. To do this, the executor must do many things beyond what the duty of an executor in ordinary cases imposes. His personal trouble, and responsibility, under such circumstances, may be increased ten fold. He ought to be compensated accordingly, whenever it appears that he hath faithfully discharged this extraordinary duty imposed upon him by his testator. For, even under our law, the executor (as such) can have nothing to do with his testator's real estate after the end of the year in which he dies. After that period, he ought to be considered as something more than an executor, if the testator by his will entrusts him with the management and care of his family, and his real estate, in general. But, in the present instance, the executor, from some cause or other, perhaps incapacity, has not kept such regular accounts of his transactions, as to entitle him to any considerable further allowances for his extra services. And, upon that ground only, I was inclined to think the decree right in allowing him only five per cent. on the amount of his account as settled by Commissioner Rose. I am, however, disposed to concur in the opinion of the other Judge, that he ought to be allowed 7 1-2 per cent. In a statement since received from Mr. Williams, in the case of *M'Call v. Peachy*, it is stated, that 157 *this Court, in a decree made in that suit May 21, 1798, allowed a commission of ten per cent. to the executor, on the money received by him for the use of the estate, including debts, sales and profits, in full satisfaction for receiving, putting out, and paying away the said money, and for his services in the administration and management of the testator's estate. But, as there is a debit against him in consequence of the verdict of the Jury for a large quantity

of tobacco, supposed to be made in the year 1779, 1780, and 1781, upon which Commissioner Hay seems not to have allowed any commission, I am of opinion that the decree is so far erroneous, and I also agree, that a commission of 7 1-2 per cent. be allowed on the net balance of that tobacco also.

3. Mr. Hay objects to the decree, because the Chancellor was mistaken in supposing that 5 hogsheads of tobacco, only, were credited to the estate for the year 1779, 1780, and 1781, and therein he is clearly right; there being 8 hogsheads weighing 9,747lbs. net, so credited, which ought to be deducted from the 119,850, found by the Jury to have been made in those years, the whole amount of which is charged to the estate in the account by Commissioner Hay. There are other very important deductions which I conceive ought to be made from the quantity of tobacco so found by the Jury to have been made in those years. For they find the whole crop made in 1779 amounted to 30,450lbs.; that the whole crop made in 1780 amounted to 49,000lbs., two hogsheads of which estimated at 2,300lbs. were destroyed by the British troops in 1781; and that the whole crop made in 1781, amounted to 40,500lbs. These three quantities amount to 119,950lbs. They then proceed to say "that they find that in those three years Daniel Jones ought to be debited 119,850lbs. of tobacco, which exceeds the five hogsheads mentioned in the Chancellor's decree 114,100 hogsheads, Petersburg crop tobacco." It is apparent from this, that the Jury neither deducted the 2,300lbs. contained in the two hogsheads, which they ex- 158 pressly *find to have been destroyed by the British troops in 1781; nor yet made any deduction for the overseers' shares, which, according to the evidence in the former part of the record, appear to have been usually a seventh or an eighth part. Supposing it an eighth, which is the lowest, the overseers' shares would have amounted to 14,981lbs. which with the 2,300lbs. destroyed by the British troops, and the 9,747 credited in the accounts settled by Master Commissioner Rose, form an aggregate of 27 or 28,000lbs. of tobacco, which ought to be credited the executor, against the 119,950lbs. the whole amount of the several crops for those three years, as found by the Jury. For the balance the executor ought to be charged the same rate that Commissioner Hay has allowed for the whole of those crops, as found by the Jury, deducting therefrom all reasonable expenses of the transportation to Petersburg, and warehouse expenses; and a commission of seven and a half per cent. as before mentioned.

4. Mr. Hay's fourth objection to the decree is, that the value of the tobacco found to have been made in those three years, by the Jury, has been arbitrarily fixed by the Commissioner, instead of being ascertained by evidence, as it ought to have been. It certainly does not appear by what means, or by what evidence, the Commissioner fixed the price. Mr. Hay said it was 20s. per cwt.; in this he was mistaken. Of the tobacco credited in Commissioner Rose's account made and sold in that period, three hogsheads are charged at 70l. per cwt. the

scale of depreciation being at that time 74 for one. Five other hogheads are credited at 75l. per cwt. when the scale of depreciation was at 90 for one. These prices reduced to specie are rather higher than the average price which the Commissioner has adopted. I am therefore unwilling to disturb his estimate; though, from my own recollection of that period, I am persuaded his estimate is not too low, and possibly may not be too high.

159 *Mr. Call, for the appellee, complained of the liberality of Commissioner Rose, and the Chancellor, in respect to the accounts stated by the former; but I think without sufficient reason. I am therefore of opinion that, after correcting the errors which I have pointed out, the residue of the decree ought to be affirmed; and that the cause be remanded to the Court of Chancery for a final adjustment of the accounts between the parties, (one of whom has been already overpaid,) upon the principles which I have mentioned.

JUDGE ROANE concurred that the decree be reformed in the points expressed in that about to be pronounced by this Court. He did not deem it necessary, or proper, to go into any calculations, which were more properly the business of a Commissioner. As to the compensation to be allowed the executor, he thought that, under the particular circumstances of this case, the estate having been directed to be kept together, which imposed additional labour on the executor, he was reasonably entitled to a commission of seven and a half per cent.

JUDGE FLEMING gave no opinion on the subject of commissions, being personally interested in that question; but in other respects concurred with the rest of the Court, and read the following as their joint opinion.

"The Court is of opinion that the said decree is erroneous in this; in affirming the verdict of the Jury impelled to ascertain the quantity of tobacco made on the estate of the said Daniel Jones, the elder, in the years 1779, 1780 and 1781, and the report of Master Commissioner Hay thereon; by which verdict it is found that the quantity of 119,950lbs. of tobacco was made on the said estate in those three years; for which the said executor was debited, and against which he had credit for only 5,850lbs. of tobacco; when he ought to have had credit for 9,747lbs., with which the said executor charged himself in his administration *account in the years 1779 and 1781; and a further credit for two hogheads of tobacco, net weight 2,300lbs., which the Jury found to have been destroyed by the British troops, at Colonel Brooking's, in Amelia County; and a further credit for the overseers' share of the said 119,950lbs. of tobacco; and also a further credit for the costs of transporting the said tobacco from the plantations to the inspections at Petersburg, and for the warehouse expenses of the same: Therefore it is decreed and ordered that the decree be reversed, &c. and that the cause be remanded to the said Superior Court of Chancery for an account to be taken, and a final decree to be entered, according to the foregoing principles; in which account so to be taken the executor is to be allowed seven and one half, instead of five per cent. on the receipts and disbursements of the whole estate of the said Daniel Jones the elder."

Clarke v. Conn.

April, 1810.

Court of Appeals—Jurisdiction—Consent—Acquiescence—Effect.—Neither consent, nor long acquiescence of parties can give the Court of Appeals jurisdiction. An appeal, therefore, (having been improvidently granted,) was dismissed on motion, five years after it was entered on the docket.

In this case a decree was rendered in the Superior Court of Chancery for the Richmond District, March 16, 1804, dismissing the bill with costs; from which decree the plaintiff prayed an appeal, which was allowed him "on his entering into bond with sufficient security in the Clerk's office of the said Court, for the prosecution thereof, on or before the first day of the next term." This he failed to do; and, the 6th of October following, on his motion by Counsel, and for reasons appearing to the Court, further time, until the ensuing first day of February, was allowed him for giving the said bond and security; which he did accordingly, as certified by the Clerk of the Court of Chancery.

A copy of the record was sent to the Court of Appeals, and the cause entered on the docket, April, 1805.

161 *At March term, 1810, a motion was made by Wickham, for the appellee, to dismiss the appeal, as improvidently granted; the power of the Chancellor over it having ceased on the first day of the term ensuing his final decree; according to the case of *Anderson v. Anderson*, 2 Call, 180.

Randolph, contra, insisted that this objec-

***Jurisdiction—Consent.**—It seems well settled that when a court has not jurisdiction of the subject-matter, the consent of parties cannot give it. *McCarty v. Gibbon*, 5 Gratt. 329, citing the principal case and *McCall v. Peachy*, 1 Call 55.

For other cases in point, see *foot-note* to *McCall v. Peachy*, 1 Call 55; monographic note on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457. On the subject of jurisdiction, the principal case was also cited in *Todd v. Gates*, 20 W. Va. 470.

Appeals—Dismissal as Improvidently Allowed—Costs.—As authority for the proposition that wherever an appeal is dismissed as improvidently allowed, or a supersedeas quashed as improvidently awarded, the court has always refused to give costs to the party prevailing. *TUCKER, P.*, in a dissenting opinion in *Ayres v. Lewellin*, 3 Leigh 616, citing, in support of the proposition, the principal case; *Hepburn v. Lewis*, 2 Call 497; *Lewis v. Long*, 3 Munf. 136; *Hutchinson v. Kellam*, 3 Munf. 208; *Skipwith v. Young*, 5 Munf. 276; *Rootes v. Holliday*, 4 Munf. 323; *Miller v. Blannerhassett*, 5 Munf. 197; *Thomson v. Evans*, 6 Munf. 397; *Ashby v. Kiger*, 3 Rand. 165. For further information on this subject, see monographic note on "Appeal and Error" appended to *Hill v. Salem, etc.*, *Turnpike Co.*, 3 Rob. 268; monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

tion was now too late, nearly five years having elapsed since the appeal was docketed. The appellee having acquiesced so long in the bond given by the appellant, must be considered as consenting to receive it, as executed in due time.

JUDGE TUCKER observed, that consent could not give this Court jurisdiction; and referred to *M'Call v. Peachy*, 1 Call, 55.

Wednesday, March 28th. The Judges pronounced their opinions unanimously, that it was a hard case; but the appeal must be dismissed.

On the last day of that term, this order of dismissal was set aside, and the case further considered.

Tuesday, May 22d. The Judges again pronounced their opinions.

JUDGE TUCKER. The question arises upon that part of the chancery law, (a) which authorizes the Chancellor to grant an appeal in vacation next after the term when the decree shall have been rendered.

This is a question of jurisdiction, not of discretion. All the powers of this Court are statutory; it has no claim whatever to power from any other source; neither custom, prescription, long usage, or precedent, have any pretensions here, independent of statutory provisions. This has been repeatedly acknowledged in the cases of *M'Call v. Peachy*, *Bedinger v. the Commonwealth*, and *Stras v. the Commonwealth*. The time and manner of 162 proceeding in order to give this Court cognisance of the cause, is, I conceive, as essential as the nature, or amount of the matter in controversy. If the party suffers it to elapse without proceeding as the law directs, he is as much concluded thereby, as he would be by a verdict for 99 dollars 19 cents damages, instead of 100 dollars, which is the lowest sum of which this Court can take cognisance. Until the Court has legal possession of any cause, although it be upon their docket, it has no power over it, but to dismiss it. Jurisdiction must in all cases precede discretion. In the present case, I conceive, we have not the former, and therefore that we cannot exercise the latter. My opinion therefore is, that the order of dismissal be reinstated.

JUDGES ROANE and FLEMING were of the same opinion.

The order for dismissal was therefore reinstated.

Clay v. White and Others.

Argued April 26th. 1810.

1. Ejectment—By Patentee—Entry Unnecessary.*—It is not necessary for a patentee of waste and unappropriated land, to make a personal entry

(a) 1 Rev. Code, c. 64, s. 59.

*Ejectment—By Patentee—Entry Unnecessary.—It has been uniformly held that a patent confers constructive seisin in deed sufficient to enable the patentee to maintain a writ of right. *Dawson v. Watkins*, 2 Rob. 268, citing the principal case, *Green v. Lister*, 8 Cranch 229; *Green v. Watkins*, 7 Wheaton 27. But seisin of some kind must be shown, either the constructive seisin in deed by the operation of the grant, or seisin in deed by the possession of the land and the reception of the profits. *Dawson v. Watkins*, 3 Rob. 268.

thereon, to enable him to maintain ejectment; for the patent ipso facto confers seisin.

2. Conveyance of Land—Necessity of Possession by Grantor.†—Such seisin may be transferred and continued by deed of bargain and sale, or by devise: but a person, whose seisin is interrupted by the actual entry and adverse possession of another, cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment.

3. Ejectment—Special Verdict—Failure to Specify Boundaries—Effect.‡—The plaintiff in ejectment may recover less land than the quantity stated in his declaration. But, if the Jury find a special verdict, shewing the plaintiff entitled to a certain number of acres, part of the tract sued for; and

See also, monographic note on "Ejectment" appended to *Tapscott v. Cobbs*, 11 Gratt. 172.

Patent—Effect—Constructive Seisin.—A patentee by the mere operation of his grant acquires at once constructive seisin in deed of all the land embraced within its boundaries, although he has taken no actual possession of any part thereof. *Koener v. Rankin*, 11 Gratt. 427; *Holloran v. Meisel*, 87 Va. 401, 18 S. E. Rep. 33; *Garrett v. Ramsey*, 26 W. Va. 378.

And, in *Garrett v. Ramsey*, 26 W. Va. 351, it is said: "Constructive seisin is seisin in law, where there is no seisin in fact. Thus when the state issues a patent to a person who never takes any sort of possession of the land granted to him, he has nevertheless constructive seisin of all the land in his grant, though some one else be at the time in actual possession of it; for this actual possession of land belonging to the state is not regarded as adverse possession, as the state cannot be disseized." As authority for this proposition the principal case is cited among others.

†Conveyance of Land—Necessity of Possession by Grantor.—To the point, that an owner of land, whose seisin is interrupted by the actual entry and adverse possession of another, cannot, while out of possession, effectively convey such land by deed of bargain and sale, the principal case, *Duvall v. Bibb*, 3 Call 362; *Tabb v. Baird*, 3 Call 475; *Hall v. Hall*, 3 Call 488; *Bream v. Cooper*, 5 Munf. 7, and *Hopkins v. Ward*, 6 Munf. 38, are cited in *Williams v. Snidow*, 4 Leigh 17. But actual possession of the land by the grantor is not indispensable to give effect to his deed, for, if the possession held by another be of a fiduciary character, or if its origin and continuance were such as not to amount to a disseisin except at the election of the owner for the purposes of the remedy, it will not impede the operation of the deed. *Foot-note* to *Tabb v. Baird*, 3 Call 475; *foot-note* to *Williams v. Snidow*, 4 Leigh 14.

‡Ejectment—Special Verdict—Failure to Specify Boundaries—Effect.—See the principal case distinguished in *Mooberry v. Marye*, 3 Munf. 461.

Same—Verdict for Less Than Claimed in Declaration.—It is not necessary that the plaintiff in ejectment should recover all that is demanded in the declaration. He may recover less. *Callis v. Kemp*, 11 Gratt. 84, citing the principal case as authority. And, in *Marshall v. Palmer*, 91 Va. 345, 21 S. E. Rep. 672, it is said that one may sue in ejectment and recover less than he claims in his declaration (the principal case and *Callis v. Kemp*, 11 Gratt. 78, being cited as authority for the proposition), but he cannot recover more than he proves he has title to in himself. Thus, it was held in this case (*Marshall v. Palmer*), that one joint tenant cannot recover, in an action of ejectment in his own name, as sole plaintiff, the interests of himself and his co-tenants.

See generally, monographic note on "Ejectment" appended to *Tapscott v. Cobbs*, 11 Gratt. 172.

do not specify the boundaries of such part with so much precision as that possession thereof may with certainty be delivered; a venire de novo ought to be awarded.

This was an action of ejectment, in the District Court of New London, for 342 acres of land lying in Pittsylvania County. The Jury found a special verdict, stating the following facts:

John Fox obtained a patent from the Commonwealth for the land in question, on the 8th of July, 1780. In his will, 163 *dated August 5, 1780, and admitted to record, May 7, 1785, there is the following clause; "Item, my will is that all my land shall remain under the care and direction of my wife, to be given to, and divided amongst, my sons, John Fox, W. Fox, T. B. Fox, and Henry Fox, in such manner and proportion as she shall think fit; as they, or either of them, attain to the age of twenty-one, or marry; which shares or proportions of my said lands, so given to such child or children, I give to either, and all of them, and to his or their heirs and assigns for ever." Anne Fox, the testator's widow, on the 20th day of June, 1799, by indenture reciting the devise, and that Henry Fox, one of the testator's sons, had attained his age of twenty-one years, "in pursuance of the bequest and authority thereby given to her, and in consideration of natural affection, and of five shillings to her in hand paid by the said Henry, did give, grant, bargain and sell, alien, enfeoff and confirm, to the said Henry one tract of land, in the County of Pittsylvania, containing 342 acres; describing the bounds, as in the patent; and reciting that the testator John Fox died seised and possessed thereof, in fee-simple: which deed was proved in Gloucester County Court, and certified to the Court of Pittsylvania County, where it was admitted to record in July, 1799. On the same 20th of June, 1799, Henry Fox (in consideration of 300 dollars,) sold and conveyed the same land to Matthew Clay, the lessor of the plaintiff, by deed of bargain and sale, which was duly recorded in Pittsylvania County Court.

According to a survey, made in the cause, (in presence of the parties, and set forth in the verdict,) the lands in controversy contained 440 acres; beginning as in Fox's patent, and running one or two courses nearly corresponding with the lines thereof, and some others apparently the same, or nearly so; and including a survey of 350 acres made August 2, 1788, for William White, one of the defendants; in whose favour a patent duly issued from the Commonwealth, on the 25th of February, 164 1792, "for 350 *acres of the land in controversy;" which patent recites that, "in consideration of the ancient composition of one pound fifteen shillings sterling, there is granted to the said William White 350 acres of land, by survey," &c. the lines of which are recited, and do not appear to bear any relation to, or conformity with, those in Fox's patent.

The verdict farther stated that the said White had been in possession of the said 350 acres ever since the date of his patent: but "whether any of the before named per-

sons were in actual seisin of the land other than is stated above, the Jury did not know." They found the lease, entry and ouster in the declaration mentioned, and concluded in the usual form.

The District Court gave judgment for the defendants; from which an appeal was taken to this Court.

Hay, for the appellant. The District Court appears to have given judgment for the defendants on the authority of *Tabb v. Baird* and others, 3 Call, 475; according to which, a person not in possession cannot convey by bargain and sale such a title as will enable the bargainee to recover in ejectment against another holding by adverse possession. But the facts in this case do not justify the application of that authority to it. The lines of Fox's patent are expressly stated to contain 440 acres, and include the 350 acres of land granted by White's patent. The Court, by misapprehension, thought that White was in possession of the whole land claimed by Clay; supposing 350 acres to be all: but surely Clay had a right to recover the difference between the 440 acres and the 350; though he had no right to recover the 350 acres. The obscurity of the survey and verdict misled the Court; and a venire facias de novo ought to be awarded, to ascertain the lines of the smaller patent within the bounds of the larger. Clay was entitled in equity to the whole 440 acres; and in strict law to the 90 acres only. But he ought to have recovered the latter at any rate.

165 *M'Crae and George K. Taylor, contra. There could be no ground for this. Either White was in possession of the 350 acres only; or of the whole land. If the former was the case, the plaintiff could not set up a claim against him for the 90 acres which he had not in possession. The case of *Goodright, Lessee of Balch, v. Rich*, (a) shows that confession of lease, entry and ouster does not conclude the question of possession; that, if the defendant be not actually in possession, judgment ought not to be given against him; and that the plaintiff ought to prove that the defendant is in possession.

Here the declaration claims only 342 acres. There is nothing to prove that White was in possession of more than his patent warranted. If he had had nothing in his possession, claimed by Clay, there could be no doubt that Clay could not have recovered against him: and the same reason applies to these 90 acres.

But, if White was in possession of the 90 acres, on the same ground that the plaintiff's title failed as to the 350, it fails as to the 90; for the possession is equally adverse in both cases.

No possession is found in Clay, or those under whom he claims, except so far as the deeds might be construed as carrying possession.

Hay, in reply. Nothing is said positively as to the possession of the 90 acres. Clay's title to the whole 440 appears. But, according to *Tabb v. Baird*, he cannot recover the 350 acres in this form of action. The question in Term Reports did not arise on a special verdict; but at the trial; being

(a) 1 T. R. 827.

whether the defendant could be admitted to prove himself not in possession, or whether the plaintiff was bound to prove him in possession. No such question arose here. It would be inconvenient to transfer the doctrines recently established in England to this country. This is not a rule of property, but of practice; and, even in that country, the rules are different in different Courts.

166 *The verdict here is too defective to enable the Court to decide the whole case. There are other defendants besides White. Hardy and others, also confessed lease, entry and ouster. They may be in possession of the 90 acres. The Jury ought to have said who was in possession of them.

Taylor. This is a new objection. Either White is in possession; or he is not. If he is not, the law is clearly in our favour. If he is, the Jury were not bound to state the title of the defendants; for the plaintiff must recover by the strength of his own title; not by the weakness of the defendants' title. The plaintiff's title is clearly defective according to *Tabb v. Baird*; it appearing that the person of whom he bought never was in possession. The Jury's stating farther the adverse possession of White was altogether surplusage.

Saturday, May 28th. Judge Fleming informed the counsel, that an argument was requested on the following point; "whether the bare obtaining a patent for land is to be considered as giving seisin to the grantee?"

October 29th. Hay maintained the affirmative; relying especially on the language of the several acts of assembly concerning the land office; (a) from all which it appears to have been the intention of the legislature to grant an absolute unconditional title to the patentee.

He suggested as a proposition, whether a conveyance by record is not equal to livery. In England there are two kinds; a fine and a common recovery. By either of these a complete title (which according to Blackstone is *juris et seisinæ conjunctio*) is transferred, and no entry is necessary to perfect it. A patent under the great seal is of equal dignity: for in 5 Co. 94, b. (b) the doctrine is laid down, *totidem verbis*, that letters patent under the great seal amount to a livery in law. So in Bac.

167 Abr. tit. Prerogative, and *17 Viner, 95, it is said that a grant of a reversion by the king is good without attornment. If such would have been the effect of a grant under the regal government, he could see no reason why a patent granted by the Commonwealth should not have the same effect.

Every principle of public convenience requires that this position should be held to be true: and, when we advert to the situation of this country, it is peculiarly necessary. To take actual possession in many cases would be extremely difficult. The patentee must take witnesses with him; and by their subsequent death or removal might

be prevented from recovering, though he had the oldest patent.

If a patent were not sufficient without actual entry, it might often happen that a younger patent would take precedence, and the claimant under the older patent be driven to a suit in Chancery. But the uniform understanding of the people of this country is, that the patent itself gives complete title, and enables the patentee to maintain any action whatsoever.

George K. Taylor, contra, did not contradict Mr. Hay's position that the act of assembly gives a title: but the question is whether that title is of itself sufficient to enable a party to maintain his action without actual possession. The legislature has indeed declared that actual possession need not be proved to maintain a writ of right; (c) but this does not extend to ejectment; for exception probat regulam. It would seem a fair inference from that act, that, if it had not been passed, proof of actual possession would have been necessary in a writ of right.

The case then stands as influenced by decisions in England alone. The authority of *Barwicke's* case is admitted; but it only proves that a patent amounts to a livery in law. Now it is clear that a livery in law is not sufficient without actual possession. 3 Bac. Abr. 146, (Gwill. edit.) tit. Feoffment.

Cur. adv. vult.

168 *Thursday, April 19, 1810. The Judges delivered their opinions.

JUDGE TUCKER (after stating the case) proceeded as follows: Mr. Hay admitted that, after the decision of this Court in the case of *Tabb v. Baird*, 3 Call; 475, and *Duval v. Bibb*, Ibid. 362, he could not support the plaintiff's title, under the deed of bargain and sale from Henry Fox, to maintain an ejectment for so much of the land in controversy as was found by the Jury to have been in possession of the defendant at the time that conveyance was made; but contended, that, if the verdict contained sufficient certainty to ascertain the bounds of White's 350 acres, judgment ought to be rendered for the plaintiff, for the remaining 90 acres; or, if the verdict be too uncertain for that purpose, there ought to be a venire de novo. I am of that opinion; for, if John Fox, the testator, was capable of devising this land, (of which hereafter,) Henry, his son, must be considered as taking under the devise, and not merely under the deed from his mother, which was intended to be, and was in fact, an appointment by her, under the power given by the will, and not a conveyance of any interest from herself, though both the considerations of natural love and affection, and of five shillings in money, are also mentioned therein. Whether Mrs. Fox the mother ever entered upon these lands confided to her care does not appear, and is not material to this part of the case. But the patent to White, and his actual and continued possession of the lands from the date thereof in 1792, either vested in him a rightful, or wrongful possession adverse to the title of John Fox, and of all claiming under him;

(a) Ch. Rev. p. 98, 1 Rev. Code, p. 142, s. 5, p. 147, s. 48, and p. 148, s. 44.

(b) *Barwicke's* case.

(c) 1 Rev. Code, c. 12, s. 29.

so far as that possession actually extended; but no further. For it would be a most mischievous construction, indeed, to suppose, that the entry of a disseisor upon one hundred acres of land, part of one thousand, or more, would prevent the owner from conveying away the residue, to any other person he might think proper. Here the Jury

have found the lands in controversy
169 * (meaning, I presume, the lands comprehended within the lines of Fox's patent) to contain 440 acres, and that White's survey contains only 350 acres; the amount, though not the precise bounds of the disseisin, or ouster, are therefore shewn by the jury: and they ought to have discriminated between the lines of White's patent and that of Fox, which the surveyor, in his report, alleges, covers and includes the former; Fox's deed to Clay not being impeachable for the surplus.

Mr. Taylor, for the appellee, cited the case of Goodright, Lessee of Balch, v. Rich, 7 T. R. 327, to shew that the plaintiff is not entitled to a verdict for those ninety acres, because he is bound to prove the defendant in possession of the whole of the premises which he seeks to recover. Without examining the doctrine laid down in that case, to which, as at present advised, I cannot subscribe, and to which the cases of Smith v. Mann, and Jesse v. Bacchus, cited in Buller's Ni. Pri. 110, perhaps afford a proper answer; the reply of Mr. Hay, that the Jury have in this case expressly found the lease, entry and ouster in the declaration mentioned, is, in my opinion, sufficient to obviate the objection, were such an obligation as Mr. Taylor contends for admitted.

We come now to the question suggested by a member of the Court, whether a patent from the Commonwealth be equal to an actual seisin; or, as I understood the question, whether a patent only confers a complete title to lands derived from the Commonwealth; without an actual entry into the same and corporeal possession thereof, or not.

That an entry is not always necessary to give seisin in deed, appears from the cases cited by Mr. Hargrave, Co. Litt. 29, a, note 3. (a) In England, letters patent under the great seal amount to a livery in law. (b) In this country, where grants of waste and unappropriated land only are generally made, as in the present case, I should suppose a grant of such lands from the Commonwealth, under the seal of the state, must be considered as tantamount, not

only to a livery in law, but to a livery in deed. For the lands, previous to the patentee's location, must have been waste and unappropriated, or they could not have been granted. The patent conveys all right and title whatsoever out of the Commonwealth: there is nothing in our law which implies a forfeiture in case of non-entry; whatever might have been the construction when certain improvements were required to be made within three years; there is no ground to suppose the Commonwealth can ever gain a right to the

lands, so granted, again, but by escheat for want of heirs, or by forfeiture for non-payment of taxes; the right of the patentee must then be supposed to be complete and absolute. The patent is the symbol of his possession, as well as of his title. And any person entering upon that possession must be a trespasser or a disseisor. If the King enters into lands without title, or seizes lands by a void and insufficient office, he is no disseisor, (because of his prerogative,) but the freehold remains in the former owner; but if the King, by letters patent, grant the lands into which he has so entered, or has so seized, without title, if the patentee enters, he is a disseisor. (c) If the King grant lands to one, and, before he enters, another person enters and keeps the possession until he dies, and dies seised; and the lands descend to the heir of the disseisor; yet may the patentee enter; for his entry is not taken away by the descent in this case. (d) Upon common law principles, then, I am of opinion that an actual entry into waste and unappropriated lands granted by the Commonwealth is not necessary, in order to complete the patentee's title thereto; but that the same is, upon the delivery of the patent, absolute and complete for every purpose whatsoever, whether to maintain an action, or to transmit an inheritance, or to grant the same by deed, or by last will and testament.

Other reasons, I think, may be drawn from the nature and situation of the country; constant usage from its first settlement; and some particulars in our laws.

All the lands in Virginia have been
171 originally granted * as vacant lands.

Whatever might have been the policy at the first settlement of the colony, large and extensive grants were made soon after.

With the revolution, it became an object to raise a revenue from the sale of vacant lands, without requiring any actual settlement or cultivation. Millions of acres were disposed of to purchasers from all quarters upon those terms. It was impossible to calculate upon an increase of population commensurate with such extensive grants. All that the Commonwealth required of the patentee was the payment of his taxes upon the lands thus acquired. That done, the law had no other claim upon him. Why then must he make an actual entry? His patent was evidence of every thing that could be the object of such an entry. It was founded upon an actual survey; for making which he paid all the expense; this survey was founded upon an actual location, made, or supposed to be made, by himself or his agent. His land-warrant was his authority for so doing; and his entry in the surveyor's books; the subsequent survey made pursuant thereto; and, finally, his patent, were all so many evidences, in succession, of these facts. If the possession of a lessee for years, at common law, be construed as the possession of him that hath title to the freehold, (without entry, or receipt of rent,) so as to make a man tenant by curtesy of his wife's estate, (e) surely

(a) Co. Litt. 15, a, § Atk. 471, 3 Willson, 516, Newman v. Newman.

(b) 5 Co. 94. Barwicke's case.

(c) Bro. Abr. tit. 'Disseisin' 65: 4 Bac. Abr. 'Prerogative,' ad finem, p. 214. old edit.

(d) Co. Litt. 240, b.

(e) Vide Harg. Co. Litt. 29, a. note 3.

these acts done by the patentee or his agents, (though preparatory to a patent, instead of being subsequent thereto,) may, in favour of a purchaser for a valuable consideration, (and such every patentee from the Commonwealth is,) be construed as equivalent to an actual entry, into lands granted by the Commonwealth. How many thousand titles must be defeated, if, in order to transmit an inheritance in lands so granted, or to give validity to a devise thereof, or to any other conveyance, an actual entry and corporeal seisin must be proved in every case? It would be both a mischief, and an inconvenience, too great for the law to adopt, or to countenance.

172 *Again; by an express provision in our law, actual possession need not be proved to maintain a writ of right. If the law will admit a patent, as evidence of a complete title in the demandant, or his ancestor or predecessor, in the highest and most solemn contest concerning lands, will it reject such evidence in an action merely possessory. The object of the evidence in both cases must be to prove an hereditary right in the original patentee, absolutely perfect, so as to be capable of conveying or transmitting the inheritance. It would seem strange if we were to reject the evidence of this patent to John Fox, in this case, as insufficient to support the plaintiff's title derived from his son, and devisee, and thirty years hence the same patent should be offered and admitted as evidence sufficient to maintain a writ of right for recovery of those lands, or others in the same predicament.

Nor do I conceive it necessary that Henry Fox should have made an actual entry upon the lands to enable him to convey to Mr. Clay. Wherever there is a devise of lands, the law casts the freehold upon the devisee before entry; (a) and, by the will, the possession of these lands was in Mrs. Fox, until she had made the appointment to her son pursuant to her husband's will; that appointment being made, the law cast the possession, both under the will and under the deed of bargain and sale, (in which form the appointment was made,) instantaneously upon the son. His possession thus acquired enabled him to convey all the lands of which he was not actually disseised. An actual entry was not necessary to be made by either, to enable the plaintiff to maintain an ejectment. (b)

Upon the whole, I am of opinion that the plaintiff was entitled to recover all the lands comprehended within the lines of John Fox's patent, of which his son and devisee was not actually disseised, by the abatement of William White, at the time that Henry Fox executed the conveyance to the plaintiff, which the Jury have found in their verdict; and therefore that there ought to be a venire *facias de novo*, to ascertain the boundaries of the lands not comprehended within the line of White's patent for 350 acres; the plaintiff being entitled to the residue.

JUDGE ROANE. In the case of Birch

v. Alexander, (c) it was held that a seisin in the Commonwealth need not be found; that being the ultimate point beyond which a party in proving his title is not bound to go. Although this would seem to import that, in all the derivative stages, seisin must be found, yet undoubtedly the finding of an actual seisin, or corporeal investiture, may be supplied by finding other things deemed by the law of equal validity and notoriety. Thus, under the decision in *Tabb v. Baird*, (d) it would be sufficient to find that a defendant purchased by deed of bargain and sale, (which is considered as a statutory livery of seisin,) from a person having possession. So, as a fine is deemed an acknowledgment of a tenement of record, and in which livery of seisin is not necessary to be actually given, the supposition and acknowledgment thereof in a Court of Record, however fictitious, inducing equal notoriety, (e) the finding of an assurance of that kind would be equally effectual, were it not obsolete in this country. In like manner it is held, that letters patent, under the great seal, amount to a livery in law. (f) In all these cases an actual corporeal tradition is dispensed with by the law, on the ground that acts of equal notoriety with it ought to have an equal and similar effect. The reason of this holds very strongly in relation to grants of land in a new country, where the proof of actual possession would be very difficult, and where, in some sense, a corporeal investiture of the land has been already taken by the entry and survey which preceded the grant, and may be said to be admitted and sanctioned thereby. In the case before us, the seisin thus acquired by the original patentee was deduced to the present appellant by the deeds of bargain and sale stated in the verdict, as to all that part of the tract in question, of which the

appellees were not in possession under *William White's patent, and he is entitled to recover that residue. But, inasmuch as the verdict is defective in not particularly locating in the plot White's patent, and, consequently, does not shew where that surplus lies, the verdict ought to be supplied in this particular, and therefore a venire *de novo* ought to be awarded.

JUDGE FLEMING. It appears by a survey and plot made under an order of the District Court of Franklin, that Fox's patent, under which the appellant claims, contains (instead of 342) 440 acres; and it is found by the verdict, that White's patent, containing 350 acres, is included therein: but no discrimination as to the part of the plot in which the said 350 acres lie; so as to ascertain the boundaries of White's patent. Therefore, for the uncertainty, I concur in opinion that the judgment be reversed, the cause remanded to the Superior County Court of Franklin; and that a venire *de novo* be awarded.

It is to be understood as the unanimous opinion of the Court, that a patent from the Commonwealth for waste and unappro-

(a) Co. Litt. 111, a.
(b) Co. Litt. 240, b. Bull. Nl. Pri. 108; 5 Burr. 1897, Dougl. 468.

(c) 1 Wash. 39.
(d) 3 Call. 475.
(e) 2 Bl. Com. 348.
(f) 5 Co. 94, Barwick's case.

priated lands gives to the grantee a sufficient acisin to enable him to alien, without having ever been in actual possession of the premises, by a personal entry thereon.

The following was entered as the opinion of the Court: "The Court, having maturely considered, &c. is of opinion that the special verdict is uncertain and insufficient in this; that it appears by the survey, made in this cause and referred to in the said verdict, that the boundaries of the lands claimed by the lessor of the appellant under Fox's patent, contain 440 acres, within which the lands designed in the grant to the appellee White, containing 350 acres only, are found by the Jury to lie, without discriminating the metes and bounds of the lands contained in the last mentioned patent, whereby 175 the boundaries of the residue *of the said 440 acres to which the lessor of the appellant is entitled may be ascertained; and that the said judgment is erroneous." The same was therefore reversed and annulled, and a venire facias de novo awarded.

Atwell's Administrators v. Towles.*

Thursday, April 19, 1810.

1. **Bonds**—Joint Obligation—What Constitutes—Case at Bar.—At the foot of a bond, with a penalty and condition in the usual form, signed and sealed by J. S., a writing is signed and sealed by T. A., in the following words: "I, T. A. join in the above obligation with J. S., and am his security for the above sum of —, (mentioning the sum specified in the condition:) this, it seems, is a joint obligation; and judgment may be rendered against T. A. for the penalty, to be discharged by the sum in the condition, with interest.
2. **Same**—Same—Assignment—Sufficiency.—An assignment of such an instrument, by the words, "I assign the within obligation," is a good assignment of the claim upon T. A. as well as J. S.
3. **Same**—Same—Declaration against Administrator of One Obligor—Allegations.—Quære, whether a declaration against the administrator of one of

*The principal case was distinguished in *M'Rea v. Brown*, 2 Munf. 48.

†**Bonds**.—See generally, monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

‡**Same**—Assignment.—See generally, monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

§**Joint Bond**—Death of One Obligor—Effect.—At common law, where two or more jointly signed an obligation, the death of one or more, when there was a survivor, extinguished the debt as to the decedent or decedents, and the obligation survived against the survivor, just as if no others had ever been joined with him in it. Upon the death of the co-obligor the legal effect of the obligation was an obligation of the survivor alone, and in suing on such obligation and pleading it according to its legal effect, it was unnecessary to allude to the decedent parties in any part of the declaration or pleadings. *Reynolds v. Hurst*, 18 W. Va. 654, citing *Minge v. Field*, 2 Wash. 136; *Elliott v. Lyell*, 3 Call 268; *Atwell v. Milton*, 4 Hen. & M. 258; *Atwell v. Towles*, 1 Munf. 181; *Braxton v. Hilyard*, 3 Munf. 49; *Crawford v. Daigh*, 2 Va. Cas. 521; *Backus v. Taylor*, 6 Munf. 488; *Macon v. Crump*, 1 Call 587; *Buster v. Wallace*, 4 Hen. & M. 82. And in *Somerville v. Grim*, 17 W. Va. 808, it was said (italics ours): "Before our statute if one obli-

two joint obligors, averring that neither the defendant, nor the other obligor, nor any representative of his, had paid the debt; (without stating that such other obligor was dead, or that the defendant's intestate had survived him;) and alleging, in assigning the breach, that right of action had accrued, under the premises, against the defendant's intestate, (without setting forth in what manner,) be good after verdict?

4. **Same**—Debt on—Judgment—Form.—In an action of debt on a bond, the judgment is always entered for the penalty, to be discharged by the principal and interest: and, if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty.

5. **Same**—Satisfaction.—The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor.

6. **Evidence**—Copies—Statute.—By virtue of the 24th section of the District Court law of 1792, the copies therein allowed, are good evidence in suits brought since that act took effect; although the filing of the originals was before that time.

In an action of debt on behalf of Towles, executor of Lewis, against Thomas Atwell's administrators, the instrument declared upon was a bond in the usual form, from a certain Johnson Smith to Michael Montgomery, in the penal sum of 179l. 14s. 4d. dated the 9th day of June, 1783, and conditioned to be discharged by the payment of 89l. 17s. 2d. the first day of September then next ensuing; with a writing underneath in the following words:

"I Thomas Atwell, of Prince William, do join in the above obligation with Johnson Smith, and am his security for the above sum of eighty-nine pounds seven-176 teen shillings *and two pence; as witness my hand and seal this 21st day of June, 1783.

"Thomas Atwell. (Seal.)

"Teate Nathan Hayes.

"Richard Scott."

On this instrument, a suit was brought in the General Court against Johnson Smith; in the progress of which Thomas Atwell became his special bail, and surrendered him to the Sheriff of Prince William. At a General Court held April 27th, 1786, he confessed judgment in custody, and the Sheriff was ordered to retain him in execution. Fourteen years after this, viz. in 1800, the suit now in question was brought in the Haymarket District Court, by Oliver

gor in a joint bond was dead and the other living, the action could only be against him who survived. It was gone forever as to the representatives of the deceased obligor. His estate was entirely exonerated from the payment of the debt by his death; and the burden was wholly upon the obligor that survived. *If the last surviving obligor died the action remained against his representatives.*" For this proposition the same authorities are cited that are cited above from *Reynolds v. Hurst*, 18 W. Va. 654. See also, foot-note to *Elliott v. Lyell*, 3 Call 268.

§**Debt on Bond**.—See monographic note on "Debt, The Action of" appended to *Davis v. Mead*, 13 Gratt. 118.

¶**Judgments**.—See generally, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

****Evidence**.—See monographic note on "Evidence" appended to *Lee v. Tapscott*, 2 Wash. 276.

Towles, executor of Thomas Towles, who was acting executor of Nicholas Lewis, who was assignee of Butler Bradburn, assignee of Michael Montgomery, against Charles Atwell, administrator, and Anne Atwell, administratrix of Thomas Atwell, deceased.

The declaration made profert of a certified copy of the bond and endorsements, obtained from the files of the General Court, (the original not being in the plaintiff's power or possession,) and set forth particularly the penal part; the condition; the writing signed and sealed by Thomas Atwell; and the several assignments endorsed upon it; stating the same to be assignments of the two writings obligatory by endorsement on the paper containing both; by reason of which premises, and by force of the act of Assembly in that case provided, all the rights that vested in the said Montgomery accrued to the said Lewis: and the plaintiff avers that the said Johnson Smith, or any representative of his, or either, on his behalf, hath not paid the debt aforesaid, or either of the sums of money before mentioned, &c. but the same yet remains due and unpaid: nevertheless the said Atwell, against whom right of action accrued under the premises, did not pay the said debt, or either of the said sums of money, &c. but hitherto to pay the same debt hath entirely refused," &c.

177 *The defendant, Charles Atwell, pleaded "payment by Smith and no such assignments;" to which the plaintiff replied generally. At the trial, the plaintiff offered in evidence a copy of the record of the suit first above mentioned; and proved the execution of the writings obligatory both by Smith and Atwell, and the execution of the assignments, which are "of the within obligation;" and this was all the evidence exhibited to the Jury; whereupon, the counsel for the defendant prayed the opinion of the Court "whether the writing obligatory, signed by the said Thomas Atwell, deceased, and set forth in said record, can properly go in evidence to the Jury; or, in other words, whether the said obligation tallies and agrees with the count in the declaration; and also, whether the writings in the record, importing to be assignments, were legal assignments, and sufficient to support the statement thereof set forth in the declaration: and the Court gave it as their opinion that the said obligation tallies and agrees with the declaration; and that the said assignments were legal and sufficient to support the statements of the assignments made in the declaration: to which opinions the counsel for the defendant tendered a bill of exceptions, which was accordingly signed and sealed. The Jury found the issues for the plaintiffs, and judgment was entered for 179l. 14s. 4d. "the debt in the declaration mentioned," to be discharged by the payment of 89l. 17s. 2d. with interest thereon at five per cent. from the 1st of September, 1783; and the costs; "with interest thereon at six per cent. from the date of this judgment (which was the 1st of November, 1804) until paid;" whereupon the defendant appealed.

Williams, for the appellant. If Atwell

was bound at all, it was only for 89l. 17s. 2d. and not for the penalty: and, if for the penalty, the judgment is erroneous, because it is to be discharged by a greater sum than the penalty itself. This was either a joint obligation of Atwell and Smith, or a collateral undertaking. If it was 178 a joint obligation, the *suit being against Atwell's administrator, and no averment that he survived Smith, the Court will not presume the other obligor dead; and if he be living, the action survived against him. If it was a collateral undertaking, the declaration should have demanded the 89l. 17s. 2d. only, and not the penalty.

The record from the General Court should not have been received as evidence. It is true that, according to the modern decisions, where a bond is lost or destroyed, the plaintiff may declare on a copy: but that was not the case here. So, under the late law concerning District Courts, (a) the copy in this case might have been received: but that act can only apply to cases arising since it was passed. Besides, Atwell's obligation was no part of the record in the General Court; the suit there having been brought on the bond of Smith alone.

Botts, for the appellee. There is really but one point in this cause; and that is whether this appears judicially to the Court to have been a joint bond, on which the right of action survived against Atwell. As the defendant did not plead that the other obligor was alive, the Court will not intend it. The declaration makes out a strong implication that the defendant's intestate survived Smith. It is certainly defective, but only states the case defectively, and does not state a defective case. (b) But, if the declaration was bad, the defendant should have demurred, or moved in arrest of judgment. He could not, upon the trial, object to the evidence, merely on the ground of its insufficiency to maintain the action; since it agreed precisely with the declaration. (c)

The obligors bind themselves as completely as language can express. The security agrees to join in the above obligation. This makes the bond joint to all intents and purposes. The declaration described it exactly as it was.

As to the objection arising from the circumstance that the principal and interest amount to a greater sum than 179 *the penalty; the judgment is always for the penalty, to be discharged by

the principal and interest. If that exceeds the penalty, the defendant has his choice, and may satisfy it by paying the penalty.

JUDGE TUCKER suggested a difficulty. The body of Smith being in execution, could another judgment be obtained against Atwell?

Botts. The doctrine is, that taking the body is no satisfaction; but you may still go on against the other obligor.

On this point, Williams admitted the law to be as stated by Botts.

Thursday, April 26. The Judges delivered their opinions.

(a) 1 Rev. Code, p. 77, s. 24.

(b) *Rushon v. Aspsall*, Doug. 679.

(c) *Cunningham v. Herndon*, 2 Call, 580.

JUDGE TUCKER. On perusing the record in this case, I can discover no radical error therein. The judgment, being entered for interest, at six per cent. per ann. on the costs of the suit, at first I thought it was erroneous; but I find that the act of 1803, (a) gave interest upon costs;* and this judgment was rendered before that act was amended at the next session. (b) I have had some doubts, indeed, in what manner the plaintiff ought to have declared, upon this uncommon obligation, which I incline to think a collateral, and not a joint bond; and though, perhaps, upon a demurrer, the declaration might have been considered as faulty, yet, as no exception was then taken to it, I think the error in demanding the penalty (if it be an error) is cured by the statute of jeofails. The evidence

180 was, I think, *unexceptionable, and very properly admitted. Upon the whole, I think the judgment ought to be affirmed; although a skilful pleader might perhaps have puzzled the plaintiff's counsel, and the Court, by a judicious and well-timed defence. I believe and hope the justice of the case has been obtained; and, thinking so, I am unwilling to reverse a judgment when I cannot satisfactorily point out an error.

JUDGE ROANE. The bond stated in the declaration, was undoubtedly the bond of Atwell; and that, as well in relation to the penal part thereof, as the condition. Stronger words could not have been used by him to testify his willingness to be bound thereby, and the writing containing the same sealed and delivered by him. A contrary decision would go the full length, therefore, of affirming that an obligor cannot adopt, by reference, (by any words whatsoever,) a previous obligation, as his obligation, and become a party thereto; a position which is entirely interdicted by the rules of law, which regard substance, rather than the forms used, in relation to this subject. But, although this was the bond of Atwell, it was his joint bond merely. The expression is, "I agree to join in the above obligation, and to be the security of J. S.," which expression is abundantly satisfied by considering it as a joint bond, and there is nothing therein to import that a several one was intended. In the case of *Harrison v. Field*, (c) it is said by one of the Judges, that there may be good reasons with an obligor to prefer a joint bond to a joint and several one; such, for example, as those resulting from the doctrine of survivorship. In 5 Bac. 164, it is said that if three bind themselves in a bond "conjunctim, et quælibet eorum," it is yet only a joint bond, by reason of the word "conjunctim;" and that the word "quælibet" cannot make it several; it being inserted only to shew more strongly that they should all be bound, but not that they should be severally bound. This case

is infinitely stronger than the case at bar, in which there are no words whatever
181 *importing or seeming to import, that the bond should be several.

Being a joint bond, therefore, and made in the year 1783, it is of the very substance and gist of the action, when one obligor or his representatives is sued, to aver in the declaration that that obligor survived his companion; for, if they are both alive, the action must be against both; and, if his companion survived him, the action against his representatives is gone for ever. I do not require any particular technical form of words in the declaration to charge this, but the fact must be substantially stated: it cannot be dispensed with, under the decisions of this Court, which are too numerous and too well known to the bar to be particularly mentioned. Let us see whether any thing like a positive averment is contained in the declaration before us. There is an averment "that neither the said J. S. or any representative of his" has paid the debt. This, at most, only charged, by implication, that J. S. was dead and had a representative: it does not, however, come up to the point of stating that he died in the life-time of Atwell. It therefore avers nothing, to give the action against Atwell's representatives. Again, it is stated in the breach, that the said "Atwell, against whom right of action accrued under the premises," did not pay: but this again does not come up to the desideratum: it not only states an inference in law, instead of the averment of the necessary fact; but that inference may have arisen in the mind of the drawer of the declaration, from a misapprehension of the purport of the bond; in consequence (perhaps) of his erroneously taking it to be a several bond, as well as a joint one. It is not the province of a plaintiff to state merely the inferences of law in his declaration, but those facts also on which they are founded, and which form the foundation of his claim. This declaration then is radically defective in substance;
182 *and I regret to say that the judgment of the District Court must, on this ground, be reversed.*

JUDGE FLEMING entertained doubts whether the judgment was right or wrong; but said it was always a rule with him in such cases to affirm it. He therefore concurred with **JUDGE TUCKER**; and, by a majority of the Court, the judgment was affirmed.

183 **Dilliard v. Tomlinson and Others; And Wyatt, Administrator of Curtis, v. Muse and Wife and Kemp.*

April, 1810.

I. Infants* — Personality — Distribution — Rights of

*After this case was decided, **JUDGE ROANE** stated, as a circumstance shewing the importance of the requisite averment in the declaration, that in the case of *Atwell's Adm'rs v. Milton*, decided in this Court (vide 4 H. & M. 258), upon a covenant in which the same parties above named (*Atwell and Smith*) were joined, it was stated, by way of implication, in the declaration, that *Smith* survived *Atwell*; whereas, in the present case, it is said to be implied from the statement made in this declaration, that *Atwell* survived *Smith*; and that he believed, judgment was rendered in that case accordingly!—Note in Original Edition.

*Infants.—See generally, monographic note on

(a) 2 Rev. Code, p. 30, c. 29, s. 5.

*Note by the Reporter. It has since been decided, on argument, in the case of *M'Rea v. Brown*, April 2d, 1811, that interest on costs could not properly be allowed, under the above-mentioned act of 1803. In this case, the point was not made in argument, and appears to have been noticed by **JUDGE TUCKER** only.

(b) 2 Rev. Code, c. 57, s. 2.

(c) 2 Wash. 188.

Mother—Statute.—It is now settled, that the mother of an infant who died intestate, between the 1st of October, 1793, (when the suspended acts of 1792 took effect,) and the 23d of January, 1802, (when the act "concerning the distribution of unbequeathed personal estate," was passed,) or any of her issue, by a person other than the father, was not entitled to any part of such infant's personal estate derived immediately from the father.

2. **Same—Same—Same—Same.**—But the law was otherwise relative to the property of an infant who died intestate, between the 1st of January, 1787, (when the acts of 1785 took effect,) and the 1st of October, 1798; the distribution during that interval being regulated by the acts of 1785, c. 61, and c. 60.

3. **Same—Same—Same—Same.**—Neither was the mother, or her issue, as above mentioned, excluded, where the property was derived, not immediately, but by intervening succession, from the father.

4. **Executors—Hire of Slaves—Liability for Interest Thereon.**—An executor or administrator, hiring slaves belonging to the estate of his testator or intestate, ought not to be charged with interest on such hire from the day it became due; (no proof appearing that it was then collected, or that interest from that day was received upon it;) but a reasonable time, to collect and apply the money, should be allowed before the commencement of interest.

5. **Same—Same—Same.**—In such case, no interest ought to be charged where the right to the slaves was in dispute, and it was doubtful to whom the money, when collected, should be paid; no proof appearing that the executor or administrator received any interest, or made any profit.

6. **Chancery Practice—Interest—Statute.**—Prior to the 1st of May, 1804, (when the act "concerning the proceedings in the Courts of Chancery, and for other purposes," took effect, see 2 Rev. Code, p. 30,) the Courts of Chancery, on debts not bearing interest in terms, could not grant interest subsequent to the date of the decree. *See Deans v. Scriba, 3 Call, 415.

7. **Infants—Profits of Estate—Distribution.**—The profits of the estate of an infant dying intestate, (including the increase of slaves,) accruing to such infant in his or her life-time, but not applied to his or her use, or otherwise lawfully disposed of, ought to go to the person, or persons, inheriting such estate generally.

"Infants" appended to Caperton v. Gregory, 11 Gratt. 505.

See () on page 77.

†**Executors—Debts Due Estate—Liability for Interest Thereon.**—On the authority of the principal case, in Whitehorn v. Hines, 1 Muf. 568, interest on the hire of slaves was disallowed. And the decree in Cavendish v. Fleming, 3 Muf. 201, was, on the authority of the principal case, held erroneous in charging the executor with interest from the time the debts became due, without any proof of their having been then received. In this case (Cavendish v. Fleming), the court said (p. 201), that an executor, except as to debts lost by his negligence, or improper conduct, is chargeable with interest only on his actual receipts.

When, however, a debt is returned in an inventory of an executor without its being noted as either worthless or doubtful, it will be presumed, when he settles his accounts, after ample time has elapsed for him to have collected such debt, that he has in fact collected it in full;

These two causes were argued together, on the main subject of controversy; (viz. whether the decision of this Court in Tomlinson v. Dilliard, 3 Call, 120, should be reconsidered, and confirmed or rescinded;) though several other distinct points occurred in each case.

The cause of Tomlinson v. Dilliard having been "remanded to the High Court of Chancery, for accounts to be taken, and further proceedings to be had therein, according to the principles of that decision," was, in conformity to "the act of assembly, sent to the Superior Court of Chancery for the District of Williamsburgh; which Court thereupon decreed "that the defendant George Dilliard delivered to the plaintiffs all the slaves of Benjamin Edloe Tomlinson, the infant intestate, which came to him from Benjamin Tomlinson his father, and account for their profits; that he also account with the plaintiffs for the other personal estate which came to the said intestate in the same manner, and pay what shall be due thereon; which several accounts were directed to be taken by a commissioner, who reported a balance due from the defendant on the 1st of January, 1802, of 210l. 5s. 6d. consisting of 195l. 4s. 5d. principal, (being all (except 4l. 2s. 2d.) for the hire of slaves,) and 15l. 1s. 1d. interest; as per statement annexed, in which the interest was charged, on the sums which annually became due, from the 1st day of July in each year.

The defendant excepted to the report for the following reasons:

1. "That the hires of the several slaves are extended at too high a price, the said slaves being by no means worth so much;

2. "That interest is charged on the amount of the hire of the slaves; which ought not to be; for the hire of slaves, and the rent of lands, is always given in lieu of interest;

3. "That the defendant is not allowed a sufficient sum for maintenance of the slaves; the maintenance of which forms an item of credit in the said report.

The Chancellor, on the 26th of July, 1803, disallowed the exceptions, and, confirming the report, decreed that the defendant pay unto the plaintiffs the sum of 210l. 5s. 6d. with interest on 195l. 4s. 5d. part thereof, at the rate of 6 per centum per annum; from the first day of January, 1802, "till paid;" and their costs in the Courts of Appeals and Chancery: to which decree, on the petition of the defendant, a writ of supersedeas was awarded by this Court.

185 *In the case of Wyatt, Admin-

and he should be charged with such debt as if collected at such reasonable time as it ought to have been collected in. Anderson v. Piercy, 20 W. Va. 324, 325, citing principal case.

For further information on this subject, see monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

Practice in Court of Appeals—Rehearing.—The principal case was cited in Hilb v. Peyton, 22 Gratt. 560, as precedent for reconsideration of a previous decision. In P. C. & St. L. Ry. Co. v. Board of Public Works, 28 W. Va. 224, the principal case is cited as precedent for overruling the second point of the syllabus in Low v. County Court, 27 W. Va. 785.

istrator of Curtis, the bill (originally filed in the late High Court of Chancery, on behalf of Charles Curtis, of the County of Middlesex, and his infant daughter Elizabeth, against Peter Kemp, executor, and Harriet Murray, only surviving child of William Murray,) stated, that, about the beginning of the year 1787, the said William Murray died, leaving a widow, Mrs. Anne Murray, and three daughters, Mary Anne, Harriet, and Fanny; that he left a will, whereby he disposed of his lands, slaves and personal estate among his said three daughters; that the widow, in due form of law, renounced all benefit from the said will, and, some time after, married the plaintiff Charles Curtis, by whom she had three children, Christopher and Joanna Curtis, and the plaintiff Elizabeth; that, in March 1793, Mary Anne Murray, one of the daughters, died under age, unmarried, and intestate, leaving next of kin her mother and two sisters aforesaid, and her half brother and half sister Christopher and Joanna; that the said Joanna Curtis died in July following; that the plaintiff Elizabeth was born some time before the month of April, 1795, at which time the said Fanny Murray died, an infant, unmarried and intestate; that, in the same month, and after the death of the said Fanny, Christopher Curtis died; and that Anne, the wife of the plaintiff Charles, died in August following.

The plaintiffs contended that, on the death of Mary Anne Murray, Charles Curtis, in right of his wife became entitled to 1-4th of the slaves and other personal property of the said Mary Anne; that another one fourth vested in Fanny Murray; that Harriet Murray became also entitled to one fourth; and the remaining one fourth vested in Christopher and Joanna Curtis, in equal shares; that, on the death of Joanna, her share vested in her father; that, on the death of Fanny Murray, one third of her slaves and personal estate vested in Charles Curtis, in right of his wife; one third in Harriet Murray; and the

186 remaining one *third in the plaintiff Elizabeth and Christopher her brother, in equal moieties; and that, on the death of Christopher, his share both of the estate of Mary Anne and Harriet vested also in his father. They submitted their case to the Court, and prayed decree according to their rights.

The defendants, by their several answers, admitted the truth of the allegations in the bill; whereupon the Chancellor decreed, that, as to the real estate, the bill be dismissed; but, as to the personal, that the defendant Peter Kemp do render an account of his administration before Commissioners, and deliver and pay to the plaintiff, Charles Curtis, one half of the slaves and other personal estate of Mary Anne Murray, and four equal seventh parts of the slaves and other personal estate of Fanny Murray; and to the plaintiff Elizabeth Curtis, one equal seventh part of the said slaves and other personal estate of the said Fanny Murray.

The decision of the Court of Appeals in the case of Tomlinson v. Dilliard having taken place subsequently to this decree,

Thomas Muse, and Harriet his wife (formerly Harriet Murray) and Peter Kemp preferred a bill of review; being advised that the original bill ought to have been entirely dismissed, "because, according to the statute of distributions, the mother of the said Mary Anne and Fanny (who died infants and unmarried) and the children of their said mother by a second husband, were expressly excluded from any share of the property which they derived from their father;" to which bill of review the defendants demurred, and the plaintiffs joined in demurrer. The Chancellor, on argument, overruling the demurrer, reversed his former decree in toto, and dismissed the original bill with costs; whereupon an appeal was taken by Charles Curtis and Elizabeth Curtis; which afterwards abated by the death of the former, and was revived in the name of Peter Wyatt his administrator.

George K. Taylor, Wickham and Randolph, for the appellants, 187 *contended that the opinion of this Court, formerly expressed in the case of Tomlinson v. Dilliard, was erroneous, and might yet be retraced; the decree of the Court of Chancery having been interlocutory only. The two appeals now in question, and several others, had been brought up for the express purpose of having the point reconsidered; the public mind being generally dissatisfied, and the law not considered as settled by a single decision, concerning the propriety of which so great a diversity of opinion existed.

Hay, Nicholas, Warden and Call, for the appellees, controverted these positions; insisting that this subject, having been decided, ought not again to be discussed; and if discussed, ought to be decided precisely as before.

The argument on both sides was supported with great zeal and ability, during the 9th, 10th, 11th, 13th and 14th days of March, 1809; but a small part only can be comprehended within the limits of this work.

I. In support of the first point, (viz. that this Court had erred in the case of Tomlinson v. Dilliard,) it was said that the intention of the legislature in the 27th section of the act of distributions (a) could not have been to adopt, as to personal estate, the 5th and 6th sections of the act to reduce into one the several acts directing the course of descents; those sections being provisos, and containing terms properly applicable to real estate exclusively; such as the words "purchase or descent," "dower and curtesy." An infant cannot take personal estate by purchase or descent from father or mother. If the clause be taken at all, it must be taken altogether. If so, there must be dower or curtesy in the personal estate; which would be absurd.

Suppose the words donation, grant, last will and testament, and intestacy, substituted in their proper places in those provisos, so as to make them apply to personal estate; *still the effect, as 188 to the clause relating to property derived from the mother, would be nugatory;

(a) 1 Rev. Code, p. 164.

since, by the marriage, all the wife's goods and chattels belong to the husband.

In the commencement of the 27th section aforesaid, the legislature was extending privileges to the widow to which she was not before entitled; yet, by this construction, the concluding part is to deprive her of the whole, in case of the death of her child.

Again; the difficulty of applying the principle of preferring the blood of the first purchaser to the case of chattels is extreme; since, in every case, it would be necessary to ascertain whether sheep, hogs, or other things of a fluctuating and transitory nature, were derived from the father or mother.

A construction big with so many difficulties, inconveniences and absurdities, ought to be avoided if possible, and the Court should be astute to get rid of them. This may be done either by construing the provisos in the act of descents as applying to the subject matter only; (which is lands;) or by rejecting them as to personal estate, on account of the absurd consequences which would otherwise result; (a) or, thirdly, by construing the two acts (which both passed at the same session) as one instrument, and transposing the sentences so as to connect them properly, and make their meaning consistent and rational.

With respect to authorities, *Cutchin v. Wilkinson*, 1 Call, 1, was relied upon as in conflict with *Tomlinson v. Dilliard*, and deciding substantially the same question. If the point was not argued in that case, it must have been because the members of the bar thought it too plain for argument.

To shew the power of the Courts to correct the phraseology of laws, by restraining, enlarging, or modifying general words for the purpose of meeting the intention of the legislature, *Brown v. Turberville*, 2 Call, 395, was cited as a strong case; also *Martin v. Ford*, 5 T. R. 103; *Williams v. Pritchard*, 4 T. R. 2, and *Rex v. Pitt*, 3 Burr. 1338, Lord Mansfield's observations.

The counsel on the other side observed that all these arguments relate to the policy of the law, or what it ought to be; not to the meaning of the law, or what it is. The words of the statute are certainly in favour of the construction we contend for: and quotes in *verbis nulla ambiguitas, ibi nulla constructio contra verba fienda est*. On an appeal to the common sense of mankind 999 out of 1000 would be of opinion that the legislature intended what they said.

Neither does that construction lead to the absurd consequences imagined. Why should the words curtesy, dower, &c. be interpolated as to personal property, when such words are altogether unnecessary, and would be absurd? And, as to the incongruity of extending and diminishing the rights of the widow in the same section, there is none: her rights are extended in one respect, and diminished in another, so as to put them on a reasonable footing.

The want of reciprocity in the provisions of the act proves nothing: for, in law generally, the rights of husband and wife are

not reciprocal: yet the Courts must obey the law. Nor should the decision of the question be affected by the difficulty of identifying the property; since greater difficulty often occurs in cases of executory devises of personal estate. The tenant for life takes and uses it at pleasure; and, after his death, if he lives a hundred years, the identity must be proved.

II. As to the second point; that the opinion heretofore expressed did not preclude the Court from reconsidering the subject; the counsel for the appellants admitted the general rule that a final decision, by any Court of competent jurisdiction within the Commonwealth, (not appealed from or reversed,) is a bar as to the same point. This principle is universal; and does not apply to the Court of Appeals only. On a *scire facias* or action of debt on a judgment,

the original judgment is not examinable. So, *when this Court decides on a final decree, its decree is final: but the case is otherwise where it decides on an interlocutory decree: in that case, this Court stands in the place of the Chancellor, and is clothed with all his privileges. At common law no appeal lies from a judgment not final: but not so in Chancery. This Court is authorized by the act of assembly to take cognisance of interlocutory decrees, which the Chancellor can alter whenever he pleases. He has power to revise them; why not then this Court? Suppose a plain case of mistake; a receipt lost, and afterwards found. The Chancellor would surely have a right to alter his interlocutory decree according to the document so found. When the Court of Appeals has decided on an interlocutory decree, the cause is not ended, though it goes off the docket here; for either party, at pleasure, may bring it here again. Though a new appeal bond is given, the whole record is sent up, and the whole case is before the Court.

The decision, therefore, in *Tomlinson v. Dilliard*, being interlocutory, does not operate as a bar to a different decision at this time.

Neither is it a binding precedent. The Court, it is true, ought not to retract its decisions, except on such grave and weighty grounds as apply to this case. But those decisions ought not to be irrepealable and irreversible, however erroneous. This Court must be conscious of not being exempt from the lot of humanity; and the country would be better satisfied, if it should pursue the course of correcting its decrees when discovered to be certainly wrong. In the cases of *Cutchin v. Wilkinson*, (b) *The Commonwealth v. Beaumarchais*, (c) *Barnet v. Darnielle*, (d) and *Murray v. Carrotte, Costars and Co.* (e) the decisions were reconsidered at subsequent terms, and not regarded as binding precedents.*

191 *On the other side it was urged that, according to this doctrine, the

- (b) 1 Call, 1.
- (c) 3 Call, 122.
- (d) 3 Call, 413.
- (e) MS.

*Note. It does not appear from the reported cases, but from the Orderbooks, that this observation was correct.—Note in Original Edition.

decisions of this Court would be perpetually fluctuating; and great mischiefs would arise from the uncertainty of the law. This subject has been discussed between these very parties; and Tomlinson is now in possession of the property under the decree of this Court. Nothing was said in the petition for the supersedeas about bringing the merits of the case on the main point into controversy again. The decision excited universal attention, and was generally acquiesced in. A vast deal of property must change its owners, if that decision be now reversed; and, after all, a future Court might reverse the reversing decision.

Cases may, indeed, be reargued, during the same term, or afterwards, before the opinion of the Court is finally entered. But precedents when once established are obligatory upon the Court. The general assembly, by the act "concerning the distribution of unbequeathed personal estate," passed January 22, 1802, (a) shewed that they considered the case of Tomlinson v. Dilliard as a binding authority as to past cases, and not to be shaken but by a legislative act. They therefore passed a prospective law to provide for future cases only.

The Court should pause before it establish a principle which would detract from the solemnity of its own decisions. If the gentlemen succeed in what they contend for, the question, instead of being more at rest, will be more unsettled. There being two opposite decisions of this tribunal, who is to decide which is to prevail? Would we be precluded from applying for a rehearing? We should have a better right than they had; since the circumstance of two conflicting decisions would be in our favour.

That this was an interlocutory decree does not vary the question. It is admitted that interlocutory decrees not acted upon by this Court are always under the control of the Chancellor until his final decree. But why was an appeal allowed to this

192 Court if not to settle the principle? Is not *the decision here on an interlocutory decree equally solemn as on any other? Can the Chancellor, after an affirmance by the Court of Appeals of such a decree, alter it? No: it is obligatory on him, as well as on all other persons. A contrary doctrine would make this Court merely assistant to the Chancellor, and produce perpetual litigation. A bill of review for matter of law would lie to a decree of this Court; and, if refused by the Chancellor, an appeal might be taken, and the whole matter gone over again. This practice would be intolerably burdensome. When a decree has been affirmed, the money paid and properly charged, a reversal would have terrible effects. In this case, the Court decided the title to be with Tomlinson: yet, after all, it is attempted to take it from him; even though he may have sold the property.

So much upon principle: now for authorities. *Bampffield v. Popham*, (b) *Lord Peterborough v. Germain*, (c) *Le Guen v.*

Gouverneur, (d) and *Hartshorne, Rhineland, & Co. v. Slegt*, (e) are strong cases in our favour. The same principle, that decisions of the Supreme Court ought not to be disturbed, is recognised in *White v. Atkinson*, (f) which was a case of an interlocutory decree. In *Price v. Campbell*, (g) an error of inserting current money, instead of sterling, was overlooked by this Court, and afterwards corrected by the Chancellor: on appeal, this Court (notwithstanding justice required the correction of the error) said the Chancellor had no power to correct it; the decree of this Court being final and obligatory as fate. *Triplett v. Dunlop* (h) was a case to the same effect.

In reply, the cases cited were commented upon, and said not to support the doctrine contended for. *Bampffield v. Popham* shews that cases may occur in which former decisions of the Supreme Court might be changed; though that case was not such a one. *Woodman v. Willoughby*, (i) is to the same purport. *Lord Peterborough v. Germain* does not apply. *Le Guen v. 193 Gouverneur* would have been *decided by this Court as it was in New-York; but is only a decision upon the common point that the Chancellor had not a right to take up a question which might have been brought before a Court of common law. *Hartshorne, &c. v. Slegt* was as erroneous a decision as ever was made: and, moreover, being a common law case, does not apply to this, which is an equity case. *White v. Atkinson* only shews that the Chancellor cannot alter his interlocutory decree on the same evidence, after this Court has affirmed it. And in *Price v. Campbell* the error was acquiesced in; the counsel having failed to except to the report. The Court, therefore, refused to give relief, in obedience to the maxim "*volenti non fit injuria*."

The following additional points were made on behalf of the appellant Dilliard; besides those stated in the exceptions to the Commissioner's report.

1. That the estate of the infant had not been divided, but that of the father only.

2. A number of negro children had been born in the estate; some of whose births must have been after the death of the father: yet these had been considered as belonging to the father, and derived to the infant from him.

3. So, also, the profits of the real estate accruing after the death of the father, though belonging to the infant in his own right, had been considered as part of the personal estate of the father.

On the other side it was said that no proof appeared of the infant's having any property not derived from his father; that the increase of the negroes had been properly disposed of, according to the ordinary rule of "*partus sequitur ventrem*;" and that the profit regularly went to the person entitled to the estate generally.

The counsel for Wyatt, Adm'r of Curtis, v. Muse and Wife, contended that,

(d) Johns. N. Y. Cas. 580.

(e) 2 Johns. N. Y. Rep. 554.

(f) 2 Call. 876.

(g) MS.

(h) MS.

(i) Colles's Rep. p. 74.

(a) 1 Rev. Code. 426.

(b) Colles's Rep. of Parl. Cas. p. 1.

(c) 1 Bro. Parl. Cas. 281.

even if they were wrong on the
194 *main question, the Chancellor had committed an error in setting aside his first decree in toto; for it was clear, that, Mary Anne Murray having died in March, 1793, before the act of 1792 took effect,* (which was on the 1st of October, 1793,) the distribution of her estate was governed by the acts of 1785, c. 60 and c. 61; according to which, her mother was not excluded from inheriting a share of her estate, though derived from her father; to which share, (being one-fourth part,) of course Charles Curtis, in right of his wife, became entitled.

2. That Joanna Curtis having died in July, 1793, Charles Curtis, her father, became entitled, in his own right, to the share of Mary Anne Murray's estate, which had fallen to the said Joanna; being one-eighth part; and,

3. On the death of Christopher Curtis, in 1795, Charles Curtis, in like manner, became entitled to the said Christopher's share being one-eighth of the said Mary Anne's estate; notwithstanding the act of 1792, which was then in force, but did not apply against him; for, though the estate of Mary Anne Murray came from her father; and therefore the issue of her mother by a second husband were by that act excluded from inheriting; yet the inheritance had previously fallen to Christopher Curtis; and Charles Curtis claimed under him, not under Mary Anne Murray. In the case of *Blount v. Gee*, MS. it was settled, that an estate which did not come immediately from the father, though it might mediately, was not to be considered as restricted from going to the mother, or her relations.

Charles Curtis, therefore, upon the whole, was entitled to one half of the personal estate of Mary Anne Murray, deceased; and, so far, the first decree should not have been rescinded.

195 *Tuesday, May 1, 1810. The Judges delivered their opinions.

JUDGE TUCKER pronounced the following, in the case of *Dilliard v. Tomlinson*. This is the very same case which was decided in this Court, October term, 1801, and is reported in 3 Call, 105, under the title of *Tomlinson v. Dilliard*. In October, 1803, a petition of appeal was allowed by this Court on errors suggested in carrying the decree of this Court into execution. In the statement presented by the appellant's counsel it is suggested that the appeal was prayed for and allowed by the Court; not only on account of the alleged errors after the decree of this Court was rendered, but for the purpose of inducing this Court to reconsider the original decree, in the appeal, upon which they have already decided, upon full argument, and mature consideration, as appears by the report above referred to. As I had not the honour of being a member of this Court when the petition of appeal was allowed, I must rely on the appellant's counsel for the correctness of this statement.

Whether this Court hath power, upon a second appeal made in the same cause, to

reconsider and reverse its former decision upon a point solemnly debated at the bar, and with no less solemnity considered and decided by a full Court, is a point of great magnitude and importance to the Commonwealth. If it hath such a power, (which I strongly incline to doubt,) it ought not to be exercised but upon some very great and important occasion of general concern and of great magnitude to the parties. The number of appeals taken upon the same point since this petition of appeal was allowed, is evidence of the inconvenience which might ensue from the indulgence of such a practice; and the great length of time which has been consumed in the discussion during the present term, (nearly five days,) warns us to beware of the consequences which might ensue from a departure from that principle which regards

the decision of this Court as final and
196 conclusive between the parties *in the same cause, upon any point which shall have received a full discussion at the bar, and the mature consideration of the Court. (a) It is unnecessary to enlarge further upon this previous question in the present case, because, after an attentive perusal and consideration of the arguments both of the bar and of the bench, in the case of *Tomlinson v. Dilliard*, I am constrained to say, "that the words of the law are too plain and positive to admit of doubt or construction;" as was said by the Court in their decree in that case. I shall therefore proceed to consider the errors alleged against the Chancellor's decree, after the decree made in this Court.

The first exception to the Commissioner's report appears to me to be without foundation. The second, that interest is charged upon the hire of the slaves, though not very important in amount, being only 15l. 1s. 1d. is so in principle. The defendant is charged with interest from the very day the negroes' hire became due; whether it were received by him or not. This cannot be right: for it presupposes a fact which seldom or never happens in this country; that a debt is always punctually paid the very day it falls due. But, admit it were received on the day it became due; is an administrator chargeable with money received even upon a bond or mortgage, if there be no person authorized to receive it from him? Suppose a creditor out of the state, without any known attorney or agent within it; is the administrator chargeable with interest on the money in his hands which he has no means of paying away? Suppose, also, that the distributees are infants who have no guardian assigned them; is the administrator to pay interest until they have a guardian, or come of age? Suppose, as in the present case, he knows not to whom he is by law bound to make payment; shall he be charged with interest, until the question shall be decided by this tribunal? Lord Ch. Loughborough, in the case of *Creuze v. Hunter*, says, "I always understood the constant course of the Court was, that debts carrying interest had interest computed by the *report to the time of
197 actual payment; but simple contract

*See the case of *Proudfit v. Murray*, 1 Call, 401, and *Brown v. Turberville*, 2 Call, 300.

(a) *Morris, Overton and others v. Ross*, 2 H. & M. 408.

debts, not carrying interest had no interest, computed by the Master." He then asks, "Does any one remember an instance of the Master's computing interest on such debts as, on his report, do not carry interest?" (a) What is the hire of a slave but a simple contract debt arising from the labour of the slave? If so, is it not within the rule thus emphatically recognised, as the constant course of the Court of Chancery in England, from which we have borrowed almost all our ideas and rules of equity? I am, therefore, of opinion, that there is error in so much of the Chancellor's decree as allows this charge of 15l. 1s. 1d. for interest on the negroes' hire; and a still further error in allowing the interest on 195l. 4s. 5d. the amount of the slave hire received by the administrator beyond the date of the decree; as was decided in the case of *Brewer v. Hastie*, (b) and *Deans v. Scriba*. (c)

The next question is, in what manner this 195l. 4s. 5d. arising in part from the hire of negroes, and, in part, perhaps, from the rents of lands, is to be distributed. In the case of *Blount and Wife v. Gee*, decided in this Court, November, 1, 1805, (d) it was determined that Mrs. Gee, the mother of Sarah Jones, was entitled to inherit lands from that daughter who died an infant, which she had derived from her brother John Norfleet, to whom the same were devised by his father, who was also the father of Sarah Jones. In that case, however, John Norfleet had attained his age of twenty-one years: but I was of opinion, and understood the rest of the Judges who sat in the cause, to concur with me in that opinion, that the mother might have inherited these lands although John Norfleet had not attained his age of twenty-one years; for that the descent from the father to the daughter was not immediate, but broken: and therefore not within the exceptions contained in the fifth and sixth sections of the law of descents. I incline to adopt the same construction with respect

to rents, issues and profits, either of land or slaves, and even of *personal estate generally, where the same can be clearly ascertained and identified as such. Otherwise, they must go with the principal subject, whatever it be. Upon these grounds, I think this money should be distributed according to the fourth section of the law of descents, and not according to the fifth, as the property immediately derived from the father must, according to the act of 1792. But as this point seems already decided in this case when it was formerly before this Court; and, as there may be a difference of opinion upon it; I shall, on the present occasion, press it no further, but submit to the opinion of a majority of the Court.

Upon the whole, I conceive the Chancellor's decree ought to be affirmed, except as to the charge of interest on the hire of the negroes as before mentioned.

JUDGE ROANE delivered the following opinion as applicable to the two cases of

Dilliard v. Tomlinson, and *Curtis v. Muse*.

The general question occurring in both these cases is, whether the exceptions contained in the 5th and 6th clauses of the act of descents, in relation to infant intestates, extend to personal estate as well as real. In the case of *Dilliard v. Tomlinson*, a further question conditionally presents itself; namely, whether, in the event that the act does not, in the opinion of the Court, extend to personal estate, the Court has power to correct the decree formerly rendered in that case, as well as to render decrees, in other cases, pursuant to such construction of the act. This question becomes unnecessary to be decided, (as I understand,) in consequence of the opinion of the majority of the Court upon the principal question; and therefore I shall not enter upon it: the rather, because the question may rarely, if ever, be expected to occur in future.

In giving my opinion upon the general question aforesaid, I shall consider it as if it were an entirely new question; as if it had never before been acted upon or

discussed by *this Court. In doing so, I am warranted by the decision of this Court at a former term; by which it was resolved, that that question should be reconsidered, and an argument upon it was directed by the Court, and has been accordingly had, at great length. In coming to this decision in favour of a reconsideration, the Court was justified by innumerable precedents in this Court; in which the Court has admitted its own fallibility, and corrected its former errors. I will mention, in particular, the cases of *Bedinger v. The Commonwealth*, (e) in which this Court disclaimed a jurisdiction which it had exercised in many former instances, two of which had also gotten into print,* (a circumstance which, with upright Judges, certainly can make no difference,) and in which the Judges had also delivered seriatim opinions. Great as my respect is for this Court, I do not believe that it cannot err: nor can I believe that its decisions, if recent and erroneous, ought not to be corrected. I have the authority of Judge Pendleton, in the case of *Jolliffe v. Hite*, (f) for saying that they ought. Considering that the former judgment of this Court, in favour of a new argument of the question, is as obligatory upon us as the prior decision itself, which is the object of reconsideration; and that it has always been understood by the bar, and the parties concerned, that that question was to be reconsidered by the Court; I cannot but express my surprise, that the Judge who has gone before me, seems to have shrunk from the discussion thereof, and reposed himself upon the sanctity of the former decision. I will go farther, and say, that such reconsideration is not only proper, on general principles, in relation to the decisions of all fallible tribunals, but is peculiarly so, in relation to the particular decision now before us. That decision was a single and a recent decision: the appeal which seems to have been tendered to the Legislature

(a) 2 Ves. Jun. 166, 166.

(b) 3 Call. 24.

(c) 3 Call. 419, 420.

(d) MS.

(e) 3 Call. 461.

*Vide Newell v. The Commonwealth, 2 Wash. 88, and Jones v. The Commonwealth, 1 Call. 555.

(f) 1 Call. 328.

upon it, by Judge Pendleton, (3
200 *Call, 119,) had been immediately
acted upon by that body, and the de-
cision of the Court was reversed, (if I may
so express myself,) by a declaratory act of
the Legislature: and a rehearing of the
question had shortly thereafter been
granted by this Court. Under these cir-
cumstances, (to say nothing of the probable
state of the opinion of the bar, and the pub-
lic,) the decision had not been considered
by our citizens as final and irrevocable, nor
had ripened into a rule of property. Few
or none of the consequences, therefore, re-
sulting from overturning the settled rules
of property, can be expected to arise, in
any event, in this case.

In giving my opinion at present, I beg
leave to have reference to, and to adopt, as
part of this opinion, the one I formerly
gave in this case. (3 Call, 109.) That op-
inion contains an imperfect, irregular, and
rapid view of my ideas of the question, at
that time: I shall now subjoin a few fur-
ther observations upon it; but cannot omit
declaring, that the ideas I submitted on
that occasion, have, on long and mature
deliberation and reflection, been rivetted
upon my judgment, which, consequently,
remains entirely unchanged.

I begin by saying, that the position that
a preceding law or statute is to be consid-
ered as unchanged by a new statute, until
such change be clearly shewn to be operated
thereby, emphatically exists in relation to
a Legislature of revision. The Legislature
of 1792 was a Legislature of revision, in
relation to the general laws, although its
powers to alter them is at the same time
readily admitted. The committee appointed
to report upon the laws, by the act of 1790,
c. 20, were confined, by the terms thereof,
to reducing multifarious acts into single
acts; or, in other words, to the province of
simplifying the laws, and not suggesting
changes in them. Such was also the deci-
sion of the Legislature of 1791, (a) in its
resolution in answer to a letter, upon this
subject, addressed to them by the revisors.
When to these considerations we add, that
the Legislature both before and after
the enacting the act of 1792, viz.

201 *when they enacted the act of 1790, c.
13, and that of January 22, 1802, (b)
were steady in confining the exceptions in
question to real estate only, it will require
very strong features indeed, in the inter-
mediate act of 1792, to extend them to per-
sonal estate also. I will here remark that
Judge Pendleton, in delivering his opinion
formerly in this case, (3 Call, 119,) laid
great stress upon the coincidence of senti-
ment in the Legislature, it having, both in
1785 and 1792, (as he supposed,) declared,
that land and personals should go the same
way. While I must be permitted to say, that
in relation to the construction of the act of
1792, that was taking for granted the very
thing to be proved, I must beg leave to bor-
row and apply this strong argument of that
great Judge, in relation to the acts of 1790
and 1802, both of which are clear beyond the
possibility of a doubt, against the extension
of the principle to personals; and the act of

1802 is a declaratory act in the very teeth
of the former decision of this Court.

I take it to be an undoubted rule in the
construction of statutes, that general words
in a clause thereof may be restrained by
particular words in another clause, subse-
quent thereto. (c) Applying this rule to
the case before us, if, instead of the gen-
eral reference in the act of distributions,
for persons and proportions, to the act of
descents, an insertion had been made in
the first clause of the act of descents, extend-
ing it to personal as well as real estate, and
to read thus: "That henceforth when any
person having title to any real estate of in-
heritance (or personal estate) shall die,
&c.; and if these words, "or personal es-
tate" had been (as they are) omitted in the
5th and 6th sections, such omission, singly
taken, would operate a restraint upon the
general words, and narrow the operation of
the said sections to real estate only: and a
fortiori, when the terms "derived by pur-
chase or descent," and the provisions rela-
tive to "curtesy and dower," (expressions
and provisions which properly appertain
to real estate, and not to personal,) are
found therein, and still more so as
202 the 6th *section (as will be shewn
hereafter) would be, as to personal
estate, a mere nullity, on account of the
incompetency of an infant to derive per-
sonal property from his mother, it being
intercepted by the superior claim of her
husband.

So, on the other hand, if, instead of such
reference, or such insertion, a particular
law of distribution of personal estate had
been enacted, precisely similar to that of
descents, merely substituting the terms
"personal property" in lieu of "real estate
of inheritance," and the 5th and 6th sec-
tions were still found therein precisely as
they now exist; it might be reasonable to
conclude, from the foregoing considera-
tions, that they slipped into the act by mis-
take, related to a subject different from
that of the act, belonged properly to an-
other law, and did not apply to the case of
personal estate at all. That, however, is a
broader position than is necessary to be
taken in this case; in which, considering
the insertion to have been made as afore-
said, on the principle "referendi singula
singulis," and of reading the act distribu-
tively, in relation to the different subjects
thereof, the 5th and 6th sections would nat-
urally fall within the class of the real, and
be rejected in regard to the personal estate.

The general reference in the distribution
act to the descent act, for persons and pro-
portions, certainly cannot operate any great
effect in applying the exceptions to personal
estate, than if the canons of descent had
been particularly repeated with respect to
personal property, either in a joint or sev-
eral act as aforesaid; in either of which
cases (it has been endeavoured to be shewn)
the 5th and 6th sections would be taken in
a sense restricted to real estate. This mode
of a general reference was adopted in the
act of distributions for brevity only; and a
specific insertion as to personal estate was
only not made in the act of descents, be-
cause that act properly related to real and

(a) See acts of that session, p. 37.

(b) 1 Rev. Code, p. 426.

(c) 6 Bac. 381, and JUDGE PENDLETON, 2 Call, 406.

not personal estate, and the reference was properly made in the distribution act, because that act on the other hand properly related to personal estate. These were the only grounds and motives
203 *of the present arrangement, and therefore no greater effect will be produced than if a more particular and detailed adoption of the canons of descent had been resorted to, in relation to personal property.

I presume it is not necessary to quote authorities to shew, that a statute compounded of or relating to several subjects, may be read distributively in relation to each: nay, we are even told that the same words in a statute will bear different interpretations; and that these words may be considered as remedial, or penal, for example, (as the case may be,) according to the nature of the suit or prosecution founded thereon. (a) So, again, taking the construction of a statute by analogy to that of a will, which, when we are in quest of intention, must stand on a common foundation with it, (with this additional circumstance concerning the former, that the Legislature are supposed to know the meaning of the technical words they use, (whereas testators are considered in the law as inopes consilii,) and are, therefore, rather than a testator, to be bound by them,) we are told in the case of *Forth v. Chapman* (b) recognised in this Court in the case of *Hill v. Burrow*, (c) that if a will devises real and personal estate to A.; and, if he die leaving no issue of his body, then to B.; that the devise shall be expounded to mean an indefinite failure of issue as to the real estate, and be restricted to issue living at the death as to the personal; shall be taken in a legal sense in relation to the former, and a vulgar sense in relation to the latter; and that the same words shall be taken in different senses as to the different estates, and the will be read as if it had been repeated by two several clauses. If this principle be extended to the case before us, and the compounded act in question be twice read, in relation to each subject, the 5th and 6th clauses will be considered as nullities when the act is read merely with respect to personal estate.

If the act in question be not read distributively as to each subject, (the real and personal estate,) the term "infant" would be taken in one sense only, and in-
204 fancy would be *construed to continue up to 21 as to personal as well as real estate, on the ground that personal estate, which is the accessory, should follow real, which is the principal: the consequence of this would be, that, in relation to all the life of an infant between 18 and 21, the ground of the provision of the law in this instance would wholly fail, that provision being bottomed only upon the incompetency of an infant to dispose of his estate: but that incompetency does not exist as to personal estate, after the age of 18 years. It follows irresistibly, therefore, under pain of this and similar consequences and inconveniences, that the act is to be read distributively in reference to the several subjects

thereof; and that, in this particular instance, infancy is to be understood, as to real estate, to continue up to the age of 21 years, and to expire as to personal at 18.

Another rule is, that a construction which tends to absurdities is not to be admitted. (d) The extension to personal property, of the exception in question, leads the Legislature into the absurdity of supposing (contrary to another principle that the Legislature is not to be supposed ignorant of the proper meaning of technical terms or phrases, or of the general provisions of the common and statute law) that personal property is to be acquired by "purchase," or "descent;" that a husband succeeds to personal estate as tenant by the "curtesy," and a wife as tenant "in dower," and that an infant can derive personal estate "from his mother," in derogation of the superior right of her husband thereto, as established both by the general provisions of the common law, and the recognition of that principle in the act of distribution. (e) We are not at liberty to garble the 5th and 6th sections, by throwing out the 6th as being wholly insignificant as applied to personal property, and by rejecting the provisions relating to "curtesy" and "dower," contained in both, as being only applicable to lands: we must take the said sections altogether; and, when so taken, they completely and effectually exclude the idea of an extension of the principle to personal property. We have as much

205 *power to reject, on this ground, the whole of those two sections, as to reject the 6th section only, together with so much of the 5th and 6th sections as speaks in relation to "curtesy" and "dower:" we can as well reject the proviso itself, as reject the proviso of that proviso. We must not convict the Legislature of the absurdities just mentioned: we must rather say that the exceptions in question were intended to apply to "real estates of inheritance" only, as the latter of the proviso imports, and to which it is properly adapted in every point of view. We must permit the particular words in the clauses in question, having that effect *ex vi terminorum*, to restrain the general words of reference, which would otherwise lead to such absurdities.

Again, a statute is to be so construed, that no clause, sentence or word shall be void, superfluous, or insignificant. (f) In the case before us, the whole 6th section will be void, superfluous and insignificant, if applied to personal estate, unless we repeal the provisions of the common law, which prevent a child's deriving personal property from his mother, by giving it to her husband on the marriage: but, on the contrary, the right of the husband thereto, is recognised and admitted, as aforesaid, in the same clause of the act of distributions, in which the general reference in question is made. It is of no avail to say, that a child may, in some cases, derive personal estate from his mother also as where she has, after the death of the husband, acquired such,

(a) 1 Bl. Com. 88, Christian's note.

(b) 1 P. Wms. 663.

(c) 3 Call. 351.

(d) 1 Bl. Com. 91.

(e) 1 Rev. Code, 164, s. 27.

(f) 3 Bac. 880, and *JUDGE v. FENDELTON*, in *Brown v. Turberville*, 3 Call. 406.

and has not again married: that, although a possible, may be considered as a rare case; and statutes are to be expounded in relation to cases "quæ frequentius accidunt." (a)

It is further held that no statute is to be so construed as to be inconvenient; and that consequences may be resorted to where the meaning of a statute is doubtful; which it may be, although the words of any particular clause (separately taken) are clear. (b) The consequences which should influence us in this case, are not only the difficulties and absurdities before stated, but 206 others which grow out of "the nature of the subject, (personal property,) to be hereafter more particularly noticed. One of these consequences, more particularly, is, that the rejection of the 6th section, as aforesaid, would not only contravene justice, and the general policy of the act, but unequally contravene (owing to the paramount laws on that subject) the clear intention of the Legislature, in the exceptions in question, which was, that property coming from the mother should go to her relations, as well as the converse: but the construction I am now combating would operate differently, and give all personal property whatsoever, however derived to the infant, to the relations on the part of the father!

In the case of *Brown v. Turberville* such consequences were adjudged sufficient to control the express letter of the statute; and words were supplied, or interpolated therein, rather than overthrow and derange the general scope and policy of the act. The construction was made in that case, as I think it ought to be in this, under the influence of that rule of construction which admits a statute to be construed by equity, contrary to the letter, (which equity here stands for the intention of the legislator), and considers that a thing (whatever the letter of the statute may be) is not within the statute, if it be not within the meaning thereof.

Another rule of construction, of most overruling influence in the present case, is, that all statutes in *pari materia* are to be taken together as one system, and, in a case of doubt, to be construed consistently. (c) Thus, in the MS. case of *Rex v. Loxdale*, referred to in the above cited passage of Bacon, it was held that, "as the statute of 39 Eliz. was undoubtedly under the consideration of the Legislature, when that of 43 Eliz. was made, it ought, although long since expired, to be taken into consideration in construing the latter statute, for that it is a rule, that all statutes which relate to the same subject, notwithstanding some of them are expired, or not referred to, must be taken as one system, and construed consistently." Again, the English statute of 22 and 23 Car. II. 207 having enacted that every "person shall be excluded from killing game, "not having an estate of inheritance of the clear yearly value of 100l. or for life, or having a lease or leases for 99 years, of the clear yearly value of 150l." and a doubt

having arisen whether the words "or for life" should be referred to the 100l. or the 150l., the Court of K. B. having looked into the former qualification acts, and found that the qualification was an estate of inheritance of 10l. per annum, and an estate for life of 30l. a year, they presumed that it was still the intention of the Legislature to make the yearly value of an estate for life greater than that of one in fee, although the same proportions were not preserved in the act in question; and decided accordingly. (d) When to these authorities we add the foregoing considerations relative to the character of the Legislature of 1792, as a Legislature of revival quoad the public laws of the Commonwealth, and which as such undoubtedly had all the laws on the subject under their consideration, and that the Legislature, both before and since the act of 1792, as aforesaid, have excluded the sections in question from an application to personal estate, (to say nothing of the other considerations before mentioned,) it follows, emphatically, that the original act of 1790, is also to be considered in forming a construction in this instance: and, if so, it is completely decisive in favour of my idea; for it not only is confined, expressly, to "real estates of inheritance only," but the Legislature having in one section of the same act (sec. 2,) also had reference to and amended the act of distributions, and not having extended the provision in question to personal estate, in terms, it follows that that act (which indeed has never been denied) is exclusively confined to real estate.

On this point, so decisive of the question before us, of the competency of the Court to look into the act of 1790, in forming a construction upon that of 1792, I find a strong corroborative opinion of Judge Tucker himself, as stated in his edition of *Blackstone*, vol. 2, Appendix, p. 24. Speaking of the decision of this Court, in 208 the case of *Brown v. Turberville*, he says that, "although" (as I understand him) "that decision could not be justified if the act of 1792 had been an entire new law; yet being, in its present form, altogether a piece of patch work, the same construction cannot be made upon it as if it had been made originally what it now is." If that act be a piece of patch work, the act of 1790, c. 13, must necessarily be a part thereof: for we are told by Judge Pendleton, in delivering his opinion in the case of *Brown v. Turberville*, (as the fact undoubtedly is,) that the act of descents of 1792 was compounded only of the act of 1785 and that of 1790, c. 13. This act of 1792, therefore, not being "an entire new act," but compounded as aforesaid, we are justified in looking into both the parts of which it is compounded, as well by the opinion of the author just cited, as by the general authorities I have mentioned: and if we look into the act of 1790, c. 13, we cannot possibly wink so hard as not to see that personal estate stands utterly excluded thereby.

It is another fundamental rule in the construction of statutes, that it is the business of Judges to know the mischief which

(a) 3 Bac. 388.

(b) 6 Bac. 391.

(c) 6 Bac. 362, Doug. 30.

(d) *Lowndes v. Lewis*, stated by Christian in a note to 1 BL. Com. 60.

the statute was meant to remedy, and "so to construe the act as to suppress the mischief, and advance the remedy:" (a) a construction which leaves the mischief in full force and unredressed, and, a fortiori, one which enlarges or creates that mischief, is utterly inadmissible. We are told by Judge Pendleton, in the said case of *Brown v. Turberville*, that the mischief of the common law in relation to land, which was meant to be put an end to by the act of 1795, was "the inquiry when a man died intestate, perhaps at fourscore, how he came by his land;" and that this was done away by that act; and only restored by the act of 1790, in relation to land, during the short term of the infancy of a minor: that mischief is not permitted to exist, even in relation to land, for a longer term than that. Now, when we consider that land is permanent, and passes only by deed or will, and that acquisitions thereof can, therefore, be easily traced even for the term of

209 fourscore years, whereas *personal property, being perishable and transitory, and passing also by mere delivery, (which circumstance also would give rise to much perjury and false swearing,) cannot readily nor easily be traced even for 18 or 21 years, shall I go too far to affirm, that the mischief of the common law (admitting it had ever applied to personals) is permitted, by this uniform construction, to exist in a greater degree with respect to chattels than to lands? or, in other words, that the lapse of 18 or 21 years is entirely as fruitful of mischief and difficulties, as to personal estate, as the lapse of fourscore years would be in relation to lands? It cannot be denied that the term of 21 years, is, in effect, a longer term in relation to tracing the genealogy of a sow and pigs! for example, than a century is relatively to a tract of land, under all the care the law has taken to place on record memorials of all conveyances of land whatsoever. The extension, therefore, of the limited term in question to the case of chattels, is entirely illusory and unequal: it undoubtedly opens a door to more mischiefs when applied to personal estate than when applied to lands, and is, in effect, a longer term when applied to the former than the latter; a consequence unavoidably resulting from the different natures of the subjects. Under pretence, therefore, of permitting the continuance or restoration, in part, of a mischief which never did exist in relation to chattels, we must take care not to create that mischief de novo, in its full extent, on the other hand, by implication, and under the delusive belief that it is merely coequal under a term of time, which, though nominally equal, is unavoidably rendered otherwise (to the disadvantage of chattels) by the discordant nature of the subject. I will here add, that, inasmuch as this principle of the blood of the first purchaser is to be applied to chattels, for the first time, in our code, it would require a much clearer legislative declaration to have that effect, than under a contrary state of things, than in the case of lands, on the other hand: it is much more natural and easy to suppose that the Legislature meant to

210 *restore in part, a system immemorially existing in our country till of late, as relative to land, (to which subject also it is not in so great a degree unadapted,) than that they meant to create in its full extent a new principle, never before found in our code, as applicable to chattels, and which stands interdicted, as to them, by the actual difficulties of the case, and by irremediable circumstances, growing out of the nature of the subject.

In making the construction in the present case, it must never be forgotten, that it is a fundamental rule, that all statutes are to be expounded with reference to the nature of the subject matter thereof; which (whatever may be the words of a particular clause of an act) is supposed to have been always in the contemplation of the legislator, and all his expressions are to be directed and controlled thereby. (b) Thus, (to omit the common-place examples upon this point,) although the general words of our act of distributions refer the distribution of personal property to the rules contained in the act concerning descents, which requires land to be divided specifically, ad infinitum, I presume it would not have required legislative aid to have authorized a Court to depart from the letter thereof, and decree a division by means of the sale of a slave, who (individually taken) is not so partible: the nature of the subject in this case would prevent the division of the slave into two parts, and control the effect of the general words of the statute. And, again, if a question were to arise under doubtful or general words of an act adopting the principle of the blood of the first purchaser relatively to chattels through all time, (and I see little or no difference (as I have already said) between that case and such adoption for the long term of 21 years as aforesaid,) the difficulty of ascertaining the quarter whence they were derived, amounting, in many, if not most cases, to an impossibility, and growing out of the nature of the subject matter, would undoubtedly turn the scale against the application of the principle, to property

211 of that kind. That, *in truth, is the question now before us: it differs from the case at bar only in degree, not in principle.

But we are told that these tyrannical and cabalistical words "same persons and proportions" are so imperative as to admit of no exception, and that the two species of property are to go to the same persons, and in the same proportions, in all possible cases whatsoever. This, it must be admitted, is not universally true: it is not true in the case of an alien, who is permitted to succeed to personal estate, and is prohibited from inheriting real. If there be an alien in the way, therefore, the two subjects do not go to the same persons; nor do they go in the same proportions; for, the alien being set aside in relation to lands, the remaining parceners will get a greater proportion of the land thereby: they will, in such case, get a greater proportion of the lands than of the personal estate of the infant, notwithstanding the reference in question. While we yield up this fa-

(a) 1 Bl. Com. 87.

(b) 1 Bl. Com. 60.

vorite idea of uniformity, in obedience to the provisions of the ordinary laws of alienage, why shall we not also succumb to those overruling and paramount considerations, growing out of the nature of the subject, which, in point of fact, and under the actual operation of the rule, set such uniformity at defiance?

My conclusion then is, that the act of descents merely gives the general rule for the distribution of personal property by reference to the act of descents: but that, taken as well in relation to other laws or statutes, as to considerations which are equal to such laws or statutes, it is only "lex sub graviore lege." I will not bottom myself upon the mere letter of the statute, (and that, too, couched only under general words of reference,) and obstinately contend for a construction which is reprobated by the actual nature of the subject, confronted by so many absurdities, contradictions, inconveniences and incongruities; and the consequences of which will operate undoubtedly against the manifest intention of the Legislature.

212 *Upon the whole, I am of opinion that the law is for the appellants in both the cases, (of Dilliard v. Tomlinson and Curtis v. Muse,) and that the decrees therein ought to be reversed. As, however, the other Judges are of a different opinion, I shall be ready to pass my opinion upon any subordinate points of a decree to be rendered, pursuant to that of the majority of the Court.

JUDGE FLEMING delivered the following opinion in the case of Dilliard v. Tomlinson. Three points were made by the appellant's counsel.

1st. Whether the former decision in this case be a bar to a rehearing of the merits of the cause, respecting the rights of the parties? If not,

2ndly. Whether the merits be not in favour of the appellant? And, if not,

3dly. Whether there is not error in the report of Master Commissioner Rose, respecting the profits of the negroes in question; and whether there is not error in the decree, affirming that report; and in decreeing interest on 195l. 4s. 5d. from the first day of January 1802, until payment shall be made?

The first was a point that I did not expect would have been made; though much was said in support of it; but the only plausible argument used was, that the decree of this Court, reversing that of the Chancellor, was an interlocutory decree, and therefore open to future discussion. That decree was made by a full Court, consisting of five members, after able and solemn arguments of counsel, and long deliberation of the Judges; and the rights of the parties respecting the subject in controversy clearly and finally decided by a majority of four to one: and what has been called an interlocutory decree, was a consequential and necessary order, growing out of the nature of the case, for carrying into effect the decree that had so expressly, and conclusively, determined the rights of the parties. And should this Court, the dernier resort in all our judicial proceedings,

213 *consisting now of only

three members, (but of whatever number it may consist, it makes no difference as to principle,) furnish a precedent to reverse its own judgments or decrees, after a lapse of eight or nine years, the evil consequences would be incalculable. That great and many mischiefs would consequently ensue, must, I conceive, be so obvious to every reflecting mind, that it seems unnecessary further to animadvert on the subject.

2. With regard to the second point, "whether the merits be not in favour of the appellant?" the decision of the first seems to preclude the necessity of any remarks upon it; but out of respect to the ingenious arguments of the counsel who stated it, and for my own satisfaction, I reconsidered the subject with great attention; but the more I reflected on it, the more was I convinced of the correctness of the former decision of this Court. I am not, generally tenacious of my own opinions; but all the law-learning and eloquence of Westminster-Hall could not convince me that the decision (as the law then stood) was erroneous. The words of the law were, in my conception, too clear and explicit to admit of a doubtful meaning.

3. With respect to the third point, whether there was not error in the report of Master Commissioner Rose, respecting the profits of the negroes in question, and whether there is not error in the decree affirming that report; and decreeing interest on 195l. 4s. 5d. from the first day of January, 1802, until payment shall be made?

I discover no error in so much of the report as states the profits of the negroes in question to be 195l. 4s. 5d. and is affirmed by the decree; but there appears to be error in so much thereof as allows 15l. 1s. 1d. interest on those profits; and there is error in directing it to be continued beyond the date of the decree, which was not, at the time of making the decree, authorized by law, the act allowing Chancery Courts to award interest on final decrees, not having passed until the 20th of January following: but, as to the profits themselves, I have no

214 doubt but that the appellees *have a right to them, in exclusion of the mother, and any relations on the part of the mother; not only because this Court hath so adjudged it, but also, because it seems clear to me that the right to profits follows the right to the subject out of which they issue, as the shadow follows the substance.

I am therefore of opinion that the decree ought to be reversed, so far as it respects the interest, and affirmed as to the residue.

The following was entered as the decree of this Court.

"The Court is of opinion that there is error in so much of the said decree as directs the payment of the sum of 15l. 1s. 1d. by the appellant, as administrator of Benjamin Edloe Tomlinson, deceased, for interest on the hire of slaves, for which he is supposed to have been chargeable from the day the money for their hire became due from the persons to whom the slaves were hired, although there be no proof that the same was then received by the said administrator, and it was in this case doubtful to whom

the same ought to be paid; and, also, in this, that the interest upon the same was directed to be continued beyond the date of the decree, which was not then authorized by law. Therefore, it is decreed and ordered, that the said decree be reversed and annulled; and that the appellees pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And this Court, proceeding to make such decree as the said Superior Court of Chancery ought to have pronounced, it is further decreed and ordered, that the appellant pay unto the appellees the sum of 195l. 4s. 5d. and their costs by them expended, as well in the prosecution of their appeal formerly in this Court, as in the prosecution of their suit in the said Superior Court of Chancery."

215 *The following opinion was pronounced in the case of Wyatt, Adm'r of Curtis, v. Muse and Wife, by

JUDGE TUCKER. This cause depending in great measure upon the same principles as that of Dilliard v. Tomlinson, I find it necessary to say no more upon the subject, generally. The limitations in the will of William Murray, the father of the infants Mary Anne and Fanny Murray, deceased, and of the complainant Harriet Muse, leave no question to be decided as to the operation of the law of descents upon that portion of his estate.

But I am of opinion, that the slaves and personal estate of those infants respectively are to be distributed among their next of kin, according to the course of law at the time of their respective deaths; that is to say, that the slaves and personal estate of Mary Anne Murray ought to be distributed between her mother and surviving sisters, in the manner prescribed by the act, passed in the year 1785, entitled an act directing the course of descents, which act, as to personal estate, was in full force at the time of her decease. And that the slaves and personal estate of Fanny Murray, which were derived to her immediately from her father William Murray, upon her death became liable to distribution according to the course in which lands are to descend, under the act passed in the year 1792, entitled an act to reduce into one the several acts directing the course of descents; subject to the proviso which is contained in the fifth section of that law. But that the slaves and personal estate of that infant, which were not immediately derived from her father, including under that description the rents, issues, and profits of lands, the hire and increase of slaves, and the interest of money, or any other property acquired after the death of the father, (including also in that description the sum of 100l. charged upon the lands devised to the complainant Harriet Muse, on the contingency in the father's will expressed,) where the same can be clearly and definitively ascertained, ought to be distributed among the next of kin of that infant,

216 in *the same manner, and in the same proportions, as if she had attained her full age of 21 years at the time of her decease. I am further of opinion, that if it shall appear that the complainant Harriet Muse, or her husband, entered upon the

lands devised to her upon the contingency of the death of her sister Mary Anne, on her paying to her sister Fanny Murray, one hundred pounds current money, that complainant, or her husband, ought to be charged with interest upon that sum from the time of such entry, and possession taken and held, or upon so much thereof as ought to be paid to the distributees of the said Fanny Murray, other than the said Harriet Muse. And that this cause be sent back to the Court of Chancery with directions that an account (if required by either party) be taken, and distribution made according to these principles.

I wish it to be understood that Charles Curtis, the husband of Anne Murray, mother of Mary Anne and Fanny Murray, and also the father of Joanna Curtis and Christopher Curtis, deceased, is entitled to the distributive shares of all those persons.

JUDGE FLEMING. Upon the death of William Murray, his widow, Anne Murray, having renounced the will of her deceased husband, took, as her dower, three ninths of his slaves, and other personal estate; and his three daughters, Mary Anne, Harriet, and Fanny Murray, each two ninths thereof. Upon the death of Mary Anne Murray, in March, 1793, before the act of December, 1792, c. 92, was in force, her mother, then the wife of Charles Curtis, the appellant, succeeded to two equal eighth parts of her slaves, and other personal estate: two other equal eighth parts vested in each of her surviving sisters, Harriet and Fanny Murray; and one equal eighth part vested in each of her brother and sister of the half-blood, to wit, Christopher and Joanna Curtis. And of the reversionary interest in the dower slaves of her mother, two equal sixth parts vested in each of her said sisters, and one equal sixth part in each of her said brother and sister of the half-blood.

217 *Upon the death of Joanna Curtis, in July, 1793, the estate derived to her from Mary Anne Murray, her sister of the half blood, vested in her father Charles Curtis, the appellant, who, upon the death of his son Christopher Curtis, in April, 1795, became entitled to one other eighth part of the estate of the said Mary Anne Murray, deceased, making, in the whole, a moiety thereof.

With respect to the estate of Fanny Murray, she having died whilst the act of 1792, c. 92, was in full force, her mother, and brother and sister of the half blood, were thereby excluded from any distributive share of her estate.

The following decree was thereupon entered.

"The Court is of opinion that there is error in the said decree in reversing so much of the decree in the original suit brought by Charles Curtis, and Elizabeth Curtis, an infant, by the said Charles, her father and next friend, against Peter Kemp, executor of William Murray, and Harriet Murray, only surviving child of the said William Murray, as declares that, by the statute for distributing personal estate, including slaves unbequeathed, the plaintiff, Charles Curtis, (in right of his wife and his two elder children by her, who are dead,

and whom he representeth,) is entitled to one half of the personal estate of Mary Anne Murray; and as directs that the said Peter Kemp, defendant in that suit, should render an account of his administration of the estate of his said testator, before the Commissioners appointed to examine, state and report on the same; and as decrees that the said Peter should pay and deliver to the plaintiff in that suit, Charles Curtis, one half of the slaves and other personal estate of the said Mary Anne Murray; and as approves and confirms the report of the Commissioners made in pursuance of that decree and order: and that there is also error in so much of the first mentioned decree on the bill of review as dismisses the bill in the original suit with costs; this

218 Court being of opinion *that so much of the said original decree as relates to the estate of Mary Anne Murray, deceased, is correct, and ought to have been affirmed on the said bill of review; and that the residue of the said decree in the original suit was properly reversed; it is therefore decreed and ordered, that the decree in this suit be reversed and annulled, and that the appellants recover against the appellees their costs by them expended in the prosecution of their appeal aforesaid here. And this Court proceeding to make such decree as the said Superior Court of Chancery ought to have rendered on the bill of review aforesaid, it is further decreed and ordered, that the said Peter Kemp do pay and deliver to the appellant, Peter Wyatt, administrator of Charles Curtis, one half of the slaves and personal estate which were of the estate of the said Mary Anne Murray, deceased, and account for the profits of the said slaves from the time of her death, and pay the same to the said Peter Wyatt, administrator, of the said Charles Curtis. And it is ordered, that the cause be remanded to the said Superior Court of Chancery for an account to be taken, and further proceedings to be had therein, agreeably to the principles of this decree."

Hunter v. Fairfax's Devises.*

Argued Tuesday, May 3, 1796, and reargued Wednesday, October 25, 1809.

1. **Northern Neck—Waste Lands—Title of Denny Fairfax—Effect of Statute Thereon.**—By the act of compromise, passed the 10th of December, 1796, (see Appendix, No. V. to 2 Rev. Code, p. (71.) c. 5.) the title of Denny Fairfax, and of those who claim under him, to such of the lands in the North-

***Sequel of Principal Case.**—This case gave rise to a highly important discussion, viz. the appellate jurisdiction of the supreme court of the United States over the tribunals of the state. The principal case was carried before the supreme court of the United States by a writ of error and the judgment therein reversed. 7 Cranch 608. The supreme court of the United States issued its mandate to the court of appeals of Virginia to enter judgment for the appellant, Philip Martin. This the Virginia court of appeals declined to do. See *Hunter v. Martin*, 4 Munf. 1. From this refusal, a writ of error to the supreme court was prosecuted and the case finally decided in 1 Wheat. 804.

†**Northern Neck—Title to Land Therein.**—On this

ern Neck of Virginia as were waste and unappropriated at the time of the death of Lord Fairfax, was clearly extinguished.

2. **Same—Same—Acts of Assembly—Effect—Quære.** Were the several acts of Assembly, respecting the mode of acquiring titles to waste and unappropriated lands in the Northern Neck, equivalent to an inquest of office, and sufficient to authorize grants of the said lands by the Commonwealth, independently of the said act of compromise?

3. **British Subjects—Right to Hold Land in Virginia—Treaty.**—Quære, whether, by virtue of the treaty of 1783, persons born in Great Britain, and residing there on the 4th of July, 1776, could, without ever thereafter becoming citizens of Virginia, or of any of the United States of America, take and hold lands in Virginia, by descent, or devise, accruing between that day and the date of the said treaty?

4. **Ejectment—Declaration—Enlarging Term Laid Therein.**—In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term.

In an action of ejectment, on behalf of David Hunter against Denny Fairfax, in the Winchester District Court, 219 *for 788 acres of land lying in the County of Shenandoah, the parties, by their counsel, on the 9th of September, 1793, agreed a case, in substance, as follows:

1. That the act of Assembly entitled, "an act for confirming and better securing the titles to lands in the Northern Neck, held under the Right Honourable Thomas Lord Fairfax, &c. (a) truly recites the several grants or charters which were made by the Kings of Great Britain, to the predecessors or ancestors of the late Thomas Lord Fairfax, of and concerning that part of the territory of the then Colony, now Commonwealth, of Virginia, called and known by the name of the Northern Neck; and that all the estates, rights and authorities thereby granted to them were lawfully vested in him previous to the year 1736, and remained vested in him until the time of his death.

2. That, in the year 1748, an act of Assembly was passed, entitled, "An act confirming the grants made by his majesty, within the bounds of the Northern Neck," &c. (b)

3. That the said Thomas Lord Fairfax, proprietor of the said territory called the Northern Neck, in the year 1748, opened and kept and conducted at his own expense an office within the said Northern Neck, for granting and conveying what he described and called the waste and ungranted lands therein, upon certain terms, and according to certain rules by him established and published, and that such of the afore-

subject of the title of Lord Fairfax, and of Denny Fairfax, to lands in the Northern Neck of Virginia, the principal case was cited in *Stephen v. Swann*, 9 Leigh 414, 419, 420: *foot-note* to *Hite v. Fairfax*, 4 Call 42.

†**Ejectment—Declaration—Enlarging Term Laid Therein.**—See generally, monographic note on "Ejectment" appended to *Tapecott v. Cobbs*, 11 Gratt. 172.

(a) 1 Rev. Code, p. 5.

(b) 1 Rev. Code, p. 10.

said lands as were granted and conveyed by him in fee, were granted and conveyed, in parcels, in a certain form, set forth at large in hæc verba; and that the said grants and conveyances in fee were transcribed and entered in books kept by him for that purpose, in the said office, by his own clerks or agents, and were uniformly alike, except as to grants and conveyances of lots in places laid off and designed for towns; that he kept the said office open for the purposes aforesaid, from the year 1748 till the time of his death, which happened in December, 1781; during all which time, as well as prior thereto, from the time he became proprietor as aforesaid, he exercised the right of *granting and conveying in fee-simple, the lands called waste and ungranted lands as aforesaid, upon the rents, conditions and reservations contained in the grants and conveyances made by him; the rents reserved therein were paid to him as they annually accrued; and he also exercised the right of leasing for term of lives and for years (reserving annual rents) parcels of the said lands called by him waste and ungranted; which rents were also paid as they became due.

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4. That the said Thomas Lord Fairfax was, at the time of his death, and for many years had been, a citizen and inhabitant of the Commonwealth of Virginia; that he duly made and published his last will and testament, which is set forth in hæc verba, and was admitted to record by the Court of Frederick County the 5th of March, 1782; in which will he devised all his "undivided sixth part or share of his lands and plantations in the Colony of Virginia, commonly called or known by the name of the Northern Neck of Virginia, to the Reverend Denny Martin, his nephew, of the County of Kent, in Great Britain, to him, his heirs and assigns for ever; upon condition that he should procure an act of Parliament to pass to take upon him the name of Fairfax and coat of arms. And that the defendant Denny Fairfax was the same person mentioned in the said will by the name of Denny Martin, and that he obtained the name of Denny Fairfax, and the Fairfax coat of arms, in conformity to the directions of the said will.

5. That the lands in the declaration mentioned are a part of the lands known by the name of the Northern Neck of Virginia; and are also the same lands for which a patent was granted to David Hunter, the lessor of the plaintiff, by Beverley Randolph, Governor of Virginia; (which is set forth in hæc verba, dated April 30th, 1789;) and are part of the lands called and described as waste and ungranted within the said Northern Neck, by the said Thomas Lord Fairfax, as aforesaid; and are of the value of five hundred pounds current money.

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forms of other lands conveyed and granted by him in fee as aforesaid, which lands were soon thereafter reconveyed by the said Thomas Bryan Martin unto him in fee.

7. That "the defendant in this suit was born in England, a subject to the King of Great Britain, in the year 1750, is now, and ever since his birth hath been, a subject to the said King, and hath always inhabited within England, as well during the late war between Great Britain and America, which was ended by the peace made in the year 1783, as in all other times; and hath not made himself a citizen of the United States of America, or of any of them, by taking the oath of citizenship required by any law of the said United States, or of any one of them, and hath never been in any of the said United States but always hath resided in England, where he now remains."

8. That a certain Thomas Bryan Martin is now, and always hath been, a citizen of the State of Virginia, and is the second son of the sister of Thomas Lord Fairfax, and the younger brother of the defendant; and that his said mother is now living, and always has been a British subject, and never hath made herself a citizen of the United States of America, or of any of them.

9. That a treaty of peace was finally made and concluded in the year 1783, between Great Britain and the United States of America, in hæc verba.

10. They agreed the several acts of Assembly, entitled, "an act for establishing a land-office and ascertaining the terms and manner of granting waste and unappropriated lands;" (a) "an act declaring tenants of lands or slaves in tail to hold the same in fee simple;" (b) an act passed in the year 1784, entitled, "an act respecting future confiscations;" (c) "an act passed in the year 1785, entitled, "an act for safe keeping the land papers of the Northern Neck in the register's office;" (d) an act passed in the year 1779, entitled, "an act declaring who shall be deemed citizens of this Commonwealth;" (e) an act passed in the year 1782, entitled, "an act concerning surveyors;" (f) an act passed in the year 1785, entitled, "an act concerning escheators;" (g) and an act passed in the year 1785, entitled, "an act to extend the operation of an act, entitled, "an act concerning escheators" to the several counties in the Northern Neck." (h)

11. They agreed that the lands in the declaration mentioned had not been escheated and seized into the hands of the Commonwealth pursuant to the two acts of Assembly last mentioned, or either of them; and that no inquest of office of escheat had been taken of and concerning the said lands.

12. They agreed in hæc verba, the 24th section of the act passed in the year 1782, entitled, "an act to amend and reduce the several acts of Assembly, for ascertaining

- (a) May, 1779, c. 13, Ch. Rev. p. 94.
- (b) October, 1779, c. 26, Ch. Rev. p. 45.
- (c) 1784, c. 58.
- (d) 1785, c. 67, 2 Rev. Code, App. No. V. (60.)
- (e) May, 1779, c. 55.
- (f) October, 1782, c. 33, Ch. Rev. p. 179.
- (g) 1785, c. 68, 1 Rev. Code, p. 126.
- (h) 1785, c. 58, 2 Rev. Code, App. No. V. (70.)

certain taxes and duties, and for establishing a permanent revenue, into one act." (a)

13. They agreed that the lessor of the plaintiff is a citizen of Virginia, and always has been, and that he entered into the lands contained in his grant or patent aforesaid, in pursuance thereof, and was possessed thereof prior to this suit.

14. They agreed the lease, entry and ouster in the declaration mentioned; and, if, upon the whole matter, the law be for the plaintiff, that judgment be rendered for him for his term yet to come in the lands in the declaration mentioned, and one penny damages; otherwise, that judgment be rendered for the defendant.

The District Court, upon this case agreed, gave judgment for the defendant; whereupon the plaintiff appealed; and,

Denny Fairfax having afterwards departed this life, *the appeal was revived against Philip Martin, his heir at law and devisee.

This cause was argued in May, 1796, before Judges Lyons, Carrington, Fleming and Roane, and reargued on Wednesday, October 25, 1809, by William and Wickham, for the appellant, and Call, for the appellee, before Judges Fleming and Roane; (Judge Tucker not sitting in the cause, through motives of delicacy, being nearly related to a person interested;) but, as the Court went so fully into the subject in giving their opinions, it is thought proper to omit the arguments at the bar.

Monday, April 23, 1810. The Judges pronounced their opinions.

JUDGE ROANE. This was an ejectment brought by the appellant against Denny Fairfax, under whom the appellee claims, in the District Court of Winchester.

At the trial, the parties agreed a case in lieu of a special verdict. That case agrees, *inter alia*, various acts of Assembly respecting the territory of the Northern Neck, as is therein more particularly stated; the treaty of peace of 1783, between the United States and the King of Great Britain; the act of 1784, "respecting future confiscations;" that Lord Fairfax died, a citizen of this Commonwealth, in December, 1781, having devised his lands in the Northern Neck to Denny Fairfax, who was born in England in the year 1750, and has never become a citizen of Virginia, or of any of the United States; that the land in controversy was a part of the lands in that territory called and described by Lord Fairfax as waste and ungranted land; that the appellant obtained a grant therefor, from the Commonwealth of Virginia, on the 30th of April, 1789, entered, and was possessed in pursuance thereof until ejected; and

that no inquisition of escheat or forfeiture was ever found *in relation to this land, under the ordinary acts on this subject, as extended to the said territory since the death of Lord Fairfax.

Referring to the case itself for a more particular statement, these are the facts which seem most important in the present instance: there are other facts which seem to relate to the question whether Lord Fairfax had an absolute fee estate in the soil of the

said territory, or only a seigniorial right thereto; a question unnecessary to be stirred in the present instance, as my opinion will go upon the admission that he had the former. The District Court gave judgment for the appellee, from which an appeal was taken by the appellant to this Court. It is necessary here to state that the judgment was rendered the 24th of April, 1794, which accounts for the omission to state in the case agreed, either the treaty of November 19, 1794, between the United States and Great Britain, or the act of compromise of October 10, 1796, between the Commonwealth of Virginia and the purchasers under Denny Fairfax.

On the part of the appellant it is contended, that Denny Fairfax was, at the time of the devise in question, and ever after, an alien, and incapable of holding lands in this Commonwealth; that, admitting an inquest of office to have been necessary under the general laws as applying to ordinary cases, the several acts of Assembly, stated in the case, respecting the mode of acquiring titles to waste and unappropriated lands in the Northern Neck, were equivalent thereto, and supplied the place thereof, in relation to such lands, and justified the grant by the Commonwealth; and that the act of compromise of 1796, aforesaid, ceded the title to the appellant, even if it were not complete without it.

On the part of the appellee, on the contrary, it is contended, that the original appellee, Denny Fairfax, was capable of taking and holding the land devised to him,

until divested by an inquest of office, or some *equivalent act; and that no such act had taken place prior to the treaty of peace, which, it is further alleged, protected his property, and released the right of the Commonwealth to the land in question: it is also contended, that the act of compromise aforesaid (being passed subsequent to the judgment in this case) does not affect it, and cannot be introduced into the cause so as to vary that judgment.

In the case of *Reed v. Reed*, (MS. April, 1805,) it was solemnly decided by this Court, that a man standing in the predicament of Denny Fairfax, is to be considered as an alien under our laws, and that the treaty of peace did not operate to protect or enlarge the inheritable rights of British antenati accruing after the date thereof. These were the points actually before the Court in that case, and, therefore, judicially decided: every thing which may have fallen from any of the Judges in relation to other points, or to topics not necessarily presented by the case, I conceive to be extrajudicial, and, as such, not entitled to the weight of binding authority. It was not, for example, decided, on the other hand, that the descents to British antenati accruing between the epoch of the declaration of our independence and that treaty, were protected and enlarged thereby; or, in other words, that that treaty should be construed to arrest the operation of the ordinary laws of escheat and forfeiture of the several states: much less was it decided, in that case, or any other within my knowledge, that the several legislative acts

(a) October, 1782, c. 8, s. 24, Ch. Rev. p. 176.

stated in the verdict were incompetent to perfect the title of the Commonwealth to the land in question, as being equivalent to inquisitions of office. As, however, although such were the only points necessarily and judicially decided in the case of *Reed v. Reed*, the question touching the operation of the treaty upon prior cases, was discussed much at large by myself, which question now stands for the opinion of this Court, I must beg leave to refer to a part of my opinion in that case, as containing the grounds of my opinion in this. What was then entirely extrajudicial, and inserted only from the difficulty of

226 taking *a partial view of the subject, I beg leave now to adopt and render judicial, it being called for by the actual question depending before us. I regret the necessity of reading any part of that opinion; which arises from the lapse of time since it was delivered, and the inconvenient circumstance that the decisions of this Court, of that period, have not yet seen the light, and exist only perhaps in a single manuscript. I regret it, however, the less, because I shall take the liberty, en passant, to fortify some of the positions then taken, by means of notes of some subsequent decisions in the Supreme Court of the United States, and other authorities. If the opinion is long, it must be admitted that the question is important; and I offer it also by way of apology, that we had then to explore the subject in the first instance.

[Here Judge Roane, read from the notes of his opinion in the case of *Reed v. Reed*, that part thereof which immediately relates to the present question.*]

I have thus endeavoured to shew by referring to and adopting the sentiments I delivered in the case of *Reed v. Reed*, that the treaty of peace has nothing to do with the laws of alienage of the several states; that, if it had any effect upon rights like the present, it would be to enlarge a null and defeasible interest into an absolute and indefeasible one, contrary to what is contended for, that the treaty was to protect rights antecedently existing, and that this construction (while there is no strong necessity for it) is opposed by many and insurmountable objections. In relation to cases happening after that treaty, the decision in *Reed v. Reed* is a direct authority in the negative: but the question relating to prior cases has never been decided, that I can learn, either in this Court or in the Supreme Court of the United States. It was not decided in the case of *Marshall v. Conrad*. (MS.) In that case Judges Fleming and Carrington expressly waived

227 the consideration of the *operation of the treaty upon it, as being rendered unnecessary by the act of compromise of 1796. Judge Fleming considered the case, also, as embraced by the treaty of 1794; as to which, however, his opinion seems to be different from that of the Supreme Court of the United States in the case of *Dawson v. Godfrey*, 4 Cranch, 321, in which it was held, that a British antenata could not recover lands which descended upon her in Maryland, in the year 1793. Reposing in that case, therefore, upon

the ground of the compromise, in which, I believe, the other members of the Court (myself dissenting) entirely concurred, these Judges did not enter into the great question now before us, which therefore is not concluded by that decision. As for the case of *The Commonwealth v. Bristow*, (MS., Spring term, 1806,) I consider it to be in favour of the appellants. While it decides that a confiscation, which is complete prior to the date of the treaty, (which I shall endeavour to shew was the case in the present instance,) is not affected thereby, it passes no opinion as to the operation of the treaty upon the ordinary laws of alienage of the several states; for the confiscation in question in that case was under the legislative act of 1779, which, the Court properly admitted, (without any inquiry as to the question of alienage,) vested all British property, then holden, in the Commonwealth, on the ground of its being the property of enemies; and that act (as I think the act of 1782 may be) was properly compared to a general bill of attainder. That decision, however, is important on account of the analogy which holds, as aforesaid, between the general inquisition (if I may so express it) contained in the act of 1779, and that resulting from the act of 1782, hereafter mentioned, for taking possession of the vacant lands in the Northern Neck. It is also important in deciding (or considering the case of *Reed v. Reed* to have decided) that British subjects were aliens here from the date of the declaration of independence, as is before abundantly stated; from whence it would follow that stronger expressions in the treaty would be necessary to

228 *operate the effect in question, than under a contrary supposition. The question before us is, therefore, I conceive, entirely open.

Being decidedly of opinion, for the reasons already stated, that neither the treaty of peace, nor the act of 1784 respecting future confiscations, related at all to the subject of alienage, it follows, in my judgment, that the act of 1785, c. 67, was undoubtedly competent to vest the possession of the vacant lands of the Northern Neck in the Commonwealth. Except for the bar supposed to be set up by the treaty, to the power of the legislature, this, I presume, would be admitted by the appellee's counsel themselves: but, even admitting the application of the treaty to the case before us, I will go further and contend, that the title of the Commonwealth to the vacant lands of the Northern Neck was perfected before the date of that instrument.

Lord Fairfax having died in 1781, the legislature of the then sovereign State of Virginia, premising that they had reason to believe that the whole of that extensive territory had devolved on alien enemies, turned their attention to the subject in October, 1782. By their act of that session, (a) they sequestered the quit rents then due in the hands of the land-holders, ordered all quit rents thereafter accruing to be paid into the treasury, and exonerated the said land-holders therefor. I know of no means more efficacious than this, to have taken

*See Appendix.

(a) Ch. Rev. p. 176, s. 24.

possession of the quit rents, and even of the granted lands in that territory, so far as a title thereto existed in Lord Fairfax; and, although in May, 1783,(a) they released to his executors all the quit rents due at the time of his death, they retained their hold on those subsequently arising, until they finally abolished them by the act of 1785. So much for the quit rents and granted lands in that territory. As to the vacant lands thereof, by their act of 1782,(b) after premising that by Lord Fairfax's death great inconveniences would accrue to those inclined to make entries for vacant lands in the Northern Neck, they enacted "that all entries made with the surveyors

229 *of the Counties within the Northern Neck" (which entries were consequently authorized by the act) "shall be held deemed and taken as good and valid in law, as those heretofore made under the direction of the said Thomas Lord Fairfax, until some mode shall be taken up and adopted by the General Assembly, concerning the territory of the Northern Neck." As there could be no conceivable motive with the Legislature to abstain from taking possession of those vacant lands, and granting them out, thereby to settle the country while it was taking possession of the quit rents and granted lands thereof, the authorizing entries to be made therefor, is as strong a mode as they could possibly have adopted to declare that they then and there took possession of the same. They took possession thereof, and made a temporary and provisional arrangement for granting it away, declaring, at the same time, their intention to adopt another and more definitive mode at a future time. That mode was adopted by the act of 1785, c. 67; in which, although the executive were directed to take possession of the land-papers of the Northern Neck, they were not directed to take possession of the vacant lands thereof: such possession had been taken by the act of 1782, and it would have been absurd to have directed it in any other way than by authorizing entries therefor, as the act of 1782 had done, and which amounted, *ex vi termini*, as is before said, to a declaration that the possession of such lands existed in the Commonwealth. On a comparison of this permanent act of 1785, with the temporary one of 1782 aforesaid, it will be found that the former is not only as deficient as the latter in providing any mode of taking possession of the territory other than that of authorizing entries therefor, and that in a manner not more strong than that contained in the act of 1782, but has also expressly recognised the entries authorized by that act, and provided for carrying the same into grant. When, therefore, the appellees admit the title of the Commonwealth to the territory in

230 *question to have been complete, under the act of 1785, but for the alleged bar of the treaty of peace, they must also admit the same in relation to the act of 1782, which was prior to the treaty. By both those acts, the whole of that vacant territory was taken possession of by the Commonwealth; and, in relation thereto,

the last act was a mere work of supererogation: in fact, this new and ridiculous idea of the necessity of ordinary and particular inquests of office, as applying to the case in question, or of any other symbol of investiture, than that most notorious one of all, (an act of the Legislature,) had not then occurred to the mind of the General Assembly: in relation to the Commonwealth, the mere assumption of the lands by law was sufficient, though, as to the grantees of the Commonwealth, other acts were necessary to complete their title: it is, however, enough to avoid the bar presented by the treaty that the title (including the possession) of the lands was then completely in the Commonwealth.

While this general inquisition of office, by the Legislature, (if I may so express myself,) was peculiarly adapted to the case of the estate of an individual, which pervaded a great number of the Counties of the Commonwealth, the power of the Legislature to substitute an act for an ordinary inquisition cannot be doubted. It is admitted that an act of Parliament in the reign of Philip and Mary, declaring the property of Sir Thomas Wyatt to be vested and in possession of the King, without any inquest of office, was valid.(c) That case differs from the case at bar only in degree: and it cannot possibly make a difference that the inquest in that case is expressly waived by the act, whereas in the case before us, it is waived by a strong and necessary implication only: the words are wanting, but are more than supplied by the actual measures taken by the Legislature, *eodem flatu*, to grant out the lands to others.

Upon this point of the competency of a general legislative act to supply the place of particular inquisitions of office, I consider the case of *Kinney v. Beverley*(d) as a direct and pointed authority. In that case, the title of the appellant was reprobated, only on the ground that the lands alleged to be vested in the Commonwealth, by reason of non-payment of taxes, and which were regranted to him, had not been listed by a County Commissioner. This was decidedly the ground of the decision of the Court in that case, as appears by the report thereof. Although the lands in dispute in that case stood upon a common foundation with those before us, both as to the want of particular inquisitions of office, and also as to the nonexistence of any other mode of taking possession thereof by the Commonwealth, except by authorizing grants to others, the above was the only ground on which the pretensions of the appellant failed: and this, although the necessity of particular inquisitions, as applying to every case, was suggested by counsel, and much laboured by one of the Judges of the Court. That case is much stronger in this respect than the case before us: for there the lands of thousands of individuals, who were not named in the act, and whose lands lay sparsim throughout the Commonwealth, were liable to be affected, whereas, in the case before us, the lands of one individual (by name) were taken into the hands of the

(a) *Ibid.* 306.

(b) *Ibid.* 180, c. 33 of Oct. session, s. 3.

(c) 2 Tuck. Bl. p. 60, note C.

(d) 3 H. & M. 344.

Commonwealth. In short, if this objection, for the want of a more particular inquiry, exists in this case, it equally exists in relation to the act of 1785, (considered as unaffected by the treaty,) and would go to overthrow every title acquired under it!

I am thus of opinion that the treaty of peace applies not to this case, nor to arrest the operation of the laws of alienage in the several states; and that, even if it does, the title of the Commonwealth to the land in question having been perfected by a seisin under the act of 1782, or, in other words, the confiscation being complete, that treaty had nothing left whereupon to operate.

This view of the subject makes it unnecessary for me to say much in relation to the act of compromise of 1796. (a) By the

232 compromise contained in that act, the purchasers under Denny Fairfax, in consideration of a release, by the Commonwealth, of its claim to "any lands specifically appropriated by Lord Fairfax to his own use either by deed or actual survey," agreed to release to the Commonwealth "all claim to lands supposed to lie within the Northern Neck, which were waste and unappropriated at the time of the death of Lord Fairfax;" and the act has particular relation to, and was intended to settle and determine this, among other suits, then depending in this Court, touching the right to the said lands. Of this compromise the said purchasers have already availed themselves, by reversing two judgments in favour of the Commonwealth, on the 10th of October, 1798; a record of one of which is now before me. I consider the compromise as having been deposited with the Court for the purpose of settling all the causes embraced thereby, according to the provisions thereof: and I can never consent that the appellees, after having got the benefit thereof, should refuse to submit thereto, or pay the equivalent; the consequence of which would be, that the Commonwealth would have to remunerate the appellant for the land recovered from him! Such a course cannot be justified on the principles of justice or good faith; and, I confess, I was not a little surprised that the objection should have been raised in the case before us.

On every ground, therefore, I am of opinion, that the judgment of the District Court should be reversed, and entered for the appellant.

JUDGE FLEMING. The counsel for the appellant, who was plaintiff in the Court below, has made three points, in support of his case;

1. That Denny Fairfax was, at the time of the decease of Lord Fairfax, and ever after, an alien, incapable of holding lands within this Commonwealth.

2. That the several acts of Assembly respecting the acquiring title to waste and unappropriated lands within the
233 *Northern Neck, were a sufficient inquest of office to authorize the granting the lands to the appellant. And,

3. That the act of compromise between the purchasers of Denny Fairfax and the Commonwealth, vested the lands in Hunter,

even if his title was not complete prior thereto.

With respect to the first point, the counsel seems to admit (by not denying it) the right of Lord Fairfax to devise the land in question, which renders an inquiry into the nature of his title unnecessary; we are then to consider whether Denny Martin was incapable of holding the lands so devised to him, lying within this Commonwealth?

It has been settled in the case of Marshall v. Conrad, (and I believe it is not, or ought not, to be controverted, at this day,) that an alien may take land within the Commonwealth by purchase, as well by devise as by grant or other conveyance, and hold the same until something further be done, to divest him of his right, to wit, office found; which must be done before any title can vest in the Commonwealth during the life of the devisee.

The case agreed between the parties, in the nature of a special verdict, finds, among others, two acts of Assembly passed in the year 1785, the first entitled, "An act concerning escheators." (It should have been in the year 1779 instead of 1785.) (b) And the other extending the operation of the former act to the several Counties in the Northern Neck: and then they agree that the lands in the declaration mentioned have not been escheated and seised into the hands of the Commonwealth, pursuant to the two acts of Assembly last mentioned, or either of them; and that no inquest of office of escheat hath been of and concerning the said lands. And this brings me to consider the second position of Mr. Williams, that the several acts of Assembly respecting the acquiring title to waste and unappropriated lands within the Northern Neck, were a sufficient inquest of office to authorize the granting the lands to the appellant; and both of the counsel

234 argued that the Government, *or Legislature, might have an office taken, and confiscate the lands by any mode they pleased. That, as a general principle, is not denied; but then the mode ought to be explicit, and clearly understood by all persons interested, and not by implication, that such and such acts of the Legislature, by strained construction, amount to an office found, to deprive any person, whether citizen or alien, of their justly acquired rights. More especially, as the Legislature had already acted on the subject, and by the acts of May, 1779, concerning escheators, and the amendatory act of October following, (c) clearly pointed out a mode by which, with great solemnity, those inquisitions of office were to be taken, giving to British subjects, or other persons in their behalf, the right of being heard before the General Court, by a monstrans de droit; and to any person other than a British subject, a right either to traverse the office, or to be heard on a monstrans de droit, in the General Court.

I proceed to examine the acts of Assembly, or clauses of them, as are supposed to amount to such an inquest of office as authorized the granting the lands to the appellant.

(b) May, 1779, c. 45, Ch. Rev. 106.

(c) October, 1779, c. 18, Ch. Rev. 110.

The first that occurs is the 24th section of the act of 1782, c. 8. "To amend the several acts of Assembly for ascertaining certain taxes and duties, and for establishing a permanent revenue, into one act," whereby, after suggesting in a preamble, that since the death of the late proprietor of the Northern Neck, there is reason to suppose that the late proprietorship hath descended upon alien enemies, it is enacted, "that persons holding land in the Northern Neck shall retain, sequestered in their hands, all quit rents which are now due, until the right of descent shall be more fully ascertained, and the General Assembly shall make final decision thereon; and all quit rents which hereafter may become due, within the limits of the said Northern Neck, shall be paid into the public treasury, under the operation of the laws of this session of Assembly; for which quit rents the inhabitants of the said Northern Neck shall be exonerated from the future claim of the proprietor."

235 *At the same session of Assembly, an act passed, (c. 33,) entitled, "An act concerning surveyors," in the 3d section of which, after reciting, that the death of the Right Honourable Thomas Lord Fairfax might occasion great inconvenience to those who might incline to make entries for vacant land in the Northern Neck, it was enacted that all entries made with the surveyors of the Counties within the Northern Neck, and returned to the office formerly kept by the said Thomas Lord Fairfax, should be held, deemed, and taken, as good and valid in law, as those before made under the direction of the said Thomas Lord Fairfax until some mode should be taken up and adopted, by the General Assembly, concerning the territory of the Northern Neck.

At this period, then, (October, 1782,) the Legislature was quite undetermined on the subject of this territory, and had done nothing that acquitted an inquisition of office: and, therefore there was, from any act of government at that time, scarce a semblance of a title vested in the Commonwealth; as the clauses just above recited seem to have been enacted merely for the convenience of those who were resident, and had acquired permanent titles to their lands within the territory, and also of those who were taking steps to acquire titles to lands therein.

Thus the matter rested until the ratification of the treaty of peace, in September, 1783; at which time the land in question was held by Denny Fairfax, under the will of Lord Fairfax, as no confiscation thereof had ever taken place; and, by the 6th article of the treaty, it was stipulated that there should be no future confiscations made, or any prosecutions commenced, against any person or persons for, or by reason of, the part which he or they may have taken in the war, and that no person, on that account, should suffer any future loss, or damage, either in his person, liberty, or property. And so sacred was the treaty held by the Legislature of the state, that in an act passed in October, 1783, (c. 17,) prohibiting the migration of certain

236 persons *to this Commonwealth, there

is a proviso that nothing therein contained should be construed so as to contravene the treaty of peace with Great Britain, lately concluded. And in October, 1784, (c. 53,) an act passed, entitled "An act concerning future confiscations," in which, after reciting that it is stipulated by the sixth article of the treaty of peace that there shall be no future confiscations made, it is enacted, that no future confiscations shall be made, any law to the contrary notwithstanding. With a proviso that the act should not extend to any suit depending in any Court, which commenced prior to the ratification of the treaty of peace; which treaty, aided by the last recited act, in confirmation thereof, completed, in my conception, the title of Denny Fairfax to all the lands devised to him by Lord Fairfax; in which he, by the devise, acquired the same interest as was vested in the deviser, at the time of his death; as the treaty, in my apprehension, by the general wording of the sixth article, operated as forcibly, and effectually, on the subject now under consideration, as if it had been specifically stipulated that the estate devised by Lord Fairfax to Denny Fairfax should not be confiscated; or, in other words, that it should not (nor any part thereof) be seized, taken, or appropriated to the use of the Commonwealth, and the act of 1874 had been penned in exact conformity to such stipulation. It was a solemn compact of the highest nature and dignity known in civil society; and, if there be any thing ambiguous, or doubtful in it, ought to be construed in the most liberal and beneficial manner, in favour of the party for whose benefit there may be any article inserted therein; and ought not, in my conception, to have been contravened, or impaired, by any legislative act of our government. But it is contended that the act of 1785, c. 67, "for the safe keeping of the land papers of the Northern Neck in the register's office" operated as an inquest of office, and gave to government the right of granting the unappropriated lands in the Northern Neck.

To this I answer, that the treaty of 237 *peace, as recited above, and so solemnly recognised and acted upon, by the Legislature but the preceding year, absolutely forbids such a construction: and, it appears to me, therefore, that the granting the land in question to the appellant, in the year 1789, was an exercise of power, without a right.

3. We come now to consider the third point, "that the act of compromise between the purchasers of Denny Fairfax and the Commonwealth, vested the lands in Hunter, even if his title was not complete prior thereto." This point seems in favour of the appellant; and the only doubt and difficulty with me was, whether, as the act is not noticed in the case agreed, the Court ought, ex officio, to take notice of it? and, if so, the only question will be, whether the land in controversy had been specifically appropriated and reserved by Lord Fairfax, or his ancestors, for his or their use? On reflecting upon the subject, my doubt is removed. By a clause in our act, for limitations of actions, &c. private acts of Assembly may be given in evidence,

though not specially pleaded: a fortiori, shall public acts be noticed, in all cases, to which they apply; whether specially referred to, or not. By the act of compromise passed the tenth day of December, 1796, (at which time there were several suits depending between the Commonwealth and those who claimed under the will of Lord Fairfax, in regard to their respective rights,) the immediate purchaser of Denny Fairfax, who claimed under the will of Thomas Lord Fairfax, gave up all claim to the lands supposed to lie within the Northern Neck, which were waste and unappropriated at the time of the death of Lord Fairfax, in consideration that the Commonwealth relinquished all claim to the lands specifically appropriated by the late Thomas Lord Fairfax, or his ancestors for his or their use. The case before us, then, comes expressly within the provisions of the act: and, it being stated in the case agreed, that the lands in the declaration mentioned are a part of the lands called and described as waste and unappropriated, within

238 *the said Northern Neck by the said Thomas Lord Fairfax; the title of Denny Fairfax, and of those who claim under him, was, by the act of compromise, clearly extinguished. And, upon that ground, and upon that only, I am of opinion that the law is for the appellant, and he must have judgment accordingly.

Judgment reversed, and entered for the appellant. And it appearing that appellant's term in his declaration mentioned has expired, liberty was given him to amend the same by striking out the word "ten" and inserting the words "twenty-three."

To this judgment the appellee obtained a writ of error from the Supreme Court of the United States; (a) which is now pending and undetermined.

Betts v. Cralle.

Tuesday, April 24, 1810.

1. **Attorney in Fact—Contracts Thereof—Liability.**—If an attorney in fact undertake to have a tract of land (with the situation of which he does not profess himself personally acquainted) surveyed for a part thereof, and upon terms "in case the land cannot be found, to have a proportional part of the damages which may be recovered by his employer of the person of whom he bought, and a proportional part of his expenses paid," he is not bound to have it done at all events; but only to a faithful performance, according to the best information he can obtain.
2. **Same—Same—Mistake—Liability.**—In this case, therefore, the attorney in fact being imposed upon by the County Surveyor, and, in consequence of such imposition, having a survey made of land not purchased by his employer, was held not responsible for his mistake, and not thereby barred of his claims under the contract.
3. **Same—Same—Case at Bar.**—But, after the survey, the employer having executed a bond to the attorney to make him a conveyance of part of the land so surveyed; and having snatched and torn the bond so given; for which trespass a suit was

threatened; and, thereupon, having given two bonds for money in full satisfaction for tearing the above bond, and for the attorney's services: the last-mentioned bonds were considered as a bar to any claim of the attorney under the original contract, and adjudged valid and obligatory, notwithstanding the mistake in the survey was not discovered until after those bonds were executed.

Thomas Cralle, on the 13th day of July, 1798, presented a bill of injunction to the County Court of Lunenburg, against Charles Betts; stating that he had employed the defendant as his attorney in fact

239 to survey and "secure for him a tract of 3,000 acres of land which he had purchased of Christopher M'Conico; being part of a larger tract, which, as the complainant had been informed, had been located and surveyed for the said M'Conico; that the defendant undertook faithfully to transact the said business, for which the complainant agreed to allow him 300 acres, part of the said 3,000 acres: the said Betts thereupon went to Kentucky, and had a survey of a certain 3,000 acres of land made, purporting to be part of the said M'Conico's land, and then returned, bringing with him a plat and certificate of the said survey, which, on the face thereof, appeared to be regular and correct: the complainant thereupon supposed that the said Betts had really had the land properly surveyed, and hesitated not to allow him the said 300 acres of land for his trouble; but, as the said Betts was desirous to take money for the said land, (which the complainant preferred,) he gave him his bond for 100l. payable December 25, 1796, and another bond for 50l. payable December 25, 1797, being the sums and times of payment which the said Betts agreed to take for the said land; and, still supposing all was right, he had paid, and taken in, the said bond for 100l.; but, to his utter astonishment and mortification, had since discovered that the whole survey made as aforesaid by the said Betts was erroneous, and contained no part of the land which he bought of M'Conico, but was located upon lands belonging to other people: "the said Betts must have been guilty of a fraud or criminal neglect of his duty as attorney, because he had a true plat of M'Conico's land, by which he might have made a true survey, which he had not done." The complainant had, therefore, "under the influence of a deception, and without any consideration," paid the said sum of 100l.; and yet the said Betts had brought a suit, and recovered a judgment against him on the said bond for 50l. He therefore prayed an injunction, which was granted.

The defendant filed his answer, stating that he had got the surveyor of Harrison County, Kentucky, in which the

240 *lands were said to be situated, to survey 3,000 acres, part of M'Conico's grant, according to copies of the said grant, and of the agreement with the said M'Conico, furnished him by the complainant; a fair and true copy of which survey, signed by the said surveyor, he produced to the complainant on returning from Kentucky; that, upon producing the same, the re-

(a) See Laws of the United States, vol. 1, p. 68, a. 25.

spondent demanded the complainant's bond to make a title to 300 acres, part thereof, agreeable to contract, which he then refused to give; after which the complainant applied to the respondent for a copy of said plat, and said that he would go out to Kentucky himself, and, in case he should find the services aforesaid had been rendered, he would, on his return, give his obligation to make a title to 300 acres of said land to the respondent; that a copy of said plat was accordingly delivered the complainant in 1795; that he went to Kentucky, and (the respondent hoped to prove) viewed the lines of the said land, and had the same transferred from M'Conico to himself, by the Commissioners in that country, and was so well pleased that, shortly after his return to this State, (viz. October 28, 1795,) he gave his bond in the penalty of 300l. with condition to convey to the respondent a good and sufficient title to 300 acres, part of the said 3,000 acres of land, agreeable to the original plat which was then before him, specifying where to begin, and how to be extended for quantity; that there were only two witnesses then present who attested the bond; and, the contract being for land, the respondent supposed it necessary to have a third witness, and about three days after, applied to the complainant to reacknowledge said bond, which he consented to do; and, the third witness being called upon, and the bond produced by the respondent, to the great astonishment of the respondent, the complainant made a most indecent catch at the said bond, and tore nearly half of the same off, having his name on the part which he so disgracefully snatched away. The respondent, therefore, being about to commence a

241 suit against the complainant *for his conduct aforesaid, the said complainant agreed to give his two bonds, in the bill mentioned, for 100l. and 50l., to the respondent, provided he would quit all claim to the said 300 acres of land; all which was immediately agreed upon; the bonds were executed, and the original plat delivered up to the complainant; that, about two days afterwards, the complainant was offered 50l. cash more than he had allowed the respondent for said 300 acres of land, which he refused to accept, as he had previously viewed the said lands, and knew they were valuable.

The respondent denied all fraud on his part; declaring that the copy of the grant furnished him by the complainant (the water-courses corresponding with the survey which he caused to be made) was all the guide he had in the agency intrusted to him; and concluded with praying a dissolution of the injunction.

Sundry affidavits were taken which fully proved the circumstances set forth in the answer, relative to the complainant's executing, and afterwards snatching and tearing his bond for the 300 acres of land, and relative to his giving the bonds for 100l. and 50l., "which were understood to be in full satisfaction for the breach of Cralle in tearing the above bond, and also full compensation to the said Betts for his services rendered the said Cralle in Kentucky;" but on Cralle's behalf, it appeared in evidence

that Betts, when he applied for the first mentioned bond, wanted his 300 acres laid off in a certain part of the land where he said there was to be a ferry place; that Cralle refused to give the said bond until Betts agreed to have them laid off in another place; and that, after it had been signed, the said Betts said that he had got the land in the very place he wished it, being the part to which Cralle had objected.

The deposition of John Tittle, the surveyor, stated, that he was called upon by the defendant as agent for the complainant, to shew M'Conico's survey, and lay off and survey 3,000 acres out of the same for 242 the complainant; that, *having surveyed an entry made in the name of a certain Mr. Logwood, which called to adjoin M'Conico's west line, he supposed he could find said M'Conico's survey; that he went in search of M'Conico's lines, but, not finding any, proceeded to lay off the complainant's 3,000 acres; and that he had since found, from the copy of M'Conico's entry, that the said 3,000 acres were not within 240 poles of said M'Conico's survey aforesaid. From other evidence it appeared that this discovery was made in the fall of 1796; after Cralle had given the money bonds, but before that for 100l. had become due.

The defendant proved by the affidavit of John Knight, jun. that, in September, 1795, the witness was in the state of Kentucky, and accompanied the complainant and the same surveyor to see the 3,000 acres of land, said to have been surveyed out of Christopher M'Conico's survey; that the surveyor then said he had laid off the same at the instance of Charles Betts, attorney in fact for the complainant; that they examined the greater part of the corners and lines of the said land, and found them plainly and well marked: the complainant expressed himself much satisfied at the faithful execution of the business by his said attorney; so much so, that he had 400 acres (part of the said 3,000) laid off, which he had previously sold to a certain James Claughton then present. The witness heard nothing said in contradiction to the validity or legality of the said survey of 3,000 acres; but understood it was generally believed by the neighbours to be a part of a large survey granted to Christopher M'Conico.

Among the exhibits were copies of M'Conico's grant, for 14,137 acres, by certain metes and bounds expressed therein, and of his obligation to Cralle, to make him a title "to a certain tract or parcel of land containing 3,000 acres, lying and being in the County of Fayette," (from which Harrison County was afterwards taken,) "in the District of Kentucky, and bordering on Main Licking Creek, being a part of the grant above mentioned;" 243 but without specifying any *other boundaries; also, a copy of the survey made for Betts, attorney for Cralle, purporting to be of 3,000 acres out of a survey of Christopher M'Conico's, containing 14,137 acres; "beginning at a beech on the said M'Conico's west line, on the bank of Main Licking," &c.

The County Court dissolved the injunction, and afterwards dismissed the bill:

but, on an appeal, the late Chancellor Wythe reversed their decree, with costs; and adjudged and decreed that Betts should refund the 100l. he had received, with interest thereupon from the time of such receipt until paid; that the injunction be made perpetual; that Cralle convey, with warranty, against himself, and claimants under him only, to Betts, at his costs, the said Cralle's right to 300 acres of land, part of the 3,000 acres certified by John Tittle to have been surveyed by him; and that Betts pay to Cralle his costs in the County Court: from which decree Betts appealed.

Wickham, for the appellant. The testimony clearly proves that Betts did every thing in his power to secure the land. The fault, therefore, was in the surveyor; or, perhaps, M'Conico's land was ideal; for there is no evidence that it could be found at all. But, however this might be, Cralle was guilty of very improper conduct in snatching the bond out of Betts's hand, and tearing it. A compromise was afterwards made, which closed the previous transactions. It was agreed that Cralle should pay 150l. at several payments, in full compensation for tearing the bond, and also for Betts's services in Kentucky; and this compromise ought not now to be disturbed.

There is no ground to impute to Betts any unfair conduct. He (as well as Cralle himself) was imposed upon by the surveyor; and, where there is no fraud, the equity on both sides being equal, the law should prevail. Besides, Cralle may still sue M'Conico for damages, if his land be really lost; or may maintain an action against the surveyor: but Betts has no remedy, except
244 against *Cralle, for the great trouble and expense which he incurred on his account.

Call, contra, did not pretend to justify Cralle's conduct in tearing the bond; but neither could Betts be justified in endeavouring to impose on him. According to the terms of the original agreement, all that Betts had a right to, (the land being lost,) was his proportion of such damages as might be recovered of M'Conico; but he was certainly not entitled to the land, having not complied with the agreement on his part. The first bond, therefore, smells of imposition; being for an absolute conveyance of 300 acres of land which Betts was not entitled to; and the last bonds were without any consideration at all. Cralle's weakness and fear of being prosecuted for tearing the bond, are not sufficient reasons to bind him. There is strong reason from the testimony to believe that M'Conico's land, with due diligence, might have been found. If a man covenant to do a thing, he is bound to do it at all events, if it be

practicable. Nothing can discharge him, but proving it to be impossible.

The decree was right, except that the Chancellor ought not to have given Betts the land: for he is not entitled to any thing.

Wickham, in reply. The Chancellor's directing the 300 acres to be conveyed was a matter of moonshine; having himself decided that no such land existed. Mr. Call sets off the improper conduct of Betts
245 against that of Cralle: *but there is no proof of any improper conduct on the part of Betts; nor even of any negligence. It was his own interest to find the land; for he was to have part of it. Cralle's own measure of diligence was a good rule to measure that which Betts was bound to exert. He went himself to Kentucky, and had the same land surveyed. The bond for the 300 acres was not a void act. The parties were able to bind themselves by their contract, and did so. Mr. Call contends that Betts committed a fraud in taking that bond; the condition being to make an absolute conveyance. But, the bond having been destroyed by Cralle, this cannot now be presumed in his favour: on the contrary, the bond should be presumed to have been in pursuance of the contract.

Neither is there any proof that the money bonds were obtained by terror. Betts accepted them in bar of his claim under the original contract, as well as in satisfaction for the trespass. How, then, can he have the benefit of that contract now? The Chancellor ought, indeed, upon annulling the compromise, to have restored us to our original cause of action: but this he has not done.

Friday, April 27th. The Judges pronounced their opinions.

JUDGE TUCKER. The circumstances of this case appear to be extremely hard. The complainant appears to be a loser, without the fraud, default, or neglect of the defendant, who seems to have proceeded to perform his undertaking to have the lands, purchased of M'Conico, in Kentucky, surveyed with fidelity, and, as far as in him lay, with prudence and discretion. The county surveyor, a sworn public officer, was, of all others, the person most proper to apply to, to point out and divide lands located in a wilderness. That the surveyor acted unfaithfully appears evident from his own depositions. He imposed first
246 upon Betts, and afterwards upon Cralle himself. It would seem *to me that the bond which Cralle tore, being given by him and accepted by Betts for a conveyance of lands therein particularly described, was pleadable in bar of any action or suit for a specific performance of the original contract, or for damages for the breach thereof; (except, perhaps, for expenses incurred by Betts;) consequently, Mr. Call is mistaken in supposing Betts might still avail himself of that contract. The second and third bonds, given when the compromise took place, not only in full satisfaction for the 300 acres of land claimed by Betts, but as full compensation to him for his services rendered, cannot therefore be said to have been given without any consideration. Cralle either has or may

*Note by the Reporter. The original agreement, bearing date the 18th of March, 1794. (which was among the exhibits, though not described as a written contract, either in the bill or answer,) contained a clause "that in case the land could not be found, Betts was to have, in proportion of money and damages that Cralle might recover of M'Conico for his non-compliance in making him a lawful title to the said 3,000 acres of land, as 800 is to 3,000; and the said Cralle was to bear the above proportion of the expenses attending the laying off the said 3,000 acres of land, and other contingent expenses, in like proportion as 800 is to 3,000."

have, the whole lands, now, if found; or, if they cannot be found, he has his action against M'Conico for damages. Of those damages Betts, under the original contract was entitled to a proportion; to which, as also to all other recompense for his trouble and expenses, he has by the compromise yielded all claim. I cannot think it competent to a Court of Chancery to set aside so many deliberate acts between the parties, and reinstate the original contract between them. I am therefore of opinion, that the Chancellor erred in reversing the decree of the County Court, and that his decree ought to be reversed, and that of the County Court established and affirmed.

JUDGES ROANE and FLEMING, were of the same opinion. The decree of the Chancellor was therefore unanimously reversed, and that of the County Court affirmed.

247

*Marshall v. Frisbie.

Monday, April 30, 1810.

1. **Depositions**—Order Thereof—Presumption.—An order of Court granting leave to take a deposition in the city of Philadelphia, being, "by consent of parties, that a commission issue to any four aldermen of the said city and W. K.," and a subsequent order (also by consent) granting "new commissions to take depositions;" a commission issuing afterwards "to R. K. alderman of the city of Philadelphia, and four other persons by name," not said to be aldermen, (and omitting W. K.) "any three of whom to act, if the whole cannot," should be presumed to have been directed to persons agreed upon by the parties, but whose names were omitted by the Clerk in entering the last order; no objection having been made. In the Court below, on account of any real or supposed variance between the first and second orders and the commission.
2. **Same**—Commission to Five Persons—Execution by One.—A commission directed to five persons. ("any three of whom to act,") cannot be executed by one only: and a return, by one, that three others were present when the deposition was taken, is not sufficient. It should be certified by three, at least, who were present.
3. **Same**—Failure to Take at Place Mentioned in Notice—When Admissible Evidence.—A deposition, taken at a time and place not mentioned in the notice, may be read as evidence; an agent of the party to whom the notice was given, duly authorized to attend to the taking of such deposition, having appeared at the time and place appointed, and consented to a postponement to such other time and place. And if, in other respects, the commission be regularly executed and returned, the Court will presume from circumstances, that the person who gave the consent was the authorised agent of the party.
4. **Same**—Adjournment of Taking Thereof.—Quære, whether Commissioners appointed to take depositions can, "by their own mere authority, adjourn the taking thereof to any other convenient time and place, in the event that the business cannot readily be finished on the day, and at the place, to which the notice applies;" no intended adjourn-

ment from day to day until the business be finished, being expressed in such notice?

In an action of trespass on the case by Nathaniel Frisbie against Almarine Marshall, in the County Court of Wythe, a commission was granted the defendant on the 15th of June, 1796, to take the deposition of Philip Dick, of the city of Philadelphia; "and Benjamin Jones, William Kenner, and any three aldermen of the said city, to take the same by consent of the parties;" and the same was granted the plaintiff. On the 11th of July, 1797, by consent of the parties, it was ordered that a commission issue "to any four aldermen of the city of Philadelphia, and William Kenner," to take the deposition of the same witness. September 14th, 1797, the following order was entered: "Continued at the plaintiff's costs. And, by consent of the parties, order granted for new commissions to take depositions."

A commission was issued, November 24th, 1798, "to Reynold Keen, gent., alderman of the city of Philadelphia, and John Gibson, William Rogers, Robert Underwood, and David Denniston (any three of whom to act if the whole cannot) of the same city," &c. in the usual form.

The notice from Frisbie to Marshall, appointed "the house of Philip Dick, grocer in Market Street, Philadelphia, on the 19th day of December, 1798," to take the deposition, which was taken and certified in the following manner:

"Philadelphia, ss. By virtue of a commission from the Commonwealth of Virginia, issued, &c. to me Reynold Keen, one of the aldermen of the said city directed, I was called upon the 19th day of December, inst. by John Gibson, William Rogers and Robert Underwood, to go to the house of Philip Dick, in the said city, to take his deposition in an action now depending, &c.; and William Jones likewise appearing on the part of the defendant; it was agreed by the said John Gibson, William Rogers, and Robert Underwood, the Commissioners in the said commission named, as well as on the part of William Jones, the defendant's representative, that the taking of the deposition be postponed to the 21st December, then for the greater convenience to meet at the office of the said alderman Reynold Keen. Whereupon, this said 21st of December, 1798, I have caused to come before me the said Philip Dick, in the presence of the said Commissioners, and in the presence of William Jones, the representative of the said defendant, and he the said Philip, being sworn, &c. did depose and say," &c. (here inserting his testimony; and concluding as follows:) "The foregoing with the interrogatories sworn to and subscribed before Reynold Keen. P. Dick." On the 12th of June, 1799, 10th of April, 1799, and 12th of November, 1800, Juries were empanelled, but not agreeing, were discharged, the plaintiff having at the trials on the 10th of April, 1799, and 12th of November, 1800, offered in evidence the deposition taken as aforesaid, to which the defendant excepted, but his objections were overruled. On the 13th of June, 1800, a ver-

*Depositions.—The Virginia and West Virginia cases pertaining to the subject of depositions are collected in a monographic *note* on that subject appended to Field v. Brown, 24 Gratt. 74.

dict was found for the defendant, but a new trial awarded.

249 *August 12th, 1800, a dedimus was granted the defendant to take the depositions of Philip Dick and William Jones, of the city of Philadelphia; but whether he ever took their depositions accordingly does not appear.

A fifth Jury was empanelled the 15th of April, 1801, when the plaintiff again offered in evidence the same deposition; "and the defendant by his counsel objected to the reading thereof, because, 1st. The commission was directed to five Commissioners, (any three of them to execute,) and it was subscribed, and from the face thereof, as he contended, appeared executed by one only; 2dly. It was not taken at the time and place mentioned in the notice; and, 3dly. By no evidence other than the deposition itself did it now* appear that William Jones was the agent of the defendant, or had authority, either express or implied, to consent to the postponement until the 21st of December, 1798, and to a different place."

The Court overruled the defendant's objections; and permitted the deposition to be read to the Jury, who returned a verdict for the plaintiff for 120 dollars damages; and judgment was accordingly entered, which, on an appeal to the District Court, was affirmed; whereupon the defendant appealed to this Court.

Wickham, for the appellant.

Hay, for the appellee.

250 *Friday, May 11. The Judges pronounced their opinions.

JUDGE TUCKER. The only question in this cause is, whether the deposition of one Philip Dick, taken in Philadelphia, by virtue of a commission from the County Court of Wythe, ought to have been read in evidence at the trial.

The act of 1792, 1 Rev. Code, c. 141, s. 13, authorizes the issuing of a commission directed to such Commissioners, not exceeding five, as shall be nominated and agreed on by the parties litigant.

On the 15th of June, 1796, a commission was granted the defendant to take the deposition of Philip Dick; and Benjamin Jones, William Kenner, and any three aldermen of the said city were to take the same by consent of the parties; and the same was granted the plaintiff.

On the 11th of July, 1797, by consent of the parties, it was ordered that a commission issue to any four aldermen of the city of Philadelphia, and William Kenner, for the same purpose. September 14, 1797, the cause was continued at the plaintiff's costs, and, by consent of parties, an order was

*Note by the Reporter. In the former bill of exceptions, filed in April, 1799, the defendant alleged "that William Jones did not appear to have been constituted his representative with authority to do any thing, except attend to the taking of the deposition." And in the bill of exceptions, filed the 12th of November, 1800, the same allegation was in substance repeated: the defendant contending "that Jones had not an absolute authority, but only a power to attend at the time designated in the notice." On both those occasions a witness proved the defendant's acknowledgment that he had authorized Jones to attend to the taking of the deposition; the witness using in the first instance, the words "in his stead;" and in the last instance, the words "and to act as his agent therein."

granted for new commissions to take depositions.

A commission was issued on the 23d of November, 1798, directed "to Reynold Keen, gentleman, alderman of the city of Philadelphia, and John Gibson, William Rogers, Robert Underwood, and David Denniston, (any three of whom to act if the whole cannot,) of the same city, greeting, &c."

This commission does not conform to the consent order. 1st. The name of William Kenner is not in it. And, 2dly. It is not directed to John Gibson, and the other three as aldermen, nor do they appear to have been aldermen. For, although the order of the 11th of July, 1797, was not carried into effect before the next term, I consider the order of September 14 following, not as revoking, but, as extending the time for the execution of it: and, consequently, that the commission ought to have conformed to it.

251 *Again, the deposition is certified only by Reynold Keen, and not by any other of the Commissioners, as it ought in my opinion. Both the commission, and the execution of it, being thus manifestly defective upon the face of them, the deposition ought not to have been read. The judgment, therefore, ought to be reversed; and a new trial awarded, with directions not to permit the deposition to be read on such trial.

JUDGE ROANE. Several objections have been made to the reception of the deposition stated in the bill of exceptions. It is first said, that there is no proof that W. Jones was the agent of the appellant; without which, it is also alleged, the deposition could not properly have been taken on the day and at the place in which it was taken. Several answers occur to this objection. In the first place, I apprehend that the Commissioners, by their own mere authority, could have adjourned the taking of the deposition to any other convenient time and place, in the event that the business could not readily have been finished, on the day and at the place to which the notice applied. In the next place, if it were necessary, and the execution of the commission were in other respects regular, I would presume that W. Jones was constituted by the appellant his agent, for the purpose of taking the deposition: I would presume this, because P. Dick was considered by the appellant himself as a material witness for him, as appears by the orders for commissions, granted at his instance, on the 15th of June, 1796, and 12th of August, 1800, and it is natural to suppose, that a man would appoint an agent to attend to the examination of a material witness: I would also easily presume that W. Jones was this agent, because (in addition to other considerations) a confidence in him may be in some degree inferred, on the part of the appellant, from his having considered him also as a material witness; having included him in the order for a commission of the 12th of August, 1800.

252 *Another objection (if I understood the counsel rightly) was, that there was a variance between the order for the commission, and the commission itself, in

this, that the former requires the latter to be directed to five aldermen, any three of whom are authorized to act, whereas it does not appear by the commission, or return, that more than one of the persons, to whom the commission under which the deposition was taken, was an alderman. That objection of variance applies, it is true, to the order of 12th of August, 1800; but it was not under that order that the commission issued, but under that of 14th September, 1797, as appears by the date of the commission itself, it being the 23d November, 1798; and it does not appear that that order of 14th September 1797, made aldermen indispensable, as Commissioners; and, as the arrangement for the commission was by consent of parties, there is no ground to say that the commission in question is in this respect objectionable. I consider this order of 14th September, 1797, and not those of a prior date, as the one under which the deposition was taken; and that the former commissions were superseded by the latter, by which alone we are to be governed.

I should, therefore, readily get over all these objections: but this commission is not returned as executed by more than one out of five Commissioners, contrary as well to the tenor of the commission itself, as to the general principles of law in relation to authorities. See 1 Bac. Abr. 319, (Gwill. edit.) and the cases there cited. It might be of dangerous consequence to sanction such a return as this; which would be as properly done in the case of twenty Commissioners as of five, and thus one dishonourable character might abuse his trust to the injury of the parties, and in opposition to the precautions they have taken to require the concurrence of a majority. The terms of this commission, which is directed to five by name, (any three of whom are, however, empowered to act,) in using the word "you" and omitting to use the expression "any of you," are very emphatical to import, that the trust was

253 *confided to, and can only be executed (which includes the return) by the whole number, or, at least, the majority thereof. If this objection had never been taken in the Court below, or even if we were now considering it upon the first bill of exceptions, (and no previous notice of the objection on the part of the appellant had been given,) I will not determine that the objection ought to prevail: but the case is widely different at the present time. We are now acting upon the bill of exceptions exhibited on the 15th of April, 1801, when the case was on trial before the fifth Jury. The objection in question was not then taken for the first time: it had been taken on the 1st of April, 1799, and on the 13th of November, 1800, as appears by the several bills of exceptions of those periods. On the 12th of August, 1800, the appellant also obtained an order for taking Dick's deposition, which shewed he was not satisfied with the one formerly rendered. All these facts and circumstances shew an early and constant objection, on the part of the appellant, to the deposition in question: the appellee cannot, therefore, complain of surprise, and the case now comes before us as it would in relation to a first trial, if notice

that the objection would be made had been previously and formally given. The principles of law must therefore prevail; and the appellee having deliberately stated his right to recover upon this, as an abstract question, he must submit to a decision upon it accordingly.

My opinion therefore is, that the judgment of the County Court is erroneous, in having admitted the deposition in question to go to the Jury, and that the judgment of the District Court affirming it is also erroneous; that both ought to be reversed, and a new trial awarded, in which the said deposition is not to be admitted in evidence.

JUDGE FLEMING. The only important point in this cause is, whether the deposition of Philip Dick, taken in the city of Philadelphia, and read at the trial of the cause in the County Court, was legal evidence or not?

254 *The exceptions taken by the counsel of the defendant (the present appellant) were, 1st. That the commission under which the deposition was taken was directed to five Commissioners, any three of whom might act; and it was subscribed, and from the face thereof appeared, as he contended, executed by one only.

2dly. That it was not taken at the time and place mentioned in the notice. And, 3dly. That by no evidence other than the deposition itself, did it now appear that William Jones was the agent of the defendant, or had authority, either express or implied, to consent to the postponement until the 21st of December, 1798, and to a different place. No exception whatever has been taken by counsel with respect to the legality of the commission, in either of the Courts in which the cause has been discussed. But a Judge of this Court, for whose opinions I have the highest respect, seems to think that the commission itself is too defective, in law, to authorize the taking of any deposition in virtue of it: but, being of a different opinion, I must first refer to the act of Assembly on the subject, and then notice some of the orders that had been made in the cause, previous to the date of the commission.

The mode pointed out, by the 13th section of the act of 1792, 1 Rev. Code, c. 141, for taking the depositions of witnesses residing out of the state, seems, in part, superseded, in the case before us, by the appearance and consent of the parties in Court; both of whom seem to have relied on the testimony of Philip Dick, whose deposition is now the subject of controversy.

On the 15th of June, 1796, a commission was granted to the defendant to take the deposition of Philip Dick, of the city of Philadelphia; and Benjamin Jones, William Kenner, and three aldermen of the said city to take the same, by consent of the parties; "and the same is granted to the plaintiff."

That commission not having been executed, on the 11th of July, 1797, by consent of the parties, it was ordered, 255 *that a commission issue to any four aldermen of the city of Philadelphia, and William Kenner, to take the deposition of Philip Dick of said city. It does not appear whether a commission ever issued

by virtue of that order; and if one did issue, it was not executed: as on the 14th of September, about two months thereafter, by consent of the parties, an order was granted for new commissions to take depositions: from whence I infer that the parties found it convenient to change the Commissioners, whether on the death of William Kenner, (the only one specially named in the order of July,) or from any other cause, seems immaterial, as the change was made by consent of the parties. In the commission issued in consequence of the order of the 14th of September, and by virtue of which the deposition was taken, five Commissioners were specially named, to wit, Reynold Keen, alderman of the city of Philadelphia, John Gibson, William Rogers, Robert Underwood, and David Denniston, any three of whom to act, if the whole could not. And it appears that the four first named were present at the taking of the deposition, though certified by Keen, the alderman, only. I have no doubt but the commission issued conformably to the order, though no commissioners are named therein. 1st. Because I will presume that the Clerk did his duty, unless the contrary had appeared; 2dly. Because I cannot suppose the clerk, at the distance of four or five hundred miles from Philadelphia, where he was, probably, an utter stranger, could have so particularly inserted the names of five Commissioners, unless they had been chosen and designated by the parties themselves. And, 3dly. Had the commission not have been issued in conformity to the order, the error would not have escaped the vigilance and notice of Mr. Sheffy, the eagle-eyed counsel of the appellant, who seems to have availed his client of every advantage he supposed the law would allow him. I am therefore of opinion, that the commission was of sufficient validity to authorize the taking the
256 deposition *under it. I proceed to consider the exceptions taken to the deposition.

With respect to the first objection, "that the commission was directed to five Commissioners, any three of them to execute, and it was subscribed, and from the face thereof (as he contended) appeared executed by one only." This is the only point on which I had any doubt, but, on mature reflection, after carefully attending to the deposition, and the return thereof, my doubt is removed. It appears to have been taken in the presence of four Commissioners, (when three would have sufficed,) and of Jones, the agent of the appellant, with great attention, skill, and circumspection. After the witness had gone through his plain, simple narrative, every pertinent interrogatory that an acute attorney could have suggested seems to have been put to him; all of which he answered with apparent candour and perspicuity. The deposition itself seems one of the most unexceptionable that I ever heard read in a Court of Justice. But "it was subscribed by one Commissioner only." That I take to be the usual mode of making returns on commissions of this nature, executed in Philadelphia: which seems to me rather a matter

of form than of substance, and ought not, in my apprehension, to vitiate a deposition so unexceptionable in every other respect; and appearing to have been taken by the whole four Commissioners, who, by the commission, were directed "to cause to come before them Philip Dick, and him diligently examine, in solemn form, on oath, or affirmation, and having received his examination aforesaid, that they plainly send the same enclosed into our said County Court of Wythe." The commission did not require that the deposition should be subscribed by all the Commissioners: but that it should be diligently taken by them, and sent into the Court from whence the commission issued; which appears to me to have been substantially and completely done. On trials by Jury, even in cases of life and death, the verdicts are subscribed only by the foremen, in behalf of the other Jurors.

257 *The second objection is, "that it was not taken at the time and place mentioned in the notice." It appears that the Commissioners met at the time and place therein mentioned; and if the appellant had not appeared, either in person, or by agent, they might have proceeded to execute the commission in his absence. He did not appear in person, and their receiving Jones as his agent did not place him in a worse situation than he would have been in without an agent: Jones (having been received as such) had a right to consent, and did consent, (probably in the absence of the witness,) to postpone the business for two days, and then, for greater convenience, to meet at the office of alderman Keen, the first named Commissioner, where the commission was executed in the manner before noticed, in the presence of Jones, the agent, and by the same four Commissioners.

The third objection is, "that by no evidence, other than the deposition itself, did it now appear that William Jones was the agent of the defendant, or had authority, either express or implied, to consent to the postponement until the 21st of December, 1798, and to a different place." To this it may be answered, that there is evidence in the record that the appellant confessed he had appointed a certain William Jones his agent, to attend to the taking of Philip Dick's deposition; and, if he was his agent for that purpose, he had a right to consent to any thing, and every thing, relative to the business, that the appellant might have consented to, had he been personally present.

I am therefore of opinion, that the deposition was properly admitted as evidence on the trial, and that the judgment ought to be affirmed:

But, as a majority of the Court is of a different opinion, the judgment is reversed, and the cause remanded to the Superior County Court of Wythe, for a new trial to be had therein, on which trial the deposition of Philip Dick, read at the former trial, is not to go in evidence to the Jury.

258

***Eppes v. Cralle.**

Tuesday, May 1. 1810.

1. **Mills*—Verdict—Uncertainty.**—What degree of uncertainty and inaccuracy of language is sufficient to set aside the finding of a Jury in a mill case.
2. **Same—Petition to Raise Height of Dam—Subject of Inquiry.**—On a petition for leave to add to the height of a mill-dam, the only proper subject of inquiry is, what damages will be occasioned by the proposed addition. It is error, therefore, to direct the Jury to assess such other damages, accruing from the dam already erected, as were not contemplated by the original Jury.
3. **Same—Same—Same—Surplusage.**—But an error in this respect should be regarded as surplusage, (the petition for the writ of ad quod damnum having prayed only for such inquiry as the law authorizes,) if the Jury assessed such erroneous damages separately, and the Court did not direct the same to be paid, but only the damages properly assessed.
4. **Same—Appeal—Costs—What Included Therein.**—On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the Court of Error; though the Court determined on viewing the record only, and therefore did not examine the witnesses.

This was an application for leave to raise the dam of a water grist-mill on Flat-rock creek, in the County of Lunenburg.

The petition of Richard K. Cralle, presented to the County Court, requested permission to raise his dam "from its present height to fourteen feet and one half," and prayed a writ of ad quod damnum "to ascertain what additional damages would be done, by overflowing land not condemned by the former Jury, in raising the dam that additional height;" without specifying what the present height was; neither did it mention any other subject of inquiry.

The Court awarded a writ of ad quod damnum to assess the damages that would accrue by raising the said Cralle's mill-dam "six inches higher than the present dam, and such other damages, as have accrued in raising the dam the present height, not contemplated by the former Jury."

The writ of ad quod damnum conformed to this order; except that, by an apparent mistake of the Clerk, the word "condemned" was used, instead of "contemplated." In other respects it was in the usual form.

The first writ not having been executed, in consequence of a fresh in the creek, as appeared by the Sheriff's return, an alias writ of ad quod damnum was awarded, "according to the prayer of the petition." This second writ directed the Jury to make the same inquiries with the first.

In obedience to this writ, a Jury
259 "having been empanelled, *charged and sworn as the law directs, proceeded to inquire into the several matters delivered them in charge." Their inquisition then proceeded, "after due considera-

tion thereof, we are of opinion that by erecting the said Richard K. Cralle's dam six inches higher than its present height, agreeable to the annexed writ of ad quod damnum, it will damage the lands and other conveniences of Francis Eppes to the amount of fifty dollars and fifty cents, and that the lands of William Buford will be damaged to the amount of one dollar. We are further of opinion, that there has accrued damages to the land conveniences of the said Francis Eppes to the amount of one hundred and forty dollars, and that it will damage the lands of William Buford four dollars, which said last mentioned damages was occasioned by the waters overflowing higher than the former Jury contemplated, and have been assessed by us, which we are of opinion ought to be paid by the said Richard K. Cralle to the said Francis Eppes, in addition to the damages assessed by the former Jury. We are further of opinion that no mansion house, office, garden, curtilage or orchard will be effected or damaged by the erection of the said mill-dam six inches higher than the present dam, and that no mansion house, garden, office, orchard, curtilage, or the ordinary navigation, or passage of fish, or the health of the neighbourhood will not be annoyed, or affected by the raising the said mill-dam to the present height, not contemplated by the former Jury, and in our opinions there will be no other damage to any person or persons whatsoever, except to the said Francis Eppes and William Buford. Certified under our hands and seals this 5th day of October, 1807."

On the return of this inquisition, Francis Eppes only was summoned, to shew cause, if any he could, why an order should not be granted according to the prayer of the petitioner; and the parties appearing, the Court, "upon hearing the inquisition and other evidence adduced by the parties," was of opinion "that the said Cralle have leave to build his dam fourteen feet
260 six inches high." And the said

*Cralle tendered in Court the damages found by the Jury, which the defendant refused to accept, and appealed to the District Court of Brunswick, which reversed the said order, and, proceeding to make such order as the said County Court ought to have made, directed "that the said Richard K. Cralle have leave to raise his dam six inches higher than the present dam, and that the appellee pay to the appellant fifty dollars and fifty cents, and William Buford one dollar, the amount of the damages found by the Jury in their inquisition, which will be sustained by them in consequence of the appellee's raising his dam six inches higher than the present dam; and that the appellee recover against the appellant his costs expended by him in prosecuting his petition in the said County Court."

From which order the appellant prayed an appeal to this Court.

George K. Taylor, for the appellant, made three points; viz.

1. The petition was for leave to raise the dam "to fourteen feet and one half;" the order awarding the writ of ad quod damnum said "six inches higher than the present

*See generally, monographic note on "Mills and Milldams" appended to Calhoun v. Palmer, 8 Gratt. 88.

The principal case was distinguished in Mitchell v. Thorne, 21 Gratt. 174.

dam." This is a fatal variance; for there is nothing in the record to shew what the present height is.

2. The order made by the District Court should also be reversed for uncertainty. The County Court, notwithstanding their first order, had directed the Jury to assess the damages that would accrue by raising the dam six inches higher than at present, in their last order conformed to the petition, and granted leave "to build the dam fourteen feet six inches high." The District Court reversed that order, (which was the most correct,) and gave judgment in the language of the inquest, "to raise the dam six inches higher than the present dam;" leaving it uncertain to what height it should be raised.

3. The first order of the County Court, and the writ of ad quod damnum directed the Jury to ascertain the damages
261 *which a previous Jury had not foreseen and estimated; and this Jury made a return as to that fact. This inquiry the Court had no right to direct them to make, and their having made it vitiates the whole inquest.

Call, for the appellee. The two first points depend on the testimony which is now about to be laid before the Court. The third point relates to mere surplusage, which ought not to have been in the order, but need not be regarded.

Taylor. The act of Assembly directs the attention of the Sheriff and Jury to certain points only. The Court here directed another point to be inquired into not authorized by law. Their act is therefore void. So, in the case of official bonds, if not exactly conformable to law, they are void.

Call. This objection never would have entered my mind; and, I must say, I never knew one of less foundation. I grant, if things ordered by the statute had not been done, the inquisition would have been void. But here the Court have only done a work of supererogation.

Where a statute directs bonds to be taken in a prescribed form, I admit that form must be strictly pursued. But no particular form is prescribed for an inquest. The case of a forthcoming bond is therefore similar to this. Where more than the amount of the execution is inserted in the bond, the plaintiff may release the surplus.

The additional inquiry in this case was for the benefit of Eppe; not of Cralle. The two assessments of damages may easily be severed; being separately found. So far, then, as the jurisdiction of the Court under the act extended, its orders should be supported; and disregarded as to the other part. Both the County and District Court rejected this, and merely proceeded to award the damages for raising the dam.

262 *JUDGE TUCKER. The party was entitled to his action toties quoties for injuries not estimated by the former Jury. In this case the writ of ad quod damnum could legally issue only to assess the additional damages occasioned by raising the dam. I am therefore of opinion, that the inquisition taken upon it was illegal and ought to be quashed.

JUDGE ROANE was of a different opinion. The party having prayed for what was perfectly legal; and the Court having corrected its own error, (for the last order was exactly conformable to the petition,) no injury was done. The maxim therefore applies "utile per inutile non vitiatur."

JUDGE FLEMING, as to this point, agreed with Roane; observing, that the error committed in the first order was subsequently corrected by the Court.

Taylor proceeded to mention another point. The Jury have not answered to all the commands of the writ. They have not said whether fish of passage, and ordinary navigation, will be obstructed, or the health of the neighbours injured.

Call. The Jury, in conclusion, negative all damages to any person whatever. But it greatly depends on the manner of reading this inquisition, to determine whether it answers to the whole command of the writ.

JUDGE TUCKER. This inquisition is not intelligible to me; and the last clause implies there might be other damages (not ascertained) to Eppe and Buford.

JUDGE ROANE. I am for looking to substance; and, if satisfied that the meaning of the Jury (though not technically expressed) comes up to the requisition of the law, will be satisfied. I under-

263 stand the meaning of the last *clause in the inquisition, though inaccurate and ungrammatical, to be that the health of the neighbours had been contemplated by the former Jury; and that no other damage than (as before mentioned) to Francia Eppe and William Buford, would result. They thus adopt the opinion of the former Jury, as to the health of the neighbours; and say as they did.

JUDGE FLEMING considered the return of the Jury insufficient; not having answered to the essential parts of the writ of ad quod damnum; viz. to what related to the health of the neighbours, the passage of fish and navigation.

An order was therefore directed to be entered, reversing both judgments; quashing the inquisition and writ of ad quod damnum; setting aside all the proceedings subsequent to the petition; and remanding the cause to the County Court for further proceedings. But, on Judge Roane's suggestion, the Court agreed to reconsider the subject.

Wednesday, May 2. A second argument took place.

Call. More precision than was used in this case is not required by the terms of the act of Assembly. The question is about raising a dam, not about an original order to build a mill. The inquiry is only as to the value of additional damages; not as to the original points. But, even if a larger latitude of inquiry be requisite, this inquisition is sufficient. Whether the health of the neighbours will be injured is a mere matter of opinion, not conclusive, but traversable, and amounting to no more than the oral declarations of the Jurors in Court. Evidence may therefore now be received as to this point.

The degree of certainty required in in-

quisitions is not as great as in pleadings. Certainty to a common intent is sufficient. (a) "There are three manners of certainty. 1. Certainty to a common intent; 2. Certainty to a certain intent in general; and, 3. Certainty to every intent;" which last certainty is rejected altogether. The same certainty is not requisite where a statute is directory only, not prohibitory. (b) It was the duty of the Sheriff and Jury to make these inquiries; and it shall be intended that they did their duty unless the contrary appear. (c)

In England, there are two kinds of inquests. One is called an office of instruction, or information; the other an office of intitling. In the former, as much accuracy and certainty are not requisite as in the latter. In this country, the inquisition in a mill case resembles the office of instruction.

In inquisitions of this kind, whatever is well found shall stand; and a writ melius inquirendum shall go as to whatever is not well found. (d) Where the inquisition is totally uncertain, I admit that a melius inquirendum cannot issue: but the case is otherwise where it is uncertain as to part only. (e)

In *Wroe v. Harris*, (f) it was decided that where an inquisition is general, "that no man will be damaged," it is sufficient. In this case the inquisition shews, on its face, that the Jury considered every thing that the law directed: the conclusion is general, negating every subject of inquiry. Where the Jury say that the "ordinary navigation, or passage of fish, or the health of the neighbourhood, will not be annoyed or affected by the raising the said mill-dam to the present height, not contemplated by the former Jury," their meaning must certainly be to the present contemplated height, which had not been taken into consideration by the former Jury. But a sufficient answer to the objection is, that the whole case is still open to the Court upon the evidence.

Taylor, contra. If the inquisition find facts against the petitioner, that finding is conclusive; and such is the constant practice. Other evidence is never admitted to supply defects, but only to traverse the inquisition.

265 *According to Mr. Call's own doctrine, if uncertainty appear, the inquisition must be quashed: and this is the very case at bar.

Wednesday, May 2. Judge Tucker observed that he had nothing to add to his opinion given yesterday relative to two points: but he would now say that the District Court erred in making the present height the standard, there being nothing to shew what that height was: and, if for no other cause, the judgment should be reversed for that. He afterwards furnished the reporters with the following written opinion.

My opinion, briefly, was, that there were

(a) 5 Co. 56. b. Knight's cases, 4 Resol. 1 Tidd's Prac. 186, 2 Salk. 460, 5 Co. 121. a., Long's case.
(b) 2 Sid. 144.
(c) 1 Hale's P. C. 416.
(d) 1 Hale's P. C. 415, 2 Salk. 460.
(e) Vaughan's Rep. 241.
(f) 2 Wash. 128.

several errors in the proceedings and judgments of both Courts.

I. That the writ of ad quod damnum was erroneous,

1st. In directing an inquiry to be made as to what damages would accrue from raising the mill dam six inches higher than the present height, without mentioning what the present height was. And,

2d. In directing the Jury also to say what other damages have already accrued and been done to individuals, in raising the dam to the present height, "not condemned by the former Jury." The first of these matters being uncertain and indeterminate; and the latter, not within the proper objects of this Jury's inquiry, but the subject of an action, or actions, between the parties.

II. That the inquisition taken was erroneous,

1st. In answering to these erroneous matters.

2d. In not answering in what manner the ordinary navigation, the passage of fish, and the health of the neighbourhood may be obstructed or annoyed by raising the dam. And, therefore, that the said writ of ad quod damnum and inquisition ought to be quashed, for such uncertainty, &c.

III. That the County Court erred,

1st. In giving leave to raise the dam, instead of quashing the writ and inquisition.

266 *2d. In allowing the petitioner to raise his dam to the determinate height of fourteen feet six inches, without a previous inquiry into the effects which might be produced by raising the same to that particular height. There being nothing in the writ or inquisition to shew what such effects might be.

IV. That the District Court erred,

1st. In giving leave to raise the dam upon these uncertain, insufficient, and erroneous proceedings. And,

2d. In giving leave to raise the dam to the uncertain and indeterminate height of six inches above the present height, which present height does not appear from any part of the proceedings.

JUDGE ROANE was of opinion that the order of the District Court should be affirmed. He thought the return to the writ of ad quod damnum substantially good. It appeared also sufficiently from the proceedings that the present height of the dam was fourteen feet; and that granting leave to raise it to fourteen feet six inches, (according to the petition), or six inches above its present height, (according to the order awarding the writ of ad quod damnum,) was, in fact, the same thing.

JUDGE FLEMING. I have examined the cases cited yesterday by Mr. Call, and cannot perceive their application to the case now before the Court. He properly observed that there were in England two kinds of inquisitions, where the crown is concerned—one of instruction, or information, and the other of intitling; and, if there be any analogy between them and the one before us, this is analogous to the office of intitling; which, his own authorities say, requires accurate certainty.

The writ of ad quod damnum, in the

present case, (omitting what has been adjudged surplusage,) required the Jury to meet on the land of Richard K. Cralle, where he has erected his water grist-mill, and examine the lands above
267 *and below, of the property of others, which may be probably overflowed by raising the said Cralle's mill dam six inches higher than the present dam, and say what damages will be to the several proprietors; and to say whether the mansion house of any such proprietor, or the offices, curtilage or garden, thereunto immediately belonging, or orchards, will be overflowed; to inquire whether, and in what degree, fish of passage, and ordinary navigation, will be obstructed; and whether, in their opinion, the health of the neighbourhood will be annoyed, by the stagnation of the waters?

The Jury, after taking notice of their charge, proceed to say, "We are of opinion that the erecting the said Richard K. Cralle's dam six inches higher than the present height, agreeable to the annexed writ of ad quod damnum, it will damage the lands and other conveniences of Francis Eppes to the amount of 50 dollars and 50 cents; and that the lands of William Buford will be damaged to the amount of one dollar." And (omitting here what they say respecting damages, and inconveniences, not contemplated by the former Jury, as irrelative to the point under consideration) they proceed to say, "We are further of opinion that no mansion house, office, garden, curtilage, or orchard, will be affected or damaged by the erection of the said mill dam six inches higher than the present dam, and, in our opinion, there will be no other damages to any person or persons whatsoever, except to the said Francis Eppes and William Buford;" implying, however, that there may be other damages to those two persons: but the great defect seems to be, that they are quite silent, and have made no particular answer, respecting the passage of fish, the obstruction of navigation, nor the annoyance of the health of the neighbourhood, in consequence of the dam being raised six inches; which was given them in charge by the said writ.

But Mr. Call argued that the general finding of the Jury, that, "in their opinion, there will be no other damages to
268 *any other person or persons whatsoever, except to the said Francis Eppes and William Buford," comprehended those three latter subjects of inquiry, and rendered any special finding, with respect to them, unnecessary.

As well might he have argued that a general finding, that no damage nor inconvenience would accrue to any person or persons whatsoever, in consequence of raising the said dam six inches higher than the present dam, (without specifying a single subject of inquiry,) would have been a sufficient compliance with, and execution of, the said writ.

But the counsel further observed, that, by the fifth section of the act concerning mills, other evidence than the inquest might, and ought to be resorted to. True; but for what purpose? not to aid the in-

quest but to contradict it; and to prevent the Court giving leave to build, or raise, a mill dam, if it should appear to the Court, from such other evidence, that the Jury had been mistaken on any one subject of their inquiry. I am, upon the whole, of opinion, that the judgment of the District Court is erroneous and ought to be reversed, and the inquisition quashed.

By the majority of the Court, the judgments of both Courts were reversed; all the proceedings subsequent to the petition set aside; and the cause remanded to the County Court for further proceedings.*

269 *Bullitt's Executors v. Winstons.

Argued Thursday, March 22, 1810.

1. **Executiones—Levy—What Constitutes.**—A writ of fieri facias may be levied, without touching, or removing, the property: provided it be in the immediate power of the Sheriff, and admitted by him to have been taken to satisfy the debt.
2. **Same—Same—Same.**—The Sheriff's permitting the property to remain in the possession of a third person, or of the defendant, under a verbal engagement to produce it on the day of the sale, does not prevent the *fi. fa.* from having been levied in contemplation of law; the Sheriff being responsible to the plaintiff, in such case, if the property be not produced.
3. **Same—Same—Proof Thereof—Parol Evidence.**—Parol evidence is admissible to prove that a *fi. fa.* was levied, though no return was made upon it.
4. **Same—Return—Amendment.**—A Sheriff may be permitted, by order of Court, to make a return upon an execution, or to amend it, according to

*Note. In this case the mileage and attendance of a number of witnesses, summoned to the Court of Appeals, was ordered to be taxed in the bill of costs, and recovered by the appellant against the appellee; though no witnesses were examined: the Court having determined on a view of the record only.—Note in Original Edition.

†Executiones.—See generally, monographic note on "Executiones" appended to *Paine v. Tutwiler*, 27 Gratt. 440.

‡Same—Levy—What Constitutes.—To constitute an effectual levy, it is not essential that the officer should make an actual seizure; if he have the goods in his power and view, this may suffice. *Dorrier v. Masters*, 33 Va. 476, 2 S. E. Rep. 927, quoting from 3 *Tucker's Com.* 367, and citing the principal case as so holding. To the same effect, see *Poling v. Flanagan*, 41 W. Va. 198, 23 S. E. Rep. 685, where the principal case is cited.

§Same—Return—Amendment.—A court from which process is issued may permit the sheriff's return thereon to be amended at any time, even though a suit or motion founded on the original return be then pending, and even though the proposed amendment be inconsistent with the original return, and take away the foundation of the suit or motion. *Stone v. Wilson*, 10 Gratt. 533, citing *Wardsworth v. Miller*, 4 Gratt. 99, *Smith v. Triplett*, 4 Leigh 590, *Bullitt v. Winstons*, 1 Munf. 369, and *Rucker v. Harrison*, 6 Munf. 181. To the same effect, the principal case is cited in *Goolsby v. St. John*, 26 Gratt. 160; *Walker v. Com.*, 18 Gratt. 49, 51; *Reinhard v. Baker*, 13 W. Va. 809.

For further cases on this point, see foot-note to *Walker v. Com.*, 18 Gratt. 14; foot-note to *Wardsworth v. Miller*, 4 Gratt. 99; foot-note to *Smith v. Triplett*, 4 Leigh 590; monographic note on "Amendments" appended to *Snead v. Coleman*, 7 Gratt. 300.

the truth of the case, at any time after the return day.

5. **Same—Postponement of Sale—Release of Sureties.**—A plaintiff, by directing the Sheriff to put off the sale of property taken in execution, to a day after the return day, and to suffer it to remain in the possession of the principal defendant, or his securities, releases the securities altogether from that or any subsequent execution; such direction being given without their concurrence.

6. **Same—Same—Same.**—In such case, the plaintiff's adding to the direction the words "holding the property subject to the said execution," cannot prevent the release from operating.

7. **Same—Order Quashing—Appeal—Revivor.**—An appeal from, or supersedeas to, an order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only.

The principal questions involved in this case were, first, what acts amount to a legal levying of a writ of fieri facias; and, secondly, what is the effect of the plaintiff's directing the Sheriff to postpone the sale of property taken in execution, and suffer it to remain in possession of the defendants, until a day subsequent to the return day; as against securities; such arrangement having taken place by an agreement between the principal debtor and the plaintiff, without their concurrence?

A motion was made, to the District Court of common law, holden at Richmond, on behalf of Samuel Jordan Winston and Edward Winston, to quash a writ of fieri

[**Same—Postponement of Sale—Restoration of Property to Debtor—Effect.**—The mere postponement of a sale under an execution does not affect the plaintiff's rights, unless there be collusion. But if he directs the sheriff not to sell, but to leave the property in the debtor's possession, the execution is fraudulent and any other creditor may take the property in execution. The difference is obvious. So long as the goods are in the hands of the sheriff, they are in the custody of the law. But when the plaintiff directs a return of them, he takes them out of the custody of the law; and, from that moment, they are no longer bound by the execution. As maintaining these principles, the principal case is cited in *Governor for Fisher v. Vanmeter*, 9 Leigh 27, 29. See also, *foot-note* to *Baird v. Rice*, 1 Call 18.

[**Same—Levy—Release Thereof.—Effect on Surety.**—When an execution is levied on the property of a principal, if the creditor interferes and releases it, he thereby discharges the surety. *Garland v. Lynch*, 1 Rob. 563, citing the principal case. To the same effect the principal case was cited in *McKenzie v. Wiley*, 27 W. Va. 661. But the surety is discharged only to the value of the property on which the execution was levied. *McKenzie v. Wiley*, 27 W. Va. 661. See also, *foot-note* to *Baird v. Rice*, 1 Call 18; *foot-note* to *Alcock v. Hill*, 4 Leigh 622.

To the point that mere indulgence granted to the principal debtor will not release the surety, the principal case was cited in *Knight v. Charter*, 22 W. Va. 428. See also, on this point, *foot-note* to *Walker v. Com.*, 18 Gratt. 18; *foot-note* to *Hill v. Bull*, Gilm. 149.

Principal and Surety—Relief of Surety—Motion.—To the point that a surety may have relief by motion, when he is no longer liable for the debt of his principal, *Bullitt v. Winstons*, 1 Munf. 269, was cited in *Steele v. Boyd*, 6 Leigh 554, 558.

facias issued the 21st of February, 1804, in favour of Thomas Harrison, and Thomas James Bullitt, executors of Cuthbert Bullitt, against John Carter Littlepage, and the said Winstons; on the ground, (set forth in the notice,) "that a former writ of fieri facias for the same debt, had been regularly issued and levied on the goods and chattels of the subscribers, who were only securities for the said debt, and the said property, then taken, released 270 and discharged *by the aforesaid Thomas Harrison, under a compromise with the said John Carter Littlepage; to which compromise they were not parties, or in any manner consulted with respect to the same."

The evidence introduced on the hearing of this motion, and spread upon the record by a bill of exceptions, consisted of two writs of fieri facias on behalf of the said executors; one of which was against John C. Littlepage, Thomas Starke and the said Winston; and the other against the same persons, except Thomas Starke; both bearing date the 21st of January, 1800, and returnable the 1st of April following, but with no returns endorsed; also a letter from the said Thomas Harrison to the Sheriff of Hanover, dated March 12th, 1800, in which he directed him "to put off the sale of the property, taken by the said executions, until the first day of August, holding the property subject to the said executions, and to suffer it to remain in the possession of Mr. Littlepage, or his securities;" and other testimony proving that William Clarke was the deputy of Thomas Tinsley, Sheriff of Hanover County; that the said writs came to his hands as deputy aforesaid, at the time endorsed thereon; that, prior to the 12th day of March, 1800, he went to the house of Edward Winston for the purpose of levying the same on his property; that he then and there saw certain slaves belonging to the said Edward Winston, and declared that he "should levy" the said writs on them; that "no opposition was made" to the levying the said executions; that thereupon Peter Crutchfield, and the said Edward Winston, orally undertook to the said Clarke, to see that the said slaves should be forthcoming at the day of sale, and the said Clarke did not remove them, nor touch them, but assented to their remaining in the possession of Edward Winston, having taken a list of their names; that he next proceeded to the house of David Timberlake, who was in possession of a slave belonging to the said S. Jordan Winston, under hire until the end of the year 1800, and informed the said Timberlake that it was his

271 purpose to "levy the said writs upon the said slave, but did not remove him, nor touch him, (the said Timberlake having promised that he should be forthcoming at the day of sale,) but consented that he should remain in the said Timberlake's hands till then; that the said Clarke appointed the 20th day of March, 1800, for the sale of the said slaves, and advertised them (without naming them) as having been seized by virtue of the said executions; that, on the said 20th day of March, Timberlake brought the slave in

his possession to the place of sale; but Clarke (having received the aforesaid letter from Thomas Harrison) informed him he might carry the slave back; which he accordingly did; that, at the time of these transactions, S. Jordan Winston was absent from the County, and knew nothing of what had passed, until after his return. The said Clarke deposed "that he did believe, and yet believes, that the said letter was delivered to him by a certain T. Starke, but had been told by Edward Winston that it was delivered by himself; that he gave notice, on the said day, to Timberlake and Edward Winston, that he should attend at the same place on the first day of August, 1800, in order to sell the slaves according to the terms of the said letter; and did attend accordingly, but the slaves were not produced; that the execution, for the purpose of quashing which this motion was made, was levied upon the slaves aforesaid of Edward Winston only; that no property of Littlepage was seized under the former executions, and it was generally understood and believed that all his personal estate was so encumbered and covered by deed that those executions could not be levied with safety upon any part thereof; that Harrison's letter was obtained at the instance of Littlepage, on condition, that he would pay to the said Harrison the sum of 400l. which was done, and was sufficient to discharge the aforesaid execution against Littlepage, Starke, &c.; (which, according to the endorsement upon it, had first come to the Sheriff's hands;)" that S. Jordan

272 Winston did not make to "the said Clarke any objection to the said letter, while the said executions were in his hands; but it was not proved that he assented to the terms thereof, or that he ever was acquainted with the indulgence granted thereby, until after the execution now in question was issued; that the said Clarke, as Deputy Sheriff, received his full commissions, on the said executions issued in the year 1800, from John C. Littlepage and the said Starke; that the execution which issued the 21st of January, 1800, (on the same judgment on which the present execution is founded,) had an erasure on the back thereof;" and the said Clarke further deposed "that he believed that the names of the slaves were put on the back of the execution, but that the writing is now erased, except the word "Peggy" which he believed was the name of one of the slaves advertised by him, and which word is in his hand-writing." He also deposed that he did not know who made the said erasure.

Upon this evidence, the Court rendered judgment, that the said execution be quashed; "it appearing to the Court that the former execution had been levied on property which had been released by consent of the plaintiff, although the said execution was returned without any return endorsed thereon." And it was further ordered, "that William Clarke be permitted to make a return upon the execution levied as aforesaid, according to the truth of the case; to which judgment Bullitt's executors excepted; and afterwards obtained

a writ of supersedeas, which abated, as to Edward Winston, by his death.*

273 *Botts, for the plaintiffs in error.

The first executions were not levied. I admit that seizing a part, in the name of the whole, is sufficient:(a) but then there must be a seizure.(b) Where a Sheriff seizes property not subject to the execution, as where he seizes the property of B. upon an execution against A. he is a trespasser. But, in this case, he could not have been charged as seizing vi et armis. In point of fact there was no seizure. Mere words could not make it. The bargain that the slaves should be considered as taken (when they were not) could not make it an actual seizure; neither could the plaintiffs (who were not parties to this bargain) be bound by it.

Indeed, the bargain was illegal; for the Sheriff was not authorized to leave the property in the defendants' possession without taking a forthcoming bond.(c)

The letter from Harrison fitted a case which did not exist; appearing to have been written under a mistaken impression that the *fi. fa.* had been levied. No precedent shews that a mere postponement by the plaintiff of a sale under execution will discharge the execution. The Sheriff may obtain authority from the Court to postpone his return, and, after the return day, may sell. Withdrawing an execution from the hands of the Sheriff, before it is levied, does not discharge it.

The Sheriff's receiving commissions was only *prima facie* evidence that the execution was levied; which evidence was rebutted by positive proof that it was not.

The plaintiff's letter did not authorize the Sheriff's discharging negroes which were not in his custody. In fact, he could not discharge them; for they were not produced.(d)

Nicholas, (Attorney-General,) contra. As to the first point; the negroes are proved to have been in the sight of the Sheriff: no opposition was made to his levying; and their names were set down on the back of the *fi. fa.* All the law can require is to get legal possession of the property;

274 "which he obtained in this case. Is there any book which says the Sheriff must lay hands on the property? If it was the intention of the parties that he should be considered in possession, and the property was left with the defendant only for his accommodation, the Court ought to hold the execution levied. The plaintiff's letter too shews that he considered it as levied. Besides, the Sheriff relied on Crutchfield's engagement to produce the negroes at the

*Note. In this case, a *scire facias* for revivor was issued "to the Sheriff of — County." The return was "Executed, Henry Wills, Sheriff;" without mentioning of what County. The Court was of opinion that this return was not sufficient; but Botts observing that a revivor against the representative of Edward Winston was unnecessary and irregular; the cause was argued, with assent of the Court, as to Samuel Jordan Winston only, and was permitted to abate as to Edward Winston. *See 1 Salk. 319. *Pennoir v. Brace*.—Note in Original Edition.

(a) 1 Lord Raym. 725. *Cole v. Davies*.

(b) 1 Salk. 79. *Genner v. Sparkes* Taylor's N. Carolina Rep. 132.

(c) 1 Rev. Code, p. 208, s. 13.

(d) 6 Bac. Abr. 176: (Gwill. edit.) citing Roll. Abr. 803; 4 T. R. 640, 651; 1 Show. 174.

day of sale, and made use of him as his agent to keep them in the mean time.

The cases cited by Mr. Botts are not against us. 1 *Ld. Raym.* 725, is in our favour. 1 *Salk.* 79, relates to the service of a ca. sa., and has, therefore, no analogy to this case; for, upon a ca. sa., actual personal restraint is necessary, from the nature of the thing. But I doubt, even in that case, whether it is necessary to touch the body; for if the Sheriff shews his writ, and the defendant says "I am your prisoner," and goes to gaol, surely it is sufficient. (a) In the case in *Taylor's Rep.* 132, it is expressly stated that the Sheriff did not take the negroes into possession: what circumstances would have constituted possession are not stated; so that what amounts to a legal levying is not there decided. Some analogy exists between this question and that relative to what constitutes larceny; concerning which we are told, in 2 *East's Crown Law*, p. 544, that any act amounting by reasonable intentment to taking with felonious intent is sufficient to make it larceny.

Where an execution is issued and proceeded upon, it must be returned, and a subsequent execution must be founded upon it; (b) for an execution is an entire thing, and cannot be superseded without a return. (c) If, therefore, this execution was not levied, no new one could issue, the first having not been returned.

2. As to the second point; the case of *Nisbet v. Smith*, 2 *Bro. Ch. Rep.* 581, (cited 3 *Call*, 71, *Croughton v. Duval*.) is conclusive authority, that a creditor, by giving farther time to the debtor, so as to change the nature of the contract, discharges his securities.

275 **Wickham*, on the same side. A statement in a bill of exceptions is not like a special verdict, in which the facts are found; but only sets forth the evidence of facts. This bill of exceptions contains enough to shew that the first execution was levied. The plaintiff is bound by the acts of the Sheriff; for he has his remedy over against him. Whatever, therefore, the Sheriff considers as equivalent to service of the execution, the plaintiff is bound to take as such; and even if he acted improperly, the execution was not the less levied. But, in fact, the Sheriff acted with propriety: he had a right to trust the property to the defendant, or any body else; for he remained himself responsible to the plaintiff. According to Mr. Botts, a Sheriff cannot take negroes without putting them in gaol. But the practice of the country is very properly otherwise; for a contrary practice would be the excess of cruelty. As to *S. J. Winston's* property, it was produced, on the day of sale, by the hiree. Whether he was obliged to do this, or not, is an important question, but not necessary to be settled in this case; for *volenti non fit injuria*.

Mr. Botts's argument would shew that an execution cannot be levied without re-

moving the property: but there are many things which cannot be conveniently removed. For example; is the Sheriff to take away a stack of oats or wheat? May he not sell such articles on the premises? So the sale of furniture may be at the house of the debtor. In all such cases, if the Sheriff chooses to run the risk of leaving the property, there is nothing to prevent him; and his remedy is by action of trover, if he cannot otherwise get possession to make the sale. If a negro escapes, he may take him again, if he can; if not, he must bring trover.

I admit, postponement by the plaintiff does not discharge the execution; neither ought it to discharge it. True it is, the course of a prudent creditor, when he is willing to grant the defendant indulgence, generally is to tell the Sheriff he will have nothing to do with any arrangement between the defendant and him, but will 276 not call on him for *the money until a certain day. But the proposition I contend for is, that, by postponing the execution, at the instance of the principal debtor, the plaintiff, (though he does not thereby discharge it,) in equity exonerates the securities.

Randolph, in reply. The last execution which the Court directed to be quashed does not appear in the record; but must be presumed to have been in due form. Both the first executions are directed "to the Sheriff of — County," and are endorsed "William Clarke, Deputy Sheriff," without saying of what County. It does not appear, therefore, that they were in the hands of any legal Sheriff or authority. Of course, there was nothing to prevent the subsequent execution from lawfully issuing.

If this point be against me, I still contend the first executions were not levied. The levying is not proved to have been expressly made; for *Clarke* himself does not say this; but only that he avowed an intention to levy; saying not that he did, but that he would. Neither was it such a levying as operates impliedly in the eye of the law. What means levying, executing and serving, which are synonymous terms? Some act which takes the property into the custody of the law; some act, the effect of which, superadded to the lien by delivery to the Sheriff, insures the money to be ready on the return, or sanctions the property from rescous. Without one of these two circumstances, there can be no levying. (d)

The cases in which the touch may be dispensed with in part, are, 1. Where the property taken consists of one homogeneous aggregate; as a heap of wheat, a library of books, and a flock of sheep; or, 2. Of dissimilar constituents of one integer; as furniture in a house; different crops, or other property in the same barn; or, perhaps, even horses, &c. in the same stable, or stacks in the same field. I admit, also, that no touch is necessary, where property is brought into the presence of the Sheriff, so that, from proximity, he may be said, according to the usual course of 277 things, to *have it in his immediate power; as slaves brought into a room,

(a) *Horner v. Battyn*, *Bull. N. P.* 62; *Blatch v. Archer*, *Cowp.* 66.

(b) 3 *Bac. Abr.* 717, 719, (Gwilll. edit.)

(c) 1 *Salk.* 322, *Clerk v. Withers*; *Ld. Raym.* 1072, *S. C.*; 2 *Saund.* 343, *Mildmay v. Smith*.

(d) *Taylor's N. C. Rep.* 132, 147.

or within a short distance, as usage is; not precisely measured indeed, but according to ordinary practice; or slaves going home with the Sheriff, or on their way to gaol. But this case comes within none of these classes.

Let it be tested, by inquiring, if a person had driven off these negroes, could he have been charged with a rascous? He might have defended himself by saying there was no unequivocal act or declaration shewing that the Sheriff had taken them. Their being merely in his sight was nothing. Would the Sheriff have run the risk of being prosecuted for a false return, upon such a levying?

Crutchfield was not the agent, or bailee, of the Sheriff; for the Sheriff had not the slaves in possession, and could not therefore deliver them to him. The Sheriff's receiving commissions, (being an act in pais,) does not prove that he levied the execution, when he would not return it executed. He must have received them after the failure to deliver the slaves, and, probably, the money was paid by the defendants to quiet him. His advertising the property is also no proof of levying; for he did so, under the expectation that Crutchfield and Timberlake would produce the slaves according to promise.

The plaintiff was not bound by the act of the Sheriff, the *fi. fa.* not having been returned levied; but had his choice, either to bring his action against him, or to consider the first *fi. fa.* not levied, and to sue out another.

It is contended that Jordan Winston's slave was actually levied upon. But, before the day of sale, the Sheriff mentioned only a "purpose;" and, on the day, there was no indication of an actual levying; for the Sheriff contented himself with telling Timberlake to take him home again.

2. The property was not released by the plaintiffs. The terms of Harrison's letter (which is relied upon by the defendants themselves) prove this; a condition being expressed, of "holding the property subject to the said executions." According to its own language, the practice of the
278 *country, and the law of the case, that letter ought not to be considered as a release.

The Court also erred in permitting the Sheriff to amend his return. It was unnecessary, because it furnished no additional evidence; and, as a return, insufficient; being long after the return-day.

One more remark is important. Even if the first execution was levied, it was defeated by a fraudulent compact to the injury of the plaintiffs; and therefore might be renewed. If subtle law, and metaphysical possession, be out of the way, the plain equity of the case is in our favour.

May 16, 1810. The Judges delivered their opinions.

JUDGE TUCKER. The first question which presents itself on the bill of exceptions filed in this case, is, whether the two writs of *fi. facias* which issued from the District Court of Richmond the 21st day of January, 1800, at the suit of Bullitt's executors, one of which was against the goods of John Carter Littlepage, Thomas Starke,

Samuel Jordan Winston, and Edward Winston; and the other against J. C. Littlepage, S. J. Winston, and E. Winston, only, and which were proved to have come to the hands of William Clarke, as Deputy Sheriff for Thomas Tinsley, Sheriff of Hanover County, to execute, were actually levied, or not, by the said William Clarke. And I am of opinion, that the evidence is sufficient to prove that they were. [Here Judge Tucker recited the evidence relative to the levying; in substance as above stated.]

The simple question upon this evidence is, whether it be sufficient to prove that the execution was levied? When the Sheriff had declared his intention to levy the execution on the slaves in his view; when no opposition was made to his levying the execution on those slaves; (whether near, or at a distance does not appear, and therefore I shall presume they were in his presence;) when he had taken a list of their names, (as the law requires in such cases,)

279 which he probably *must have been informed of by their master Edward Winston, then present; and when Winston and Peter Crutchfield (whose undertaking is out of the question, at present, as both executions were endorsed, "no security to be taken") had undertaken to produce the slaves on the day of sale; can there be a doubt that it was unnecessary to touch them, in order to give effect to the levy? The Sheriff acted at his own peril, in leaving the slaves behind him, it is true; but there is nothing in law, nor in reason, to prohibit him from doing so, if, from his knowledge of the party in whose possession they are taken, he has sufficient confidence to intrust him with the care of them till the day of sale. The inconvenience, and, in many instances, the cruelty, of a contrary practice need not be dilated upon. The same may be said of the slave in the possession of Timberlake; as he did not oppose the levying of the execution, notwithstanding his possession of the slave, and his interest therein to the end of the year, no other person had a right to dispute it. He produced the slave on the day of sale, which is an additional proof that he admitted that the execution had been duly levied. We are not here to inquire how the Sheriff ought to have proceeded after this; suffice it to say, that, it being uncertain whether the property so taken (for neither the number, nor the names of the slaves now appear, although the Sheriff deposed that he believes the names of the slaves were put on the back of the execution, but that the writing is now erased, except the name of one) was or was not sufficient to satisfy the amount of the executions; and it appearing from Clarke's own evidence that he did not levy them on any property belonging to Littlepage, and it being uncertain (as not being mentioned) whether any property of Starke, the fourth defendant named in one of the executions, was taken, or not, the presumption, until the contrary be shewn, is, that the slaves of Edward Winston, on which the execution was levied, together with that of Jordan Winston, on which it was levied, were sufficient to satisfy both those executions.

280 The *Court, I think, decided rightly in ordering, that William Clarke, a former Deputy Sheriff of Hanover, be permitted to make a return upon those executions, according to the truth of the case: and, until the return was so made; or if, upon that return, it should appear that the property taken was sufficient to satisfy those executions, I think the latter execution ought to have been superseded, if still in the hands of the Sheriff, or quashed, if returned to the office. As we have no copy of that execution in the record, I cannot give a more precise opinion upon the point. In the case of *Eckhols v. Graham*, this Court is reported to have decided that, by taking out a second execution, the plaintiff had waived the benefit of the first, and discharged the lien upon the slaves taken upon it. (a) But I think that case does not apply to the present; for, until a return made upon those executions, it does not legally appear whether the property taken hath been sold, or whether it was sufficient to satisfy the whole, or only a part of those executions.

The second question is, whether the letter from Thomas Harrison, one of Bullitt's executors, directed to the Sheriff of Hanover, dated March 12, 1800, wherein he desires to put off the sale of the property taken in execution to the 1st day of August, holding the property subject to the said executions, and to suffer it to remain in the hands of Littlepage or his securities, was a release of the property so taken as to Jordan Winston, who is expressly stated to have known nothing of the transaction, or to have acquiesced in the indulgence granted by Harrison, until after the third execution was issued. Now, certainly, from the very terms of the letter, it appears that Harrison never had any intention to release the property; for he directs the Sheriff to hold the property subject to the executions. The Sheriff, therefore, was not authorized to do any thing more than to postpone the sale, leaving the slaves, where they were, in the possession of Littlepage or his securities. But how was this to be done? Not by the Sheriff, *virtute officii*, because the endorsement on the executions prohibited him, 281 *as Sheriff, from taking any security. Having levied the executions, he was bound at his own peril, that the slaves should be sold: he encountered that peril when he left the slaves in the hands of Edward Winston and Timberlake, on their promise to produce them on the day of sale. When Timberlake brought Jordan Winston's slave, according to his promise, to be sold, he had fulfilled his promise: the slave was constructively, at least, in the Sheriff's possession; and he was bound for his safe keeping until sold.

The person for whose benefit the executions issued, authorized him to suffer the slave to remain in the hands of Littlepage, or his securities; yet bids him hold them subject to the executions. Under the circumstances of this case he could not do this, as Sheriff. If the Sheriff, in pursuance of this order, suffered the slaves to return with the privity or consent of Jordan Winston, he acted in this instance as the plaintiff's

private agent, and not as an officer. The case is still stronger if he did so without the privity or consent of Jordan Winston. From that moment the slave was no longer in the custody of the Sheriff, as an officer, nor could he be retaken by him at any time, as he might have been if he had not been produced to be sold; for Timberlake was his bailee, until the day of sale, and he might have seized the slave, and put him in prison, or delivered him to the safe keeping of any other person, until that time. But in permitting the slave to return with Timberlake, he acted only as the private agent of Harrison. It would have been otherwise if the sale had been necessarily put off, for want of buyers; for in that case, the slave would still have remained in his custody. But here the case was different: the plaintiff grants an indulgence to one defendant, at the possible loss, or injury of another.

Suppose the slave had died, or had run away, before the 1st of August: if the postponement was without his owner's consent or privity, ought he to be chargeable a second time for the value of what the 282 slave would have sold for if *the indulgence had not been given to the principal defendants? It seems then to me, that this indulgence granted to Carter Littlepage, the principal debtor, without the consent or privity of Jordan Winston, (for I mean to say nothing as to the other defendants,) amounted to a release as to him; the property once taken upon the execution being, by the act and consent of the plaintiff, put out of the custody of law, in which it had before been.

But, if it be otherwise, a third question still remains. Is there not evidence upon this record, sufficient in law, to shew that these executions have been fully discharged. Clarke, the Sheriff, who levied these executions, swears, "That he as Deputy Sheriff received his full commission on the said executions issued in the year 1800, from J. C. Littlepage, and the said Starke." Now the fee bill (b) allows to the Sheriff for proceeding to sell on any execution on behalf of the Commonwealth, or of any individual, if the property be actually sold, or the debt paid, the commission of five per cent., &c. and no other commission, fee, or reward, shall be allowed upon any execution, except for the expense of removing and keeping the property taken. (c) The Sheriff being thus prohibited from receiving any commission unless the property be actually sold, or the debt paid, and having acknowledged that he has received his full commissions on both executions, the conclusion in law is, that they have been fully satisfied. And of this conclusion the defendant Jordan Winston, for the reasons before mentioned, is entitled to avail himself, as he hath done in the present instance. I am therefore of opinion, that the judgment of the District Court, so far as relates to him, ought to be affirmed.

As to the blank in the execution, for the name of the County; that may be amended by the Sheriff, pursuant to the order of the Court. His testimony sufficiently proves

(b) 1 Rev. Code, c. 95, s. 8.

(c) *Ibid.* c. 151, s. 83, accordant.

that it came to his hands as Deputy Sheriff of Hanover, and he may be compelled to amend his return accordingly.

Bradley v. Welch.

Wednesday, April 18, 1801.

283 ***JUDGE ROANE.** I shall not waste time to prove, that the facts stated in the bill of exceptions amounted to a complete levying of the execution of January 21st, 1800, and was so considered by all parties. Being so levied, the Sheriff took the personal engagement of the parties, to produce the property on the day appointed for the sale, viz. 20th March, 1800; on which day one of the slaves was produced; and the others were not produced, probably from a knowledge existing in the neighbourhood, that the sale of the same had been postponed, by the consent of the plaintiffs. The letter, under which the sale on that day was dispensed with, was written without the privity or consent of the appellees; and the releasement of the property purported thereby, was founded on a consideration flowing from the principal debtor, Littlepage, to the plaintiffs. That letter either operated a complete discharge of the property from the execution, or, at least, by holding the property still subject thereto, precluded any further execution until it was finally disposed of. Considered in either point of view, the truth of the case ought to have been returned, at the day, by the Sheriff; which, had it been done, would have prevented the Clerk from issuing a new execution. The most favourable point of view for the appellants is, to consider the first execution as not discharged, but as continuing: in that view, there was no necessity for issuing the second. The law does not permit our citizens to be harassed by repeated and unnecessary executions.

The case of *Baird v. Rice*(a) is a complete authority for the defendants, both as to the propriety of suffering a Sheriff to amend his return according to the truth of the case, and as to the effect (in favour of the security) of a restoration of the property by the Sheriff, to the defendant, with the consent of the plaintiff. Indeed, it is a complete authority in the present case, in which it is unimportant to the success of the appellees, whether the first execution be considered as discharged, or continuing: it is the rather an authority, because in that case there was some evidence
284 that *the security, *Rice*, acquiesced in the arrangement for the discharge of the property, whereas, nothing of the kind is shewn in the case before us.

I think this a very plain case, and that the judgment of the District Court quashing the second execution, should be affirmed.

JUDGE FLEMING concurred.

The judgment was therefore unanimously affirmed.*

(a) 1 Call, 18.

*Note. Some doubts, at first, existed, in this case, whether, as the second execution was not levied on the property of Samuel Jordan Winston, (the only appellee before the Court,) it was competent for him to move to quash it. But it was resolved by the Court, that he had such an interest in the question as enabled him to move to quash the execution.—Note in Original Edition.

1. Office Judgment—Setting Aside—Plea in Abatement.*

—A plea in abatement ought not to be received to set aside an office judgment; unless it be of matter which arose *puls darrein continuance*.

2. Appearance Bail.—Where appearance bail is required, the defendant cannot appear at the rules, without giving special bail.

In an action of debt, instituted by Thomas Bradley against James Welch, in the District Court of Fredericksburg, the writ issued December 12th, 1799, with an endorsement thereon "that bail was required." The Serjeant of the town returned it "Executed, and Thomas R. Rootes, appearance bail." At Rules in the Clerk's office, May 16th, 1800, declaration was filed in the usual form, on a promissory note; and the defendant at the same time "by his attorney offered a plea, on oath, stating, that he is a resident of the County of Greenbrier, in the District of the Sweet-springs, and has resided there for five or six years; and that his only and known residence is in the said County and District; and that he never did reside in the County of Spottsylvania, or in the District of Fredericksburg, nor was the security entered into within the said District of Fredericksburg; and this he is ready to verify; wherefore he prays judgment of the said writ, and prays the same may be quashed."

The plaintiff's counsel rejected this plea, and the Clerk submitted the question to the Court, whether it ought to be received, without first filing special bail.

285 *The cause having been from time to time continued until the 14th October, 1802, the Court on that day decided "that the Clerk has no discretion; but, where appearance bail is required, the defendant cannot appear at the Rules, without first putting in special bail; and therefore the plea was rightly rejected." At the ensuing Rules, the defendant failing to file special bail, a conditional judgment was entered against him. At the Court held for the said District, May 16th, 1803, Thomas R. Rootes, the appearance bail, undertook as special bail, and again offered the same plea which had formerly been rejected. The counsel for the plaintiff again objected; but the Court (as appears from a bill of exceptions signed by the Judge) "being informed by the Clerk that the delay in this case had proceeded from some misunderstanding between the plaintiff's counsel and himself, respecting the course which ought to have been taken at the Rules, and not from any default on the part of the defendant, were of opinion that this cause should be considered as standing

***Office Judgment—Setting Aside—Plea in Abatement.**

—See, on this subject, *foot-note* to *Hunt v. Wilkinson*, 2 Call 49; monographic note on "Abatement, Pleas in" appended to *Warren v. Saunders*, 27 Gratt. 259; monographic note on "Judgments" appended to *Smith v. Carlton*, 7 Gratt. 425.

It is too late, after issue joined, to object to the court's jurisdiction, on the ground of nonresidence of the defendant. *Monroe v. Redman*, 2 Munf. 24, citing the principal case.

on the same ground as if the writ had been returnable to the last term, and therefore admitted the defendant to file his said plea, leaving it to the plaintiff to demur thereto, if he thinks proper." Whereupon, the judgment obtained in the office was set aside, and the cause sent to the Rules; where, in August, 1803, the plaintiff filed a general demurrer to the plea, and issue in law was joined; upon which the Court, at August term, 1804, gave judgment for the defendant; and the plaintiff appealed.

Williams, for the appellant. The Court erred in receiving a plea in abatement to set aside an office judgment: for, even after imparlance, it is too late to exhibit such plea. (a) According to the act of Assembly which limits the jurisdiction of the District Courts, (b) the proper time to have taken advantage of the objection was at the "first calling" of the cause, which was at the first Rules after the return of the writ.

The proper mode of objecting to the jurisdiction is by plea, that the plaintiff may have an opportunity to reply, that a writ had issued against the defendant in his own District, and been returned "non est inventus." But the plea could not be filed without special bail, which the defendant failed to give.

The Court's admitting it, on the ground of some misunderstanding between the Clerk and the plaintiff's counsel, cannot cure the defect; for the defendant had been guilty of default long before.

2. This plea was bad upon general demurrer. It should have been pleaded in propria persona, (c) and not by attorney, without special leave of the Court. (d)

Thursday, May 10. The Judges pronounced their opinions.

JUDGE ROANE. The question in this case is, whether the District Court rightly received the plea in question, on setting aside an office judgment. It is a plea, stating that the defendant was a resident of another District, and that the debt sued for was not contracted in the District in which the action was brought: it is also sworn to. It is, therefore, emphatically, a plea in abatement, and was so admitted to be by the defendant himself, by his having sworn to it: it is merely dilatory, and does not go at all to the justice of the demand. I have no hesitation to say, that a plea of this character is inadmissible on setting aside an office judgment, under the provisions of our act of Assembly upon that subject. My reasons for this opinion were given at large in the case of *Hunt v. Wilkinson*, (e) and I shall not repeat them. Although that opinion was in conflict with that of a majority of the Judges, in relation to the case then before the Court, nothing then said by the Court, or by the majority of the Judges, went the length of affirming, that pleas in abatement of every description, were admissible on setting aside an office judgment, or pleas of

the particular character of the one now before us. In that case, the matter pleaded happened after the office judgment was rendered; and on that ground the opinions of most of the Judges was predicated, and, perhaps, from the necessity of the case, may stand justified. That decision, however, is no authority in this case, where the matter of abatement was coeval (at least) with the institution of the suit, and the plea stating that matter, was actually sworn to within three days after the emanation of the writ. I am therefore of opinion, that the District Court erred in receiving this plea, and that the judgment should be reversed, and the cause remanded for farther proceedings.

JUDGE FLEMING, (after stating the case.) It seems to me that the plea in abatement was improperly admitted on setting aside the office judgment, which, by the 28th section of the District Court Law, could only be done on the defendant's pleading to issue immediately.

The case of *Hunt v. Wilkinson* differs essentially from the one before us. That was a plea puis darrein continuance, the cause of which arose after the office judgment had been entered, to wit, the appearance of the will, and new administration granted with the will annexed.

Judgment reversed; proceedings subsequent to the entry of judgment in the Clerk's office set aside; and cause remanded for farther proceedings.

JUDGE TUCKER did not sit in this cause, having signed the bill of exceptions in the District Court. He did it to settle the practice which had been different from the present decision of this Court; and expressed his entire concurrence with the decision.

288 *Brown and Boisseau v. May.

Wednesday, May 2, 1810.

1. *Trespass—Plea of "Not Guilty"—Evidence in Mitigation of Damages.*—On a joint plea of "not guilty," in trespass *vi et armis* against two defendants, for breaking the plaintiff's close and beating his slaves, the defendants ought not to be permitted to give in evidence, by way of mitigation of damages, a license from the plaintiff to one of them, to visit his negro quarters, and chastise any of his slaves who might be found acting improperly; the battery being committed by the other defendant; and no proof appearing that the slaves who were beaten had acted improperly.

2. *Illegal Evidence.*—Illegal, or improper evidence ought never to be confided to the Jury, however unimportant it may be to the cause.

May brought an action of trespass *vi et armis*, in the Petersburg District Court, against the appellants, for breaking and

**Illegal Evidence.*—Illegal or improper evidence, however unimportant it may be to the cause, ought never to be confided to the jury; for, if it should have an influence upon their minds, it will mislead them; and, if it should have none, it is useless, and may at least produce perplexity. To this point, the principal case was cited in *Payne v. Com.*, 81 Gratt. 860; *foot-note* to *Lee v. Tapscott*, 2 Wash. 276. See also, *monographic note* on "Evidence" appended to *Lee v. Tapscott*, 2 Wash. 276.

(a) 1 Bac. 2, 1 Stra. 522, *Curwen v. Fletcher*; 1 Lev. 89, 1 Wash. 158, *Williams and Roy, Ex'rs of Corrie, v. Campbell*, 3 Tuck. Bl. Appendix, 50, 51.

(b) 1 Rev. Code, p. 77, s. 24.

(c) 1 Bac. 2.

(d) 1 Vent. 188, 2 Keb. 148, pl. 16, *Lutw. 22*.

(e) 2 Call, 49.

entering his close, and beating several of his slaves in the declaration named, "so that he was deprived of their service for a long time; and throwing down his enclosures 'round his field, whereby his wheat then and there growing was trodden down and injured by a great number of cattle and horses belonging to divers people; and for other wrongs, injuries, and enormities," &c. The defendants pleaded "not guilty," jointly. A bill of exceptions states that, on the trial, the defendants offered, in mitigation of damages, "the testimony of a witness tending to prove that the plaintiff had given a general permission to Brown, one of the defendants, to visit his negro quarters, and to chastise any of his slaves who might be found acting improperly; but the Court declared such testimony improper on the plea of "not guilty," and would not permit the same to be given, although the beating by the defendant Boisseau was in the presence, and with the assent, of the other defendant Brown; since both the defendants had joined in the same plea, and the act of beating the plaintiff's slaves, in the declaration charged, had been committed by the defendant Boisseau, to whom, it was admitted by the defendants, no such permission had been given." Verdict and judgment for 150 dollars damages.

George K. Taylor, for the appellants. Authorities declare that, on the general issue, special matter shall not be given in evidence: but what do they mean? Not that the particular circumstances tending each case may not be laid before the Jury in mitigation of damages: for the plaintiff may lay before them what amounts to
289 an aggravation *of injury, provided such aggravation does not itself furnish a cause of action, in which case it ought to be stated in the declaration. And, therefore, he is always allowed to prove his own peaceable demeanour, his endeavour to avoid altercation, and his retreat from combat, on the one hand, and the defendant's abuse on the other. For the purposes of equal justice, then, the defendant ought to be, and always is, permitted to prove, in mitigation, under the plea of "not guilty," every thing which is not a justification of his conduct, and a legal bar to the plaintiff's recovery: but such justification or legal bar must be specially pleaded. (a) If the circumstances, though very mitigating, will not, as the defendant knows, justify his conduct, is not the Jury to hear what may excuse it in a great degree? If not, law is not founded on justice. But this is the law. (b)

This distinction being understood, let us see whether the facts stated in the bill of exceptions amount to a justification of the defendants, or either of them. They endeavour to prove that May had given a license to one of them to visit his negro quarters, and chastise any of his negroes who might be found acting improperly. But this permission was to that defendant alone, and could not be by him transferred

to another. (c) Suppose, then, both defendants had attempted to plead it; the plea would clearly have been bad as to Boisseau; and, if two join in a plea, and it be bad for one, it is bad for both. (d) If Brown alone had filed such a plea, still it might have been demurred to; because, although good as to one part of his defence, (the going on the land,) it was bad as to another, (Boisseau's beating the slaves,) and, unless the plea be good throughout, it will not stand. (e) And there is no obligation on a party to plead what he knows to be false, or that he cannot sustain. On the contrary, every plea should be true; "for truth (saith Hobart) is the goodness and virtue of pleading, as certainty is the grace and beauty of it." (f) Suppose Brown had only pleaded the license to go to the negro quarters, and had not pleaded as to the
290 battery of the negroes *at all; judgment would, as to the battery, have been signed against him by nil dicit; (g) for, in pleading matters in excuse, all the circumstances should be shewn. (h) But, as, where Brown, Boisseau and the negroes were the only dramatis personæ, to prove their improper conduct was impossible; the effort was merely to prove the license, and not that the slaves were acting improperly. This, then, was only a matter in mitigation of damages, which could not be pleaded, and, if not admitted to be given in evidence on the general issue, could not have been used at all.*

Hay, for the appellee, did not think it necessary to object to most of the propositions made by the counsel on the other side. Admitting them all to be correct, they cannot avail him in this case. The evidence attempted to be introduced in mitigation of damages, could not have that effect; for it is not inserted in the bill of exceptions that the slaves were, at the time of the chastisement, acting improperly. Without that important circumstance, to shew the license properly pursued, it was, in itself, totally immaterial and irrelevant to the cause, and therefore not admissible. (i) Indeed, the circumstance of Brown's availing himself of May's permission, and acting under colour of authority, is rather an aggravation of the atrocity of his conduct, by the additional guilt of a breach of trust; besides, though his entry was lawful, he became a trespasser ab initio, by exceeding his powers.

JUDGE TUCKER suggested a question, whether the evidence should not have been received to mitigate the damages for breaking the close, by shewing the entry was not illegal?

(c) 1 Bac. (Gwill. edit.) tit. Authority, letter (D.) p. 320.

(d) 1 Saund. 28, note 2.

(e) Ibid. note 3.

(f) Hobart, 295.

(g) 1 Chitty, 509.

(h) Ib. 516, 517, referring to Bac. tit. Trespass, letter (L.)

*Note. In Ballard v. Leavell. (MS. Nov. 1805.) in this Court, the case was trespass for taking a slave from the plaintiff's possession: on the general issue, the defendant offered evidence (in mitigation of damages) that the slave was his own: the District Court refused to admit it; but the Court of Appeals reversed the judgment, with instructions to admit the evidence.—Note in Original Edition.

(i) 1 Cranch, 132, Turner v. Fendall.

(a) 5 Bac. (Gwill. edit.) tit. Pleas, letter (G.) p. 370, 2 Term Rep. 166, Bennett v. Allcott; 2 Bos. & Pull. 924, Watson v. Christie.

(b) Co. Litt. 233, 12 Vin. 159, pl. 18, 16.

291 *Hay. Perhaps, if the defendants had claimed the benefit of the evidence in that limited and restricted way, it might have been received; but, in the enlarged manner in which it was offered, as applying both to the breaking the close and battery of the negroes, the Court were right in rejecting it. As in the case of *Buster v. Wallace*,^(a) they were not bound to direct the jury to apply it restrictively.

Taylor, in reply. Mr. Hay appears to admit all my doctrine, but says the evidence was immaterial, and if received, ought not to have had any effect on the Jury. But of this the Jury had the right to judge. The naked case of going on a plantation and beating slaves, without any authority, is materially different from one where there was an authority, and that authority merely irregularly exercised. I admit, where evidence is totally irrelevant, it should be rejected; but the case is very different here.

May 2, 1810. The Judges delivered their opinions.

JUDGE TUCKER, (after stating the case.) I admit, with Mr. Taylor, that this action being brought against two persons, and the evidence offered tending only to prove a permission to one of them to visit the plaintiff's negro quarters, that matter could not be pleaded as a justification of the entry of both the defendants. I admit also, that it is an invariable rule, that every defence, which cannot be specially pleaded, may be given in evidence upon the general issue at the trial. (b) But I hold it to be a rule of law no less certain, "that illegal or improper evidence (however unimportant it may be to the cause) ought never to be confided to the Jury; for, if it should have an influence upon their minds, it will mislead them; and, if it should have none, it is useless, and may at least produce perplexity." (c) The trespass charged in the declaration, is, 1st. For breaking and entering his close; 2dly. For beating his slaves; and, 3dly. For throwing down his fences around his wheat

292 *field, whereby his crop of wheat was trodden down and injured, by other persons' cattle and horses. If the charge had been only for breaking and entering his close, and beating his slaves, and the evidence had been that he to whom the permission was given to visit the negro quarters, and to chastise any of the slaves who might be found acting improperly, had alone beaten any of them, and that the other defendant stood by without molesting any of them, the evidence offered might have been admitted in mitigation of damages, for the bare entry upon the plaintiff's plantation, but not for the beating of the slaves. Because the permission did not extend to beating them unless they were found acting improperly: now it is not stated that they were found acting improperly; consequently, even Brown had no right to beat them; nor could it be a matter in mitigation of damages, for beating them if not found

acting improperly, that he had permission to chastise them, (a word always to be understood in a milder sense,) if found acting improperly. The evidence therefore would have been inadmissible, if Brown had been the party who took upon him to beat the slaves. But the bill of exceptions gives us to understand that the proof was that Boisseau, and not Brown, was the person who beat them. The permission given to Brown could, therefore, form no possible excuse for the conduct of Boisseau; nor for Brown, who, by standing by, and assenting to the beating by Boisseau, made himself particeps criminis with Boisseau. The evidence, therefore, was, I conceive, totally inadmissible, even upon this view of the subject. But the declaration charges a further wilful and violent trespass, in throwing down the plaintiff's fences, and exposing his wheat to be injured by the neighbours' cattle and horses. Could a permission peaceably to visit the negro quarters, and to chastise slaves found to be acting improperly, serve as an apology, or extenuation of this sort of damage? Surely not. The evidence, if admitted to go to the Jury, might have had the effect pointed out by Judge

293 Pendleton, and *was, therefore, in my opinion, most properly rejected. I am of opinion that the judgment be affirmed.

JUDGE ROANE could see no error in the judgment.

JUDGE FLEMING was of the same opinion. The evidence had been very properly rejected.

Judgment unanimously affirmed.

Depew v. Howard and Wife.

Thursday, April 19, 1810.

1. *Equity Jurisdiction—Caveat.*—In cases in which the regular remedy is by caveat, a Court of Equity may entertain jurisdiction, under circumstances which render its interposition just and proper, but such circumstances must be made to appear to the satisfaction of the Court.

2. *Real Estate—Legal Title.*—A legal title to land ought not to be disturbed in favour of a party not having a superior right in equity to the identical land in question.

**Equity Jurisdiction—Caveat.*—Although a party may be let into a court of equity, on grounds which he could not have used on the trial of a caveat, and which, in fact, make another case (in reference to that which he might have availed himself of on such trial); or upon a case suggesting and proving that he was prevented by fraud or accident from prosecuting his caveat; he is not to be sustained in the court of equity on such grounds as were or might have been brought forward on the trial of the caveat. *Noland v. Cromwell*, 4 Munf. 155, 170, 171, 178, citing the principal case with approval. To the same effect, the principal case is cited in *Ross v. Keewood*, 2 Munf. 148; *McClung v. Hughes*, 5 Rand. 463, 485, 489. In this last case (*McClung v. Hughes*), it was held that, after a grant issued, any one claiming a prior equity against the grantee, can, in no case, have relief in equity, unless upon the ground of actual fraud in the acquisition of the legal title; or, unless the party was prevented from prosecuting a caveat, by fraud, accident, or mistake;

(a) 4 H. & M. 82.

(b) 3 Bl. Com. 305, Bull. N. P. 208, 209.

(c) Per PENDLETON, Pres't, 2 Wash. 281, Lee v. Tapscott.

3. Same—Entry—Certainty.—Quære, whether an entry for a certain number of acres "on the waters of Glade Creek, joining the lines of J. H.'s land, and the locator's own land on W.'s run," be sufficiently certain?

Jacob Depew brought a suit in Chancery in the County Court of Botetourt, against John Howard, and Mary his wife, George Lemmon and Benjamin Howard, to set aside a patent granted to John Howard for 215 or 250 acres of land on the waters of Glade Creek, in the said County, so far as the same comprehended fifty acres of land, for which the complainant had also obtained a patent subsequent in date to Howard's patent, but founded upon an entry prior to Howard's entry.

The grounds of equity stated in the bill are, that the defendants had notice of the plaintiff's prior entry, and that their location calls specially for these fifty acres; that Howard's survey was never actually made; that, the plaintiff being kept ignorant of it, a patent, prior in date to his, was fraudulently issued thereon; that he entered a caveat, (but in what Court he does not say,) which was dismissed "either because he could not attend to it, the small pox being then at the Court-house, or because the Howards resided out of the State, so that no summons could be served on them."

The defendant John Howard, in his answer, declares that his wife, in his absence, in 1778, or 1779, purchased

294 *the land in dispute of one Thomas Welch, who had then resided on it several years, for a valuable consideration paid out of his the defendant's property; that he was in peaceable possession of the said place until he came last to Kentucky, in the year 1789, which was subsequent to the location under which the complainant

and that, by actual fraud, in such case, is meant the proceeding to procure a patent, after actual notice of a prior equity. In delivering his opinion, JUDGE GREEN said: "The cases of Johnson v. Brown (3 Call 250); *Depew v. Howard*, and Noland v. Cromwell (4 Munf. 156), whilst they declare in general terms that a party cannot resort to a court of equity, upon any ground which would have availed him in a caveat, unless he was prevented from prosecuting a caveat by fraud or accident (and it might have been said by mistake, for that is a species of accident), do not advert directly and in terms, to the case of actual fraud in procuring the legal title. This was, I should think, rather an exception to the general rule, overlooked by the court in laying down the rule, than a case which they intended to embrace in the general rule, contrary to the prior decisions of the court; which they would hardly have overruled intentionally, by laying down a general proposition, and not adverting to this particular case of fraud, or to the former decisions upon it; and the subsequent decisions on the same point, fortify this impression."

See further, *White v. Jones*, 1 Wash. 116, and *foot-note*; *Johnson v. Brown*, 3 Call 250; monographic note on "Caveat" appended to *Warwick v. Norvell*, 1 Rob. 308; monographic note on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457.

†*Real Estate—Entry—Certainty.*—To constitute a valid entry, there must be a reasonable degree of certainty and precision in the description which it gives of the subject intended to be appropriated. See *Hunter v. Hall*, 1 Call 206, and *foot-note*.

claims. Mary Howard, by whom the entry complained of was made, (in the absence of her husband it appears,) swears, in a separate answer, that Depew never made his claim known to her; but that, being informed he intended to enter for the place called Welch's, and, thereupon, dreading lest there might be some defect in Welch's title, she went immediately to the Surveyor's office and examined whether Depew had made an entry to include Welch's place, and found none; that she got the Surveyor to examine his entry book, which he did particularly, and told her there was no such entry; upon which she made her location to include it. This entry was made by her October 9, 1788, and Depew's on the 30th of September preceding; but, "from the objects of description in the location, neither she nor the Surveyor thought it was intended to cover the place known by the name of Welch's."

John Depew's entry, under which his son Jacob Depew claimed, was by virtue of a land-office treasury warrant of 17,854 acres, for "fifty acres of land on the waters of Glade Creek, joining the lines of the land of John Howard, and his own land on Welch's run."

Mary Howard's entry, by virtue of a land-office treasury warrant of 500 acres, was for "250 acres of land on the waters of Glade Creek, joining the lines of the land she lives on and William Francis's land and James Goodman, to include an old survey known by the name of Welch's place, and a new survey joining said Francis, and the one she lives on."

The answer of Benjamin Howard, by whose agency, as attorney for John Howard, the surveys were completed, states that he employed the surveyor to make the surveys, but was not present when

they were made, being called on 295 *business down the country, and having intrusted the surveyor to survey the entries regularly. George Lemmon (a purchaser from the defendants) admitted his being in possession of about 120 or 130 acres of land for which he had not received a conveyance. All the defendants positively denied all fraud and combination.

Another entry made by Mrs. Howard, on the 14th of March, 1782, being for "500 acres of land joining her own land, and the land of John and Hugh Mills, and to extend to the mountain for quantity," was mentioned in the bill and answers, but does not seem to have been relied upon by the defendants.

The decree of the County Court was, "that the patent or patents that had issued for the defendants, so far as they interfere with the lands of the complainant, be annulled."

The Superior Court of Chancery for the Staunton District "being of opinion that Depew's entry was too vague, and that the appellants (having the legal title) ought not to be compelled to relinquish it to one who has not greater equity," reversed the said decree, and dismissed the bill; whereupon Depew appealed to this Court.

Hay, for the appellant. The entry of Mrs. Howard in 1782, had no relation to the land now in question; neither, in fact,

did she rely upon it, as appears by her making the subsequent entry, which expressly calls for Welch's place. The only question, therefore, is, whether Depew's entry was sufficient; for, if so, her entry in 1788, being made nine days after his, was void, since it evidently comprehended the right of another person. (a) In *Hunter v. Hall*, 1 Call, 209, it is said that, without a previous survey, no person can strictly conform to the terms of the act of 1779, in making a location; but that that act "unavoidably requires, and has uniformly received, a liberal construction in this respect." Where an entry is made in a waste country, with no patent lines to refer to, it is reasonable to require the locator to specify his beginning and courses as nearly as

296 *possible: but, where there is much patented land, a general reference to lines already ascertained ought to be sufficient. Indeed, if the person locating undertakes to specify the lines he probably might conflict with some older patented lands.

But, admitting the first entry vague, does it necessarily follow that the second (though precise) shall avoid the first in toto? It would be more reasonable (and I think it has been so decided) to give the second locator his choice, leaving enough for the first. Thus justice would be done to both parties, in case land enough for both could be found.

Wickham, contra. 1. Every objection to the entry of Mrs. Howard, in 1782, on account of vagueness, applies equally to that of Depew; and her's is the superior equity. The conduct of Depew is entitled to no favour. He evidently appears to have meditated an unwarrantable advantage over the appellee. The objection that her survey comprehends the right of another has no application. It does not appear to be the fact; and the law (b) applies to cases only where it evidently appears on the face of the plat or certificate of survey. Admit that the letter of the act of 1779 is not to be insisted on; that mathematical certainty in making an entry is not requisite; yet surely a reasonable certainty is necessary, to prevent great injury to the Commonwealth and to individuals, for, otherwise, a warrant of 50 acres might cover 500, and persons wishing to survey adjoining lands would be put to unnecessary expense and trouble. I do not contend it is absolutely necessary to have a certain beginning, though it is desirable. Where an entry is "of all the vacant land within certain points," or "including certain objects," it is sufficient. But, in the present case, Depew's entry was altogether uncertain; there being no less than three different places where he might have surveyed and satisfied the calls of that entry. Greater certainty is required, and attainable, 297 in a settled country *than in a wilderness; because, in the former, old lines are well known, and natural objects have fixed names.

It may be objected that Mrs. Howard acted improperly in shifting her location; but, being in possession, she had an undoubted right to pursue all legal means to

protect her title; on the same principle which authorizes a third mortgagee to protect himself against a second by buying in the first.

2. The question now in dispute was proper for a caveat, and not for a Court of Equity. The bill assigns no certain reason for not prosecuting the caveat, but says it was dismissed, either because the small pox was at the Court-house, or the caveatees were out of the country. If the former was the case, it was a good ground for a continuance. If the latter, the Court should have directed a publication against the absentees. A caveat was peculiarly proper; since every ground of equity as well as law might have been taken upon it.

Call, in reply. Depew's entry was sufficiently certain. The words "joining the lines" must signify lying along the lines, in their whole extent; not barely touching them, as Mr. Wickham seems to suppose. The Surveyor and Depew supposed, from the narrowness of the space, that the 50 acres would fill it. No particular form of words is necessary in an entry; but certainty to a common intent is sufficient; and, as in deeds, so in entries, the intention of the parties ought to furnish the rule. (c)

There can be no inconvenience in an entry's covering more land than the party is entitled to; for any person wishing to make another entry has a right to call on the first locator to survey his land; as in the case of surplus land included in a patent. (d) A poor illiterate man ought not to be defeated of his property, because a public officer has made a mistake. In *Field v. Culbreath*, (e) and *Hunter v. Hall*, (f) the several entries established were not more certain than this.

In *Currie v. Martin*, (g) Banks's entry 298 *(assigned to Currie) was more uncertain. The entry, too, was more uncertain in *Consilla v. Briscoe*; (h) and yet was supported by this Court, to which the appeal was taken from the Supreme Court for the Kentucky District. In *Miller v. Page*, it was held that the entry was too vague: but there, the word "between" certain lines was considered too indefinite: here, it is "joining the lines of John Howard," &c.; which is sufficiently certain.

A subsequent mortgagee, having prior notice of a second, has no right to buy in the first. (i) So here, Mrs. Howard, having knowledge of Depew's title, and fraudulently affecting to misunderstand it, shall not be protected by her subsequent entry.

As to the question of jurisdiction, the case of *Wetherinton v. M'Donald*, (k) is clear authority that a Court of Equity is the proper tribunal to try the question of fraud in obtaining a patent.

Wickham. The case from Hughes's reports has no application. It was a settlement case; and "that gives locality." Such is the express opinion of the Court. Added to which circumstance, the certi-

(c) Pow. on Cont. 242: 6 East, 104.

(d) 1 Rev. Code, 148.

(e) 2 Call, 547.

(f) 1 Call, 209.

(g) 2 Call, 28.

(h) Hughes's Kentuc. Rep. 48.

(i) 1 Pow. on Mort. 501, citing Cowp. 712, and 3 Atk. 646. Leneve v. Leneve.

(k) 1 H. & M. 306.

(a) 1 Rev. Code, p. 344, s. 1.

(b) 1 Rev. Code, 144.

cate of the Commissioners was considered part of the entry. *Miller v. Page** is a direct authority in our favour. In *Currie v. Martin* the "beginning" of the entry rendered it certain enough. In *Field v. Culbreath*, the entry, "including all the vacant land between certain lines" was also certain. As to Mrs. Howard's being bound to take notice of Depew's entry; she had a right to disregard it, if void; if not void, it stands on its own merits.

299 *May 23, 1810. The Judges pronounced their opinions.

JUDGE TUCKER, after stating the case. As there is nothing in any part of the depositions to prove the charge of fraud in returning the survey, without such survey having ever been made, or in any manner to invalidate the matters contained in the several answers of the Howards, I pass them over.

The naked question upon this view of the subject is, whether the complainant has made out such a case as to entitle him to the aid of a Court of Equity. And I conceive he has not. The answers of the Howards state, that Thomas Welch, of whom they purchased in 1778 or 1779, had previously resided on the spot several years. They had a right to presume that he had some title thereto, which, if not perfected by a patent, was recognised by the act of May, 1779, c. 12; and, when informed that there was danger of that title being disturbed, had a right to take any legal means whatsoever for securing the same. Mary Howard's entry, made the 9th of October, 1788, for this purpose, cannot therefore be deemed fraudulent, as against the complainant. If, by his entry of the 30th of September preceding, he had obtained an actual legal priority, he had nothing to do but to proceed to survey his entry, and obtain a patent for the lands; or, if she proceeded to survey also, then the law was open to him to file a caveat, in which case his legal priority must have been established, unless she had produced some elder title founded in law. But he tells us he did sue out a caveat. Why then did he not prosecute it with effect? Or, if one caveat was improperly dismissed, why did he not sue out another? for the dismissal of one caveat, unless it be upon the merits, neither decides the title to the lands, nor bars another subsequent caveat, if brought within proper time. (a) There was certainly time enough between the date of the defendants' entry in October, 1788, and their survey in October, 1796, and, 300 from that period till the time *of the emanation of their patent, (which could not be until the survey had remained six months in the register's office,) to have tried his title to a patent, by that mode of proceeding. The law (for aught that appears to the contrary) was competent to have done him complete justice. Having omitted to pursue that course, as he might

have done, he has, I conceive, no right now to ask for the aid of a Court of Equity. (b) If Mary Howard's location of lands, within which his location might be supposed to lie, was against conscience, what must we say of his entry and location of a place which he knew to have been in the possession of her husband, and Welch under whom he claimed, for twenty years before? If equity condemns the former as against conscience, the latter is ten times more liable to its censure.

With regard to the second question, and upon which the Chancellor seems to have decided the cause, namely, whether Depew's entry was too vague and uncertain, I am decidedly of that opinion. From an inspection of the plat it will appear that the fifty acres might have been laid off, so as to "join the lands of John Howard, and his own land on Welch's Run," at any spot between the letter K. and the letter T. in the plat, leaving a surplus of from 150 to 200 acres, within that area, while his entry did not amount to more than a fourth part of the quantity therein. The distance from these points is considerably more than a mile and a half; while his survey, as actually made, only touches Howard's 68 acre tract, at the point B., leaving that point immediately, and running a zig-zag course of five different lines, before it arrives at his own line, on Welch's Creek, down which it runs only sixty poles, and from thence to the beginning, without even touching Howard's lands at any other point. Fifty, or even five hundred different plats might have been laid down within the same limits, equally conformable to the terms of his entry. Can this be called a compliance with the law, which prescribes that the party shall direct the location of the lands for which he makes an entry, so specially and precisely, as that others 301 may be enabled, *with certainty, to locate other warrants on the adjacent residuum? I forbear to take up the time of the Court with a repetition of the reasons offered by me in the case of *Miller v. Page*, in support of the like opinion in that case; (c) and shall conclude with saying, I think the Chancellor's decree is right, and ought to be affirmed.

JUDGE ROANE. The entry of Mrs. Howard, of March 14th, 1782, seems to have been justly abandoned on all hands as incompetent: that of Depew, on the contrary, of September 30, 1788, taken with reference to the actual situation of the land, as exhibited by the connected survey, seems to be sufficiently certain, under the just construction of the land-law, by this Court in many instances, by the Supreme Court of the United States,* and the Courts of the State of Kentucky. Having had occasion to refer to those decisions, particularly in the case of *Miller v. Page*, (MS.) I shall not again enter into the subject; but have no doubt but that the rejection of the entry now in question, would shake many titles in this Commonwealth, which have not been

*Note. In *Miller v. Page*, (May, 1806,) Miller's entry was for "1,000 acres, between the lines of Henry Cary, deceased, on both sides of Hatcher's Creek, beginning on the same." JUDGE ROANE was of opinion that this entry was sufficiently certain; but the rest of the Court decided otherwise.—Note in Original Edition.

(a) *Hunter v. Hall*, 1 Call, 206.

(b) 8 Call, 259, 266, *Johnson v. Brown*; 1 Wash. 118, *White v. Jones*, *Staples v. Webster*, October, 1804, MS.

(c) May, 1806, MS.

*Note. See *Wilson v. Mason*, 1 Cranch, 88, 89, 92.

carried into grant. On the trial of a caveat, therefore, I should have been of opinion that that entry, so taken, was sufficient.

But this is a resort to a Court of Equity for relief against a legal title: and it is readily admitted that such resort may be had, under circumstances making the interposition of equity just and proper; as in the case of *Jones v. Williams*, (a) where the caveat had been dismissed through an accident attending the summoning of the plaintiff's witnesses; but, then, this must be made to appear to the satisfaction of the Court, as was done in that case. In the case before us it is alleged that the caveat of the appellant was dismissed, because he could not attend to it on account of the small-pox, or because two of the appellees resided out of the State, so that the summons could not be served upon them. With respect to the first fact, there is no proof of it whatsoever: and as to the second, the caveat would not have been dismissed, I presume, (if it were not served,) if the appellant had shewn to the Court that its non-execution did not proceed from any neglect of his. I infer this from the 35th section of the land-law. (b)

On neither of the grounds, therefore, was the appellant competent to come into equity. But, if it were otherwise, as to his admission into the Court; the appellees having got the legal title, that title will not be disturbed, unless the appellant has a superior right in equity to recover the identical land in question. So far from this being the case, it is in proof, from the confessions of the appellant's father, at a date posterior to the time of making the subsequent entry of the appellee, that he did not consider this land as vacant, and therefore supposed it was not located or appropriated thereby. His own construction of his entry, therefore, invalidates it, in a Court of Equity, as applying to this land; which might have been otherwise, under my construction of the land-law upon this subject, in the absence of all proof touching such a construction on his part. I am therefore of opinion that the decree be affirmed.

JUDGE FLEMING. It is unnecessary to add any thing to what has been said. I think it a very just decree; and it is affirmed by the unanimous opinion of the Court.

303 *Lewis v. Madisons.

Wednesday, May 2, 1810.

1. Contracts*—Contra Bonos Mores—Agreement as to Land Expected to Be Divided—Specific Performance.†—It seems, that a contract, under seal,

(a) 1 Wash. 230.

(b) 1 Rev. Code, p. 146.

*Contracts.—See, on this subject, monographic note on "Contracts" appended to *Enders v. Board of Public Works*, 1 Gratt. 364.

†Specific Performance.—Agreement between Children as to Division of Estate after Parent's Death.—In *Nelson v. Nelson*, 1 Wash. 186, it was held that an agreement between the children of a family, in the lifetime of their parents, to divide his estate equally between them at his death, whatever distribution he might think proper to make of it by his will, may, under circumstances, be enforced in a court of equity, if it be made out clear by proof.

between two brothers, by which one of them, for a fair and valuable consideration, agrees, that, when he shall obtain possession of a tract of land expected to be devised to him by their father, he will convey it to the other, is not contra bonos mores, and may support an action of covenant at law, or be enforced specifically in a Court of Equity.

2. Purchasers—Notice—When Not Binding.—The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question.

3. Chancery Practice—Recovery of Land—Parties.‡—In a suit in Chancery to recover a tract of land against a vendee, on the ground that the vendor had previously agreed to convey the same land, in a certain event, to the plaintiff, it seems, that the vendor, or his legal representatives, ought to be parties.

Upon an appeal from the Superior Court of chancery for the Staunton District, in a suit on behalf of the children of William Madison, deceased, (by Elizabeth Madison, their mother and next friend,) against Andrew Lewis, to recover a tract of land in the County of Botetourt, known by the name of Voss's, which had been devised by John Madison, father to Rowland Madison, brother of William, and by the said Rowland sold to Lewis, but, the plaintiffs contended, should have been conveyed to them, in consequence of an agreement, dated the 10th of October, 1780, between the said Rowland and William.

By that agreement, under their hands and seals, (being in the life-time of John Madison, their father,) reciting, "that Rowland having disposed of a tract of land in Kentucky containing one thousand acres, the property of William, for which he was to give his land in Botetourt in exchange, but, since finding it would be a disadvantage to him to comply with the bargain," William agreed to "cancel the same, in case Rowland would make him a title to the same quantity of land above mentioned: only provided the said land was obtained by a military warrant agreeable to his Majesty's proclamation, and clear of any disputes whatever: but, in case Rowland should not do this, he agrees that the first bargain shall be binding on him; that, when he comes to the possession of his land willed to him, that he will make William a title to the land, first having both tracts valued; and whatever should be judged to be the difference each party agrees to give or take: and to the true performance of that

See also, monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 248.

‡Chancery Practice—Recovery of Land—Parties.—All persons materially interested in the subject in controversy, ought to be made parties in equity, and if they are not, the defect may be taken advantage of either by demurrer, or by the court at the hearing. *Clark v. Long*, 4 Rand. 451. In delivering the opinion of the court in this case, JUDGE CARR said: "In *Lewis v. Madisons*, 1 Munf. 303, it is laid down, that in a suit in chancery to recover land, against a vendee, on the ground that the vendor had previously agreed to convey the same land, in a certain event, to the plaintiff, the vendor or his legal representatives ought to be made parties." On the same point, the principal case is cited in *Mayo v. Murchie*, 3 Munf. 381, 383.

agreement, each bound himself to the other, in the penalty of two thousand pounds specie."

304 "Upon this contract, and the evidence in the cause, the chief points in controversy were whether, by Rowland's failure to make William a title to the land in Kentucky, a lien attached, in favour of the latter, upon the particular tract called Voss's; and, if so, whether Lewis, the purchaser from Rowland, was bound by such lien. All the circumstances are so fully set forth in the ensuing opinions of the Judges of this Court, that a farther statement by the Reporter seems unnecessary.

November 29, 1804, the Chancellor appointed Commissioners to ascertain and report the respective values of the said one thousand acres of land in Kentucky, sold by Rowland Madison to John Gordon, and of the land devised to him by his father, on the day of , 1784, when he took possession, or was entitled; also to report an account of the rents and profits of the devised lands, and of the permanent improvements made thereon since the said Rowland took possession;" and decreed that, "upon the plaintiff's paying the defendant whatever sum the value of the devised land and permanent improvements thereon should exceed the value of the one thousand acres, sold by Rowland as aforesaid, and the rents and profits of the devised land, (if there should be any excess,) then the defendant should convey to the plaintiffs the land in controversy, with special warranty against himself, his heirs, and all persons claiming under him; but, should the value of the devised land and the permanent improvements thereon, as aforesaid, fall short of the value of the one thousand acres aforesaid, and the rents and profits of the devised land, then the defendants should moreover pay and satisfy to the plaintiffs the deficiency, so far as that deficiency may be occasioned by the rents and profits aforesaid, and no farther." From which decree the defendant appealed.

Warden, Wirt, and Call, for the appellant, contended, 1. That the contract between William and Rowland, having been made in their father's life-time, and attempting to dispose of a contingent interest expected to be derived from him at his death, was contra bonos mores, and not to be countenanced in a Court of Equity; in support of which point, Justinian's Code, b. 2, tit. 3, s. 30, and 1 Brown's Civil and Admiralty Law, p. 11, were cited.(a) Such is the rule according to the civil law: but at common law, also, every contract inconsistent with good morals is void.(b) The case of Nelson v. Nelson(c) does not contravene this position; for, in that case, the doctrine was not settled, but mentioned only incidentally; so that what fell from the Court was merely an obiter dictum.

By Peyton Randolph, Botts, and Wickham, contra, the case of Nelson v. Nelson was relied upon as express authority. The agreement was fair and liberal on the part

of William; and Rowland having unlawfully sold and converted to his own use a tract of land belonging to his brother, his desire to make amends for that injury was a sufficient consideration on his part. The contract, therefore, was lawful and praiseworthy; and, being under seal, an action of covenant could have been maintained upon it;(d) since there was nothing in it *malum in se*. There is a large class of bonds in England, called post-obit bonds, which are always considered good where no undue advantage has been taken; though, in cases of injustice, or hardship, equity will relieve.(e)

2. The counsel for the appellant farther urged, that this contract, relating, not to any immediate title, but a remote possibility without present interest, was void. It is, indeed, laid down in the books that a possibility may be assigned, released, or mortgaged: but there must be an inception of right.(f) And even that cannot be transferred to a stranger.(g)

On the other side, it was objected, that these authorities all related to conveyances, and not to covenants to convey.

306 The true doctrine is, that covenants to convey possibilities are good, though conveyances are not.(h)

3. The contract, even if binding between the parties, operated no lien upon the land; since it did not apply to the particular tract called Voss's. Indeed, according to the evidence, the name Voss's was applicable to the whole of a larger tract, of which this was the upper part. At the time of the contract, the testator was living on the upper part, and William his son on the lower, which, however, was then intended by the testator for Rowland. The lower part, then, was in contemplation, and not the upper, which the testator (having changed his mind) afterwards devised to him. Suppose the contract had specifically mentioned this lower part of the tract, and the testator had afterwards devised the upper, would the Court have had the power to contravene the express terms of the contract? If not, neither have they the power to change it in this case, where the lower part was as well known to have been contemplated as if it had been specifically mentioned. If this were a mortgage, would it be in the power of the Court to shift the lien from one tract of land, and fix it on another?

Admitting the tract now in dispute had been the tract intended; the contract could, at utmost, only be regarded as a conditional sale, and not a mortgage; for the Botetourt land was a mere ulterior security, or pledge, in case the Kentucky lands were not to be had. The breach of the covenant lies, therefore, in compensation, and the land itself should not be liable.(i) A lien never is created, where the vendor has not power,

(d) Co. Litt. 206, b.

(e) *Chesterfield v. Jansen*, 1 Atk. 301.

(f) 10 Co. 50, b; 2 Co. 57.

(g) 11 Mod. 152; *Cro. Car.* 477; *Cro. Eliz.* 501. *Yelverton v. Yelverton*; *Hobart*, 132, 8 Term Rep. 93; *Jones v. Roe, Lessee of Perry*.

(h) 1 Atk. 386; 2 P. Wms. 182, *Beckley v. Newland*; *Id.* 191, *Hobson v. Trevor*; 1 Vez. 409, *Wright v. Wright*.

(i) 1 Vern. 79, 187; *Popham v. Bamfield*, 2 Vern. 232; *Woodman v. Blake*, 2 Vent. 352.

(a) See 2 Com. Dig. p. 166, and *Jones on Bailments*, p. 15, 16.

(b) 2 Atk. 221, *Powell v. Knowler*.

(c) 1 Wash. 136.

at the time of the contract, to bind the estate.(a)

In answer to this, the construction put upon the evidence was denied, and the tract now called Voss's was insisted to have been the tract intended by the parties; of which the appellant Lewis, from his connection with the family, and being one of the administrators of William Madison, must have been apprized. At any rate, it being in proof that Mrs. Elizabeth Madison gave him 307 notice, before his last *payment of the purchase-money, and before he received the conveyance this was sufficient to bind him.(b)

But, 4. for the appellant. This notice was not sufficient to bind him; there being nothing which shewed a lien on the land in question. Indeed, if such a lien could ultimately exist, it might never have attached. For aught that appears to the contrary, the land in Kentucky may yet be got. No eviction or loss of that land is proved; and without evidence of this, the heirs of William have no claim upon the Botetourt land.(c) Lewis therefore remains a bona fide purchaser without notice, against whom a Court of Equity will never decree specific performance.

5. The proper parties are not before the Court. If the contract is regarded as a mortgage, the executor of the mortgagee, and not his heirs, should be the plaintiff.(d) The widow of Rowland Madison was a necessary party, because entitled to dower. If she was not so entitled in this case, a man might deprive his wife of dower by anticipating and passing off his acquisitions. The personal representatives of Rowland were also material parties; not only on account of their interest, but for the sake of information. Being possessed of his papers, they might, by their answers, give all-important information.

To this it was answered, that a suit to foreclose a mortgage may be brought against the heir of the mortgagor, without making his executor a party;* and, by parity of reason, the suit here being to recover the land specifically, the heirs were the proper plaintiffs. If the widow of Rowland Madison be alive, as suggested, (of which there is no proof,) she need not be made a party. Her dower-right is paramount to any other, and cannot be affected by the event of this suit.

The rule (though general) that all 308 persons interested *must be parties, is yet liable to exceptions, according to the circumstances of each case.(e) In Collins v. Griffiths, 2 P. Wms. 313, it was decided that the executors of a deceased obligor in a joint and several bond may be sued in equity for the debt, without making the surviving obligor a party. So, in Harris v. Ingledew, 3 P. Wms. 93, 94, the suit being to subject lands devised to the payment of

debts, and the devisees having been in quiet possession eleven years, a sale was decreed without the heir being a party; and in Darwent v. Walton, 2 Atk. 510, where one partner was out of the kingdom, the partner before the Court was compelled to pay the whole demand. In this case, the fact is established that Rowland Madison died insolvent, in another State; and there is nothing in the record to show who his representatives were, or whether he had any. But, if their names were known, the act of Assembly, which authorizes proceedings against absent defendants, applies only to cases where a plaintiff wants a decree, but does not compel him to proceed against them.(f) Here the plaintiff did not want the representatives of Rowland Madison to be parties, as nothing could be got from them. It was the duty of the defendant to have called upon them for aid, if he wanted the information they could furnish.

In reply, it was said there was no proof of the insolvency of Rowland Madison; neither was it averred in the bill, or proved, that his heirs resided in Kentucky. But, if such were the case, the plaintiffs were bound to make the proper parties, not for their own convenience, but the justice of the case. The authorities cited, as exceptions to the general rule, are not apposite to this. In each of those cases, the defendants, who were separately sued, (or the lands held by them,) were considered individually responsible for the whole claim of the creditor: of course there might have been no necessity to make other parties. Yet the case from 2 P. Wms. 313, seems inconsistent with the later authority of

Madox v. Jackson, 3 Atk. 406. In this 309 *suit, it is essential that Rowland Madison's heirs should be parties, whether he died insolvent or not; for they are interested in the question concerning this land, the title to which is derived from him. Besides, the derivative purchaser has, universally, a right to the assistance of the vendor, or his legal representatives; because they can prove whether the contract was discharged or not. They cannot be examined as witnesses, because they are interested; and the rule is universal that, where, on the ground of interest, a person cannot be used as a witness, he must be made a party.(g) If Lewis, on being cast were to sue the heirs of Rowland for compensation, they might yet prove against him, that Rowland satisfied the contract to William; for, not being parties to this suit, they would not be bound by it. But he should not be driven to this alternative; for a Court of Equity abhors circuity of action, and ought to prevent multiplicity of suits.(h) There was no necessity of a demurrer for want of parties; for in Call v. Scott, and Hoover v. Donnelly, there was no demurrer.(i)

Tuesday, May, 29th. The Judges pronounced their opinions.

JUDGE TUCKER, after reciting the terms of the agreement between William

(a) 2 Call. 298. Walcott v. Swann; Moseley, 97, 114, 119; 1 P. Wms. 104. Collins v. Plummer.

(b) Mitf. 215; 3 Atk. 304. Hardingham v. Nichols; Ib. 815. Radford v. Wilson; Sugden, 487; 2 Eq. Cas. Abr. 686, pl. 8. Jones v. Stanley; 1 Atk. 384. Wigg v. Wigg; 3 P. Wms. 307. Tourville v. Nalsh; 2 Atk. 680. Story v. Lord Windsor; 1 Ch. Cas. 84. More v. Mayhow.

(c) Yancey v. Lewis, 4 H. & M. 890.

(d) 1 Ch. Cas. 51. Powell, 1047, 1048.

*Note. See Graham's Ex'r's v. Carter, 2 H. & M. p. 6; Fell v. Brown, 2 Bro. Ch. Cas. 279; 3 P. Wms. 338, note A.

(e) Mitf. 39, 146.

(f) 1 Rev. Code, p. 116, s. 5.

(g) 1 Call, 428. Harrison v. Harrison; 3 H. & M. 816. Hoover v. Donnelly.

(h) 3 P. Wms. 888. Knight v. Knight; How. Excheq. 216. Harr. Ch. Pr. 35. (last edit.); 16 Viner, 248, pl. 6; Call v. Scott. (MS.)

(i) See also 16 Viner, 267, pl. 1.

Madison and Rowland, proceeded as follows:

To this contract Gabriel Madison, a third brother, was the only subscribing witness. It was proved by him and recorded in Lexington District Court, State of Kentucky, Sept. 18, 1800, almost twenty years after its execution, and six months after this suit was brought.

On the same day that this contract was entered into, Gabriel Madison agreed to let Rowland have land in Kentucky, under the proclamation, to enable him to comply with that contract. William was privy to this agreement, and afterwards (as Gabriel thinks) made choice of 1,000 acres on 310 Simpson's *Creek, in a letter written to Gabriel, who had 3,000 acres in Kentucky, of which William was to have choice.

On the 14th of July, 1781, William Madison conveyed to John Gordon, 1,000 acres of land on Boon's Creek, Kentucky. This, it is said, is the land which Rowland Madison had, previously to the above mentioned contract, sold to John Gordod, without any authority from William, and received some trifling consideration for, from John Gordon. But the consideration expressed in the deed, is one hundred pounds, current money of Virginia, in hand paid by Gordon to William. No other, or further consideration is mentioned.

On the 5th and 6th of November, 1781, John Craig and wife, by deeds of lease and release conveyed to William Madison, four hundred acres of land in Montgomery County, Virginia, called Hand's Meadow. This land is said to have been given by Craig to Madison, in exchange for the 1,000 acres on Simpson's Creek, which Gabriel, in behalf of Rowland, was to furnish William with; but the consideration expressed in the deed of release is 400l. current money of Virginia, by Craig to William in hand paid. Hugh Crockett states, that he understood from both Craig and Madison, that the Simpson's Creek land, and 125l. specie, were to be in full of this land; that, since William's death, (which happened in March, 1782, and in the life-time of his father,) he has understood and believes, one Hite had established a better title to the Simpson's Creek lands; that Craig, in his presence, applied to Gabriel, in whom the legal title, under which William claimed, was, to make him a deed, which Gabriel said he could not do, but would give him in lieu of it 1,000 acres on the Ohio; which offer Craig refused, and has since informed the witness that he had got the Hand's-Meadow tract back, and was in possession of it; though the witness understood the legal title thereto is still in William Madison's heirs, the present complainants.

In March, 1782, William Madison died intestate, and the bill charges that Thomas Madison, William Preston, and the 311 *defendant Andrew Lewis, took out letters of administration on his estate, and of course that they possessed themselves of and examined all his papers, among which the agreement first mentioned was, which was by no means a secret in the family. The answer denies that William's papers were ever in the defendant's hands; alleging that they were delivered to Thomas

Madison, by William's widow; he, Thomas, having signified the advantage of his keeping the papers, as he was a practising lawyer.

In March, 1784, or before, John Madison, the father of William, Rowland, Gabriel, and Thomas, died. By his will he devised to his wife the plantation whereon he then lived, during her life. And, as to the lands whereon he then lived, and whereon his son William lived, he devised the upper part, whereon he then lived, to his son Rowland, in fee-simple; and the lower part, whereon William lived, to William's widow for life, with remainder to the present complainants. The upper part, thus devised to Rowland, forms the subject of the present controversy.

The bill charges, that at the time of the agreement entered into between William and Rowland, as before stated, it was well known among the brothers, and others, that their father intended to devise that part, called Voss's, to Rowland in fee; and that it was this identical land which Rowland bound himself to give William in recompense for the Boon's Creek land, (which he had sold, as stated in the agreement,) in case he failed to comply with his engagement, to make William a clear and undisputed title to 1,000 acres of military lands: that John Madison, the father, was acquainted with the existence of this contract, and by no means disapproved of it; as in a will of an early date he had devised the same lands to Rowland, and, though shortly before his death, he altered his will in some other respects, he continued that devise to Rowland; that the defendant, Andrew Lewis, had married a sister of William and Rowland, and was unusually

intimate with them and their affairs, 312 *and very high in their confidence and that of the family; that he qualified as administrator of William, as before mentioned, and acted as such in a variety of instances; whereby, and by reason of his intimacy and connection with the family, he must have been acquainted with the agreement before mentioned; and, but for the grossest negligence, might have known of William's title to the land bequeathed to Rowland by his father; notwithstanding which, he purchased the same of Rowland; and the bill suggests, as a motive thereto, that a great part of the purchase-money consisted in a debt or debts due to him from Rowland, who was, at that time, in circumstances which threatened he would break, and who, since the purchase, actually became insolvent, after having removed out of the State so that Lewis believed he had no other mode of securing his debt, but by that purchase; that after the purchase, and before any conveyance was made from Rowland to Lewis, Elizabeth Madison was appointed guardian to her daughters, and gave Lewis notice she would institute a suit for Voss's, (the land in controversy,) as she was satisfactorily advised Rowland could not make a title to 1,000 acres of military land in Kentucky; notwithstanding which, Lewis paid up the balance of the purchase-money to Rowland; that Rowland never did tender or survey the 1,000 acres of military lands, which might have been substituted for the Virginia lands, according to the agreement; and that the Kentucky land

is worth from 3,000 to 5,000l., and would be preferred by the complainants, under existing circumstances.

The answer of Lewis states the devise to Rowland, as made in pursuance of a promise made when he was about to marry; that Rowland, who, at his father's death, (early in 1784,) resided in Kentucky, returned and settled on Voss's, and resided there till 1790: that being desirous of removing again to Kentucky, he proposed to sell Voss's to the defendant, who, believing the title derived from his father was a good one, free and clear from all encumbrances, purchased it at the price of 2,000l.: he admits that about 300l. of the

313 *purchase-money consisted of a debt due from Rowland to himself, but denies the motive was to secure that debt, as Rowland was then solvent for a much larger sum. He obtained possession in 1790, having made payment to the amount of about 1,875l. including the above debt; the sum of 125l. being left in his hands towards discharging a debt of Rowland's. "And in that situation the case remained until some time in the year 1792, when, to his surprise, the complainant Elizabeth informed him of the contract mentioned in the bill." He positively denies that he had any notice of the contract; for, although he was one of William's administrators, and took some care of the estate until the sale, yet his papers were never in his hands, but were delivered to Thomas Madison by his widow, the complainant Elizabeth; that although Thomas Madison drew the articles of agreement between the defendant and Rowland, and the bond for a title, yet he gave him no notice of the contract between William and Rowland, as he could have proved if the suit had not been delayed till after the death of Thomas; and believes it was kept a secret from their father. He admits that, after the notice given him in 1792, as before stated, he did, in pursuance of an award, pay to Rowland, 175l. or thereabout, and received his title; being, as he supposed, the most prudent course for him to pursue.

Rowland Madison's bond to Lewis to make him a title to Voss's, bears date December 5, 1789. He removed to Kentucky, as appears by the deposition of William Lewis, in October, 1790. Another witness, Hugh Crockett, proves, that Mrs. Elizabeth Madison, the guardian of the complainants, and widow of William, rode with Rowland and his wife 15 or 16 miles, when they set out on their journey to Kentucky; and this it is stated happened the day before the payment, either of the balance of the purchase-money, or of the principal part of it, (for it is not quite clear which is meant, though I rather think the balance,) by Lewis to Rowland. Lewis's answer fixes the period when he first

314 *received notice from Mrs. Madison, to the year 1792. Another witness, James Barnett, states that he was present at what he conceived to be a final settlement between Lewis and Rowland, the day before the latter set out for Kentucky. Hugh Crockett, as attorney in fact for Rowland, executed a conveyance to Lewis for the lands, after Rowland had removed to Kentucky. This witness, in answer to a question whether he did not know that Lewis had notice of the

complainant's claim to Voss's, before he made the deed under the power of attorney from Rowland, answers, "I do not know whether it was before, or after, but think it was about that time, that Lewis and Mrs. Elizabeth Madison had some conversation in this deponent's presence, respecting the complainant's claim, and this deponent recollects that he was apprehensive of some danger from acknowledging the deed, and took advice upon the subject; but the cause of his apprehension he does not at present recollect." There is no evidence whatsoever to contradict that part of Lewis's answer wherein he denies notice until 1792. Nor is there any reason to infer from the publicity, or notoriety of the transaction between the brothers, that he had notice. And, although it appears to have been known not only to Gabriel Madison, but to his brothers Thomas and George, yet no communication or hint of it appears to have been given by them, or any other person, to Lewis. Rowland, when he removed to Kentucky, carried a considerable property with him, in negroes, wagons, horses, and other things: and, though he seems to have been considered as an extravagant man, his circumstances at that time appear to have been unembarrassed, and his credit good.

I cannot agree with the counsel for the appellant that the contract between William and Rowland, for an eventual satisfaction for an unauthorized sale by the latter, of the Boon's Creek tract of land, which belonged to the former, was, under the circumstances of this case, contra bonos mores. If, as stated in the answer, and perhaps in some other parts of the record, their father in contemplation of Row-

315 land's *marriage, had made him a promise to give him a particular tract of land, I can see nothing immoral in a promise, to his brother, eventually to make him satisfaction for the wrong he had done him, out of that land, when he should come into possession of it; if he did not before make him a compensation in the manner stipulated by their agreement. And, if such a promise had been proved, and the land which was the subject of it, clearly identified, I do not know how a Court of Equity could have refused to decree a specific performance of that agreement between the parties themselves, or their legal representatives. (a) But I am not satisfied, from any thing in this record, that the father made any such promise; or, if he did, whether it ought to be understood as relating to the upper or the lower part of the tract called Voss's. Nor, perhaps, would this be a matter of any importance, if this suit had been brought against Rowland in his life-time for a specific performance of this agreement between himself and his brother. But that not being the case, the question, between the present parties, must, I conceive, turn upon points altogether different; since the question of notice seems to be naturally connected with that of certainty. The written contract between Rowland and William Madison, is entirely defective in this particular. According to the grammatical sense of it, it would appear to relate to some lands in Virginia, which

(a) *Hobson v. Trevor*, 2 P. Wms. 191; *Beckley v. Newland*, ib. 182; *Wright v. Wright*, 1 Vez. 409.

had been before that time devised to Rowland, by some person or other, and to which his title was indisputable, though, from some cause or other, he had not yet obtained the possession. But who the testator was, and where the lands might lie, within the County of Botetourt, in the State of Virginia, can no more be discovered from this contract than the way of an eagle in the air. Neither is it more certain, if considered as a contract concerning lands in expectancy, and to be given him by some person not yet deceased. And, however the maxim "*id certum est quod certum reddi potest*" may apply to such a

contract, as between the parties, or
316 privies thereto, it has, I *conceive, no application to a stranger, who may become a fair purchaser for a valuable consideration. For such a construction would tend to lock up all the property in lands within the State, and render them perfectly unalienable. In contracts of this nature we are told by the author of the celebrated treatise on equity, (a) that the Court does not bind the interest, but, instead of damages at law, enforces the performance in specie: that is, as I understand the book, as between the parties to the contract; for, without binding the interest, I cannot discover how a purchaser of it could be affected. (b) The rule in equity is, that, where a man is a purchaser without notice, he shall not be annoyed in equity, not only where he has a prior legal estate, but where he has a better title or right to call for the legal estate than the other. (c) To apply this; A. being indebted to B. covenants with him to convey to him a certain non descript tract of land, which he either hath, or expects to have, by the benevolence of some friend. A. afterwards becomes possessed of certain lands by devise from his father, enters therein, and resides thereupon several years: C., without notice of this covenant between A. and B. purchases these very lands; pays the whole or nearly the whole of the purchase-money to B.; obtains possession; enjoys and improves the lands for two years; and then pays up the balance, and obtains a conveyance, but, previous to such last payment, receives notice. Which of these persons, in the eye of equity, and reason, had the better right to call for the legal estate, at the time when C. obtained his conveyance? Surely he whose contract was most clear and certain, as having these very lands and no other, in contemplation; whereas the other might be satisfied by a hundred different tracts, provided they lay in a County containing several millions of acres. Nor can I by any means agree, that the payment of the balance of the purchase money, (after notice of this uncertain contract,) and taking a conveyance, shall, by mere relationship, be taken as strongly
317 against him, as if he had had the fullest and most *complete notice, before he had entered on the lands, or paid a shilling of the purchase-money. For the principle upon which a Court of Equity proceeds in setting aside contracts by subsequent purchasers, on the ground of notice, appears to be, that the

first contract creates a specific lien upon the lands. But that cannot be, where the contract is so uncertain, as that, if it were immediately published in a gazette, no stranger could be thereby admonished further, than not to deal at all with such a person for any lands, either that he hath, or thereafter may have, as long as he lives. But such a warning as this must be void: as against all the principles of social life and intercourse. I agree, therefore, to what was said in the case of *Walcott v. Swann*, (MS.) that those decisions which apply, on this point, with respect to a definite ascertained portion of property, will not extend to a vague and indefinite contract of this kind; it being a leading principle that, to affect a subsequent purchaser on the ground of implied notice of a former title, there must be something to lead such purchaser distinctly to a knowledge of such title, with reference to the identical specific property in question.

It is material in this case to observe, that the first notice which Lewis received of this contract was after Rowland Madison had removed to Kentucky, and had put Lewis into actual possession of the lands, having before that time received the whole of the purchase-money, except a small balance, and that undertaken to be paid to a third person. And all this happened under the eyes of the widow of William, and with the actual privity and agency of Thomas Madison, his administrator. So far as the personal estate of William might possibly be benefited by the specific performance of the contract between William and Rowland, these circumstances would operate to rebut every ground of equity which either the widow or the administrator might pretend to.

There is still another important point in this case. Even supposing the contract sufficiently certain to designate Voss's
318 *as the subject of the eventual agreement between William and Rowland, still, in respect to that tract of land, there was a mere contingent liability, in case something, which was convenient to be previously done, should not be done. So that here was a contingency upon a contingency. Such contingencies, even in wills, are not often favoured. But where they occur in a deed, and, much more, where they relate to lands, which the covenantor neither possesses at the time, nor even has a scintilla of right to, either in law or equity, I believe no case can be produced, and certainly none has been cited, to shew that they have ever been carried into effect. But, were it possible that such a double contingency, as this is, could be considered as proper to be carried into specific execution, it is further observable, that steps had been taken from its very commencement, by Rowland, to procure the military lands; that William made choice of one tract of 1,000 acres; that upon its being discovered that a good title could not be made to that, Gabriel was ready to have given another tract of 1,000 acres on the Ohio; that no laches are imputable to Lewis, who was no party to that contract, in not procuring a conveyance; and that Rowland never parted with his 1,000 acres, until after Lewis had paid him up fully, and had got a conveyance.

(a) 1 Fonb. b. 1. c. 4, s. 2.

(b) 2 Fonb. 2. c. 5, s. 2; *Fremoult v. Dedire*, 1 P. Wms. 429.

(c) 2 Vern. 600, *Wilker v. Bodington*.

for Rowland, as appears by Gabriel Madison's deposition, never sold this land until after the year 1795. And, possibly, nay, probably, had the suit against Gabriel, which Walter Bell brought for a conveyance of the Ohio land, been defended properly, no decree would have been made in Bell's favour to the prejudice of the present complainants. So that the contingency by which Voss's could have been made liable, did not actually happen until several years after the land was purchased, entered upon, paid for, and a conveyance executed. Under such circumstances, I cannot regard Lewis in any other light than as a fair purchaser, without notice of any actual charge or encumbrance on the lands purchased, either at law or equity, and therefore think the decree erroneous upon that ground. I have not considered the question as to the want of parties, but, as at present

319 advised, *(though I mean not to give any opinion upon it), the representatives of Rowland, and the several representatives of William seem necessary to have been before the Court, in order to do complete justice, if a decree for a specific performance of the contract should have been thought proper. But, as my opinion is not so, I pass over the question, and conclude with giving my opinion that the decree ought to be reversed, and the bill dismissed with costs.

JUDGE ROANE. This is a bill brought by Elizabeth Madison, as mother and next friend to her infant daughters, against the appellant. The bill was exhibited in May, 1800; and its object is, to enforce the specific execution of an agreement of October 10, 1780. John Madison, the grand-father of the infant appellees, having died prior to March, 1784, when his will was proved, it follows that more than sixteen years had elapsed between the time when the contract came into existence, and might have been enforced, (if at all,) subject to the life-estate of the testator's widow, (the precise time of whose death does not appear,) and that of the institution of the suit: and, if a reasonable time should also be allowed to enable the appellees to get a title to the Kentucky land, which, in the first instance, was to be conveyed by Rowland Madison, and for which the contract (as it related to the Virginia lands) appears only to have been intended as a security, still a very great space of time was suffered to elapse prior to the institution of the suit. In the mean time Thomas Madison died in 179-, who, as administrator of William Madison, was possessed of his papers, till about the year 1787, and, among them, it is presumed, of the contract now endeavoured to be set up; and who (as is evident from the testimony actually given in this cause) could have thrown much light upon the subject. Rowland Madison was also suffered to die about the year 1798, who, possibly, in his life-time, could have defended himself more efficiently against this claim than the present appellant can; and whose papers and representatives, if even they were before the Court, might

320 *possibly operate to the same purpose; but his representatives are not parties to this suit! In the mean time also Rowland Madison was permitted to return from Kentucky, and reside upon the lands in contro-

versy 3 or 4 years, and sell the same to the appellant, for a full and fair price, without any notice whatever of the encumbrance, as appears by the testimony; to move away, full-handed as to property, accompanied on part of the journey by Mrs. Madison, the mother and next friend of the appellees, who never gave any kind of notice of the claim, although she or her brother was possessed of the papers before that time, and although she had, (as is proved by J. Smith,) between 1783 and 1788, frequently spoken of this contract, but that in a confidential manner. It was not until 1792, perhaps two years after the purchase by the appellant, that the said Mrs. Elizabeth Madison apprized him of her claim. As for Thomas Madison, the only acting administrator of William Madison, and who was possessed of his papers till 1787, (Andrew Lewis having never been possessed thereof,) he is not only not proved to have ever mentioned the contract to Andrew Lewis, but, on the contrary, his conduct on several occasions purported that he knew of no effective lien thereon, and, in particular, in his having drawn the title-bond, of December 5, 1789, from Rowland Madison to Andrew Lewis. So, also, Mr. Francis Preston, who, probably, as brother to Mrs. Madison, was possessed of the papers in question, (See Susannah Madison's deposition,) from the year 1787, forwards, not only never mentioned this claim to the appellant, or any other, but, in the year 1790 or 1792, wrote to Gabriel Madison concerning the Simpson's Creek lands, which had been elected in discharge of the contract; and was thereupon informed by the said Gabriel Madison that he was ready to convey them upon getting the release of Rowland Madison. All these circumstances of assent, acquiescence and encouragement, on the part of the natural friends and guardians of the infants, and, above all, the suffering Rowland Madison so long to possess, and then sell out the land, without objection, would

321 *be undoubtedly powerful enough, of themselves, to put an end to this controversy, but for the consideration (as to which, however, I mean to pass no opinion in this case) of the very great tenderness shewn to the interests of infants in the Courts of Equity. The land, which is now sought for by the appellees, was not only not demanded within a reasonable time, but a good reason is found therefor, in that William Madison, in his life-time, had elected the Simpson's Creek lands, and conveyed them, with a general warranty, to Craig, who was extremely importunate to get those identical lands, and those only. A conduct, therefore, marked by all the foregoing circumstances, and a delay arising from, if not accounted for, by the consideration of the conveyance of the Simpson's Creek lands to Craig, (which also is not to be affected by the subsequent arrangement with Craig in this particular,) ought not to operate injuriously to the appellant: nothing in our code of equity could possibly have that effect, (as I have before said,) but the extreme tenderness of that code for the rights of infants; if even that consideration should be found to turn the scale, under all the circumstances of this case.

It is not necessary, however, to decide this

cause upon the foregoing grounds. It is not necessary to decide whether that mother who, as natural guardian to her children, has brought this suit in the character of next friend, was also competent by her acts and conduct to bind them; nor whether the acts of even the whole congeries of their natural and constituted friends and protectors were competent to work this effect. This cause may well go off, on ordinary grounds, and independently of all the foregoing considerations.

The question before us is, (for such is the prayer of the bill,) whether the appellees are entitled to a conveyance of the specific tract of land now in question. Putting out of this case so much of the contract of April 10, 1780, as relates to the military land, which appears to have been the principal object contemplated by the parties, and on 322 that *ground, perhaps, accounts for the vagueness of the contract taken in relation to the Virginia lands, let us examine this contract, in relation to the lands last mentioned. That contract is to convey, eventually, "his" (Rowland Madison's) and in Botetourt; and again to convey "his land willed to him," when he comes to the possession of it; and that he, Rowland Madison, will make William Madison a title to "the land," first "having both tracts valued," &c.

While the first expression in this contract, "his" land, would seem to import that the land contemplated, was land of which Rowland Madison was then possessed, or to which he was at least entitled, the second expression only enlarges that description to land then "willed" to him. It would seem to be incumbent on the appellees, therefore, to shew that the land in question then stood in that predicament. This call of the contract would, perhaps, not be satisfied by proving, not that the land was then willed to Rowland Madison, but that it was intended to be willed to him; but it will be found, on the contrary, that the proofs do not even come up to this mark, in relation to the land in question. The contract not only contemplates a tract then willed to Rowland Madison, by the terms of it, but it also undoubtedly contemplates a specific tract, and not any tract which might thereafter be willed. This idea is kept up in that part which stipulates to make a title to "the land," first having "both tracts" valued, &c.; thereby evidently shewing that both parties had their eye upon a particular specific tract, the value of which they were not themselves competent to agree upon, and which, therefore, they left to others. They had in view a particular tract on the part of Rowland Madison, and not any tract of land which might thereafter be willed to him. The cases, therefore, which go to shew that possibilities may be passed under a general description, do not fit this case, in which the description is not general. The question still recurs, was the tract now in question the one contemplated by the parties in the contract?

323 *It is admitted on all hands, that the tract now in question was not the land of Rowland Madison at the time of the contract. It is also admitted, that it was not then willed to him, as no other will is shewn than one made more than three years after-

wards: but the case will be still stronger against the appellees, if it be shewn that this land was not, at the time of the contract, intended to be willed to Rowland Madison, but another tract, the destination of which was afterwards changed; and which (and not this tract) was in the contemplation of the parties, when the contract was entered into, and provision made for the valuation thereof; and this brings us to the proofs in the cause.

It is charged in the bill, that John Madison, the father, had "intended to devise" (not "had devised") the land in question, to Rowland Madison, as at the date of the contract, and that this intention was known to the family of John Madison, and others. The answer states, as upon belief, that, at the time of the contract, William Madison and Rowland Madison did not expect their father would devise Voss's to Rowland Madison, but the lower tract, which was afterwards devised to the appellees. This denial in the answer is abundantly supported by Hugh Crockett, who is admitted to be very respectable, was much confided in by the testator, and perhaps had better opportunities of knowing his sentiments, on this subject, than any other person. He says that the testator, in his life-time, repeatedly informed him, that it was his intention to give Rowland Madison the lower part of the tract of land called Voss's, and to William Madison the upper part; and that, in consequence of this intention so expressed, Rowland Madison did actually plant fruit trees on the lower part; that afterwards, shortly before the marriage of Rowland Madison with Miss Lewis, and after the death of William Madison, John Madison, the testator, expressed an intention of changing the disposition of the said tract, so as to give to Rowland Madison the upper part, (now in question,) and to give to William Madison's children the lower part. Nothing can be more con- 324 clusive *than this deposition, (in aid of the answer,) to shew, that it was after the date of the contract, and also after William Madison's death, that the testator altered his intention, which, before, and at the time of, the contract, was to give the lower tract to Rowland Madison. That tract, therefore, and not the tract now in question, was the one which the parties contemplated by their contract, and which, in the alleged event, was to be valued. This deposition and answer is not materially impugned by any evidence in this case. Let us investigate, briefly, those parts of the testimony which have been arrayed against it, by one of the appellees' counsel. It has been supposed that the answer of the appellant, the bond of December, 1789, and the three depositions of Gabriel Madison, George Madison, and Susanna Madison, are all in opposition to the deposition of Col. Crockett, in this particular.

It was supposed, in the first place, that the answer of the appellant is in collision with Crockett's deposition. If that counsel was serious in this idea, he has viewed that answer through a very different medium from what I have done. There is nothing in it, in my judgment, which carries the semblance of such an idea. Again, he supposed that the bond of December, 1789, from Rowland

Madison to Andrew Lewis, in which he contracts to convey "Voss's," willed to him by his father, to the said Lewis, was also in conflict with that deposition. Setting aside the testimony shewing that John Madison's intention, respecting this land, was immediately changed, it is difficult to conceive how an admission that a tract of land was willed to a man, on the 5th of December, 1789, amounts to an admission that it was so willed, or intended to be willed, on the 10th of October, 1780. As to the deposition of Gabriel Madison, I can see nothing in it going, by any possibility, to shew that the testator, on the 5th of December, 1789, had willed, or intended to will, the land called Voss's to Rowland Madison. The same may be entirely said of that of Susanna Madison. There is, indeed, a general belief expressed by George Madison, that it was 325 *understood in his father's family, that he intended to give Voss's to Rowland Madison: but this belief might have arisen in the mind of the witness at a time posterior to the date of the contract, (which appears from other testimony to have been the case,) and (even throwing this last consideration out of the case) is incompetent to outweigh the testimony of the answer, and that of Hugh Crockett, which is very clear, circumstantial, and express, as to this point, and who is accredited by this witness himself, as to his opportunities of knowing the facts to which he deposes, on account of his acknowledged intimacy with his father.

It is, therefore, neither shewn that the tract of land in question was willed to Rowland Madison at the date of the contract, nor that it was then intended to be willed to him. The proofs on this point are entirely otherwise; and that it was not until after the date of the contract in question, and after the death of William Madison, that John Madison's intention was changed so as to intend to will Voss's to Rowland Madison, which intention he accordingly carried into effect. I will here make one general remark; and that is, that all those parts of the answer, of the testimony, of the belief of the witnesses, or, even of that of the appellant himself, which seem to consider and admit the contract as applying to the land called Voss's, prove nothing, as to the fact, whether, at the date of the contract, that tract was the one contemplated by the parties, which, if so proved, would go to supply the deficiency of the contract in this particular. All these may have arisen upon mere report, or under a belief that the contract itself, when produced, or the testimony might go to supply that defect; which, however, is not the case in the present instance.

My opinion therefore is, that the contract before us does not extend to this land, under any general expressions thereof; but, on the other hand, extending only to a particular tract willed, or intended to be willed, to Rowland Madison, there is a defect of proof to bring the tract in question under that contract; and that, to say the least, 326 this fair and *bona fide purchaser, for full price, should not be considered as a purchaser with notice; as the doctrines on this subject do not apply to vague and indefinite contracts; but in order to affect a purchaser with notice, there ought to be

something to lead to a knowledge of the specific land contemplated; a point which, so far from existing in this case in favour of the purchaser, by the means of ordinary diligence on his part, is not even yet established, (as applicable to the land in question,) after all the care and pains of the appellees to collect testimony upon the subject.

This case, therefore, being, upon the merits, extremely clear for the appellant, in every respect, I am of opinion to reverse the decree, and dismiss the bill; and this without deciding (as being not necessary to be decided) whether other parties are necessary; though my present impression is, that they are so.

JUDGE FLEMING. This being a case of much solicitude and of considerable interest to the contending parties, I have examined the record with great attention; and though it seemed, at first view, not a little complicated, it appears to me, on a thorough investigation, a very plain case; and as it has been fully and ably discussed by the Judges who have preceded me, I shall briefly notice only what appears to me the most material points in the cause.

By the agreement 10th of October, 1780, between William and Rowland Madison, the latter (in lieu of 1,000 acres of land on Boon's Creek, belonging to William, which Rowland had sold to Gordon, and for which, by a former agreement, he was to give his land in Botetourt in exchange) was to make William a title to the same quantity of land, obtained by a military warrant, agreeable to his majesty's proclamation, and clear of any disputes whatsoever; but in case the said Rowland should not do this, he agrees that the first bargain shall be binding on him; "that when he comes to the pos- 327 session of his land willed to *him, that he will make the said William a title for the land; first having both tracts valued," &c.

This agreement was, no doubt, understood by, and binding between, the parties, and their respective representatives; but, even if it had been made public, and recorded in due time, it appears to be too vague and uncertain (no particular land being described therein) to affect any third person, and especially a fair purchaser for a valuable consideration, without the smallest notice of that, or any other agreement, between William and Rowland Madison being in existence.

It appears that the will of John Madison, the father, by which the land in controversy called Voss's, was devised to Rowland, was dated the 10th of December, 1783, more than three years after the date of the contract; and in which land the widow of the testator (who died before the month of March, 1784) had an estate for life. That Rowland Madison was resident in the State of Kentucky at the death of his father, and some years thereafter (probably on the death of his mother) returned to Virginia and settled on Voss's, where he resided several years; and in December, 1789, sold the land to the appellant for 2,000l. to whom he executed a bond in the penalty of 4,000l. to make him a title, on or before the 1st of September, 1790. After the purchase the appellant removed to, and settled on, Voss's, where he remained

quietly until some time in the year 1792, when Mrs. Elizabeth Madison informed him of the contract between William and Rowland Madison as stated in the bill; which the appellant expressly swears in his answer was the first information he ever received concerning that contract; and this is strongly corroborated by the depositions of a number of respectable neighbours, in habits of great intimacy with the family, all of whom declare they never heard of such or any other contract between William and Rowland Madison. At the time the notice was given to the appellant, he had been, about two years, in quiet possession of the premises, had paid fifteen sixteenths of the purchase-money; *and the other sixteenth was retained to satisfy an unliquidated debt due, in certificates, from Rowland Madison to one Burford, which he had assumed to pay, and afterwards did pay.

Soon after the sale of the land in question to Lewis, Rowland Madison, in the year 1790, removed to Kentucky (supposed then to have been clear of debt) with 18 or 20 likely negroes, three loaded wagons and teams, and other property.

It appears that Gabriel Madison, a brother of William and Rowland, was present at, and the only witness to, the aforesaid agreement. He was at the time possessed of 3,000 acres of military land lying in Kentucky, such as was therein described; out of which he agreed, in presence of the parties, to furnish Rowland with 1,000 acres, to satisfy the contract, of which 1,000 acres William was to make choice, out of the 3,000 acres aforesaid. He made choice of a tract of 1,000 acres on Simpson's Creek, and exchanged it with one Craig for a tract in Montgomery County, called Hand's Meadow; but, the title of the Simpson's Creek land being defective, the contract with Craig was cancelled; and William Madison soon after died, in the year 1782. And thus the matter rested until the year 1792; two years after A. Lewis, the appellant, had purchased and got possession of Voss's, the land in controversy; when Mrs. Madison, mother and guardian of the appellees, (for the first time as before noticed,) informed the appellant of the agreement between William and Rowland Madison; which for eleven years had been a secret except to a few members of the family. It appears, too, from the deposition of Gabriel Madison, that, after the Simpson's Creek land was lost, he, in order to enable his brother Rowland to fulfil his contract with William, let him have 1,000 acres of land, of the same description, on the river Ohio; which, if conveyed to William's heirs, would have completely satisfied the contract; of which land it appears that Rowland was in possession, so late as the year 1795; and, after that period, sold the *same to Walter Bell, to whom Gabriel Madison, who had the legal title, was afterwards, by a decree of Fayette County Court, compelled to make a conveyance.

It appears also, by the deposition of Gabriel Madison, that several years before the sale to Walter Bell, he was written to by Colonel Francis Preston, another uncle of the appellees, in their behalf, requesting the deponent to inform him what he knew on the subject.

The deponent wrote Colonel Preston for answer, that he was ready to convey to William Madison's heirs the 1,000 acres of Ohio land, provided he could get Rowland Madison's release. And if proper steps had then, or for a year or two thereafter, been taken by the friends of the appellees, who were infants, a conveyance of the Ohio land would have been executed to them; the primary object of the contracting parties fulfilled; and an end put to this controversy. And it may be remembered, that the sole motive of changing the original agreement was to give to Rowland Madison the option of substituting 1,000 acres of Kentucky military land for the land he had in expectancy from his father, the identity of which was unknown to the contracting parties, and depended altogether upon a contingency that might never have taken place.

As to the omission of making the representatives of Rowland Madison parties to the suit, the appellant ought not to be affected by it. He has no claim upon them; and, I conceive, they have none upon him. He appears to be a fair purchaser, for a valuable consideration, without notice of any prior claim to the land in controversy, and ought to be quieted in the possession of his purchase. I am therefore of opinion, that the decree be reversed, and the bill dismissed with costs.

By the whole Court. Decree reversed, and bill dismissed with costs.

330 *Hull v. Cunningham's Executor.

Monday, April 23, 1810.

1. Sale in Gross—Material Mistake—Deficiency—Equitable Relief.—Though land be sold in gross, for so

*Sale in Gross—Mutual Mistake—Deficiency—Equitable Relief.—In *Crislip v. Cain*, 19 W. Va. 488, the subject of abatement of the purchase money on the sale of land because of a deficiency in the quantity is discussed at great length. JUDGE GREEN, who delivered the opinion of the court, makes an exhaustive review of the Virginia cases on the subject and criticises the decisions made therein. The conclusion reached by the court may be found in *foot-note* to *Watson v. Hoy*, 28 Gratt. 698; *foot-note* to *Pendleton v. Stewart*, 5 Call 1; *foot-note* to *Quessel v. Woodlief*, 6 Call 218. In this case (*Crislip v. Cain*, 19 W. Va. 488), the principal case was cited and discussed on pp. 515, 516, 517, 518, 527, 535, 537, 538. JUDGE GREEN remarks that the syllabus in the principal case is apt to mislead. He then states the facts in the case and, after quoting from the opinions of JUDGES TUCKER and ROANE, concludes (p. 518): "The court (i. e., in the principal case) obviously affirms the principles of *Pendleton v. Stewart*, 5 Call 1, which distinctly decided, that when there is no fraud in the vendor but simply an innocent and mutual mistake, in which neither party is more to blame than the other, as to the quantity of the land, and the sale is a sale in gross, there can be no abatement of the purchase-money because of a deficiency in the quantity. It further decides, that if the title to any part of the land is defective, and the vendee being in possession of it is put to expense in fortifying the defective title, he is entitled to be compensated for his actual cost and trouble in thus fortifying the defective title of the vendor. Surely there is nothing in the case, which gives any countenance to the idea, that an abatement for a

much, be it more or less; yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the pur-

chaser to take the risk upon himself, a Court of Equity will give relief for a deficiency.

2. **Same—Same—Same—Same—Measure of Relief.**—But if the purchaser do not (by eviction or otherwise) lose the land he expected to get; but make an entry for it as vacant, and obtain a patent; the proper measure of relief is only the amount of his expenditures in procuring the patent, with a reasonable allowance for trouble therein, and actual costs of suit.

3. **Same—Same—Action on Title-Bond.**—Quære, whether, in this case, an action at law could have been maintained upon the title-bond?

4. **Same—Relief in Equity.**—A purchaser who buys a tract of land as containing so many acres, more or less, and agrees to take upon himself the risk, as to lines, or quantity, (appearing, also better acquainted with the land than the vendor, against whom there is no proof of fraud,) is not entitled to any relief in equity, for a loss relating to the risk undertaken.

To the point that, where a sale of land is clearly one in gross, without reference to its quantity, whatever the deficiency, no allowance is made to either party even when the deficiency is great, the principal case is cited in *Caldwell v. Craig*, 21 Gratt. 137; *Allen v. Shriver*, 81 Va. 183; *Cunningham v. Millner*, 83 Va. 581; *Farrier v. Reynolds*, 88 Va. 145, 13 S. E. Rep. 893. But the court will always require clear proof that the vendee did agree to take the hazard of deficiencies on himself. *Russell v. Keeran*, 8 Leigh 14, citing principal case. See principal case also cited in *Russell v. Keeran*, 8 Leigh 17.

On this subject (*i. e.*, sale in gross and sale by acre) many foot-notes of some length have been written in this series of reports. In addition to those cited above, see *foot-notes* to *Jolliffe v. Hite*, 1 Call 301; *Pendleton v. Stewart*, 5 Call 1; *Keyton v. Brawford*, 5 Leigh 39; *Russell v. Keeran*, 8 Leigh 9; *Blessing v. Beatty*, 1 Rob. 287; *Caldwell v. Craig*, 21 Gratt. 132.

Same—What Constitutes—"More or Less."—The decisions in Virginia and elsewhere have uniformly held that when a vendor sold by written contract a tract of land for a certain sum of money, describing the land and adding thereto, "containing so many acres more or less," specifying them, or any other mode of specifying the quantity, which shows that its exact quantity was not intended to be given, such a contract or deed has been invariably construed to be a contract in gross, and has not been construed to be a contract by the acre, nor has such indefinite specification of the quantity of land ever been construed as a warranty of the number of acres by the vendor and as a contract, thus binding him to make it good. JUDGE GREEN, announcing the opinion of the court in *Depue v. Sergeant*, 21 W. Va. 333, 338, after quoting these words from *Crislip v. Cain*, 19 W. Va. pp. 526, 527, continues by saying: "This construction of such a contract, that it is a sale in gross and that there is no warranty in such a contract of the quantity, by the vendor, has in most cases been assumed and acted upon by the court as clear and indisputable, and no comment has generally been made on the subject; such contracts are not regarded in these respects as being in any degree ambiguous." JUDGE GREEN cites a long line of cases to sustain this assertion, among them, the Virginia cases of *Jolliffe v. Hite*, 1 Call 301; *Anthony v. Oldacre*, 4 Call 489; *Nelson v. Matthews*, 2 Hen. & M. 164; *Hull v. Cunningham*, 1 Munf. 330; *Grantland v. Wight*, 2 Munf. 179; *Bedford v. Hickman*, 5 Call 236. To the same effect, see the principal case cited in *Trinkle v. Jackson*, 86 Va. 242, 9 S. E. Rep. 986; *Graham v. Larmer*, 87 Va. 229, 13 S. E. Rep. 389; *Stebbins v. Eddy*, 22 Fed. Cas. 1195.

Sale of Land—Deficiency—Equitable Relief—Mistake.—It is now well settled that a mutual mistake of the parties in a matter which is part of the essence of the contract and substance of the thing contracted

Peter Hull, the appellant, brought a suit in the Superior Court of Chancery for the Staunton District, against Robert Cunningham, sen. to be allowed a deduction from certain bonds for purchase-money, on account of a deficiency in land sold and conveyed. A title-bond, dated the 29th of January, 1796, bound the said Robert Cunningham to make to the said Peter Hull "a good and sufficient deed, in fee-simple, for a certain tract of land known by the name of Crab Bottom, lying in Pendleton County, said to contain 370 acres, be it more or less, clear of all encumbrances, on or before the first day of next August, to wit, all that tract left him by his father John Cunningham, deceased." The deed, executed the 2d of September, 1797, for the purpose of complying with the condition of this bond, was for the same tract of land, setting forth the boundaries according to certain deeds of lease and release, of record in Augusta County, from James Trimble and

for, will be corrected by a court of equity and may be good ground for rescinding the contract or executing it on equitable terms of compensation, according to circumstances, even though the contract be in writing and required to be so by the statute of frauds. *Leas v. Eidson*, 9 Gratt. 278, citing principal case.

And the principle upon which equity gives relief in cases of deficiency or excess in the estimated quantity upon the sale of lands, is that of mistake: whether the mutual mistake of the parties, or the mistake of one of them, occasioned by the fraud or culpable negligence of the other. *Blessing v. Beatty*, 1 Rob. 288, 289, citing, among others, the principal case. See also, *foot-note* to *Blessing v. Beatty*, 1 Rob. 287.

The principal case is also cited in *Cabell v. Roberts*, 6 Rand. 582.

Same—Same—Abatement—Rule.—The general rule in the case of an abatement on account of deficiency in the quantity of land sold, is to allow for the deficiency the average price of the whole land. *Depue v. Sergeant*, 21 W. Va. 345, citing principal case; *Nelson v. Matthews*, 2 Hen. & M. 164; *Lowther v. Com.*, 1 Hen. & M. 203; *Blessing v. Beatty*, 1 Rob. 287; *Crawford v. McDaniel*, 1 Rob. 448; *Nichols v. Cooper*, 2 W. Va. 347; *Stockton v. Union Oil & Coal Co.*, 4 W. Va. 273.

†**Sale in Gross—Material Mistake—Deficiency—Equitable Relief—Measure of.**—See principal case cited in *Schilling v. Short*, 15 W. Va. 798; *Humphreys v. McClenachan*, 1 Munf. 500.

Sarah his wife to the defendant, dated the 17th and 18th days of August, 1761.

The bill charged that the plaintiff had rented the said plantation and tract of land from the defendant for several years before the purchase, and had then understood that all the improvements belonged thereto; that, before the bargain was concluded, the defendant, and the agent or person who, it was said, knew the lines, went upon the same with the plaintiff, and shewed him lines, which they said were the true lines, and which included all the buildings and improvements; which lines would appear by a plat marked A., (dated June 20th, 1797, and exhibited with the bill,) containing 340 acres; that the defendant had made him a deed for what he expected was the whole of the land purchased, but which he found by a survey marked B. was only 258 acres; being 112 less than the quantity mentioned in the bond;

leaving out ninety acres of the most valuable land *shewn to the plaintiff, and the dwelling-house and other improvements; that the plaintiff never would have purchased the said land had he known that the part to which the defendant had no title did not belong to the same. He therefore claimed a deduction from so much of the purchase-money as remained unpaid: and, by an amended bill, obtained an injunction to stay proceedings at law.

The defendant, in his answers to the original and amended bills, denied most expressly that he ever named any certain quantity of land; being unable to do so, from a variety of causes, which the complainant well knew; that the courses were procured and furnished by himself for the purpose of making him a deed. The defendant averred that he never was possessed of the courses or plat; that the deeds from Trimble and wife had been procured by his father to be made to him when he was very young; that he had been many years a prisoner with the Indians; that, being involved in a lawsuit, soon after his return, about this land, his papers were filed in the office of the General Court, where they were certainly lost or mislaid during the revolutionary war, so that he could never exactly ascertain the quantity of the land. He positively denied his ever having shewn the complainant any lines or boundaries; and declared that no bargain or purchase was ever made on, or within sixty miles thereof; that he lived at a great distance from the land, and received his only information respecting its value from the complainant, who lived, from his infancy, near it, (as well as, for some years previous to the purchase, upon it,) and now holds lands adjoining; that the complainant had frequently proposed to buy the land of him, and came to his house and commenced the bargain, which was finished at a neighbour's house; that the words "more or less" were inserted, because the defendant was determined not to name any particular number of acres; "that the quantity of 370 acres was named (as the defendant verily believes) by the complainant himself, as it was thought proper to mention some number in the bond of conveyance; for which reason the

words "more *or less" were expressed, to shew uncertainty with respect to quantity; that, if the tract had contained

one thousand acres, the complainant would have been entitled to the whole under the agreement, and was perfectly agreed and satisfied to receive the premises sold, at the price agreed upon." This answer stood unimpeached, and in many parts was supported by the evidence.

By a survey made in the cause, it appears that the lines expressed in the deed comprehend 270 acres. To this the surveyor annexed a plat, shewing the form of 90 acres of land which he surveyed for the plaintiff, November 18th, 1797, except a small triangle (amounting to four acres) which was excluded; and observed, that the boundaries thereof appear to be all old marked corners, and were supposed to be the boundaries of the lands formerly claimed by the defendant, amounting to 86 acres. The buildings sold by the defendant to the complainant were actually upon this part of the land. It appears that an entry was made by a neighbour for twenty acres of this part; that Hull purchased the right of the locator, made a farther entry for the residue, and, as it seems, obtained a patent for the whole, amounting (together with the small triangle of four acres) to 90 acres; notwithstanding which, he insisted that he ought not to be allowed for his reasonable charges and trouble only, but for the actual value of the land, or at least pro rata.

Such are the principal outlines of this case. The Chancellor (July 30, 1804) was of opinion, that "the plaintiff's relief is purely equitable, as it is believed that he could neither support an action on the agreement, nor deed, in the proceedings mentioned; but that the parties were mistaken in a material point cannot be doubted: had the plaintiff brought his bill to be relieved from his contract, and could the Court place the parties in the same situation in which they were before the contract took place, the mistake appears to be of sufficient magnitude to justify such a measure: but, inasmuch as the plaintiff has not prayed to be released

from his contract, nor could the parties be placed in the situation in which they stood prior thereto; part of the defendant's lands and improvements, which he had held for many years, and which he might have continued to hold uninterrupted, (more especially, as, from the report of the surveyor, the boundaries of the lands, said to be vacant, appear to be marked as boundaries of the said defendant's claim, and, as it may appear, originally were so,) are now held by the plaintiff under a different title, the Court must endeavour to place the parties in the situation they must have stood, had no mistake taken place; which, it is presumed, is equally consonant with the principles of equity." The plaintiff was therefore directed to exhibit an account of his expenditures in procuring a title to the vacant lands, as also an account for his trouble therein, to be allowed him (when reported to the Court) so far as reasonable, together with his actual costs in prosecuting his suits. From this decree the plaintiff obtained an appeal, which, having abated by the death of Cunningham, was revived against his executor.

Wickham, for the appellant. The ground for the relief prayed for is, that land was sold to Hull, to which the vendor had no title.

Both parties were ignorant of this circumstance. It was generally understood in the neighbourhood that the land in question was within the reputed boundaries; when, in fact, the most valuable part of the land was vacant, but was afterwards secured by Hull. The question then is, what is the proper measure of relief?

The Chancellor was mistaken in supposing that our remedy was merely equitable. I contend that Hull, by the terms of the bond, could have maintained an action at law upon it: the obligor being bound to make a "sufficient deed in fee-simple for a certain tract of land left him by his father." This could not be done without making a good title to the land, as he claimed it under his father, and as his father held it. Acceptance of
334 the deed was no satisfaction *of the bond; for it is not proved to have been accepted as full satisfaction; without which, such acceptance could not be pleaded in bar. The deed was for part of the land; conveying no more than Cunningham was entitled to. This was only part satisfaction, which Hull had a right to receive, as such, and then to resort to his action for the residue.

If he had brought an action at law, the measure of damages would have been the value of the land. The same ought therefore to be the measure of relief in equity.

Williams, contra. From the evidence, it is clear that Hull knew more of the land than Cunningham, who relied on Hull alone. Jolliffe v. Hite(a) settled the principle that the original contract is to be the rule; and that, if the vendee buys at so much, more or less, he takes the risk upon himself. The same rule prevailed in Pendleton v. Stuart. (b) Hull, therefore, was entitled to no compensation; but if to any, certainly not to more than the Chancellor had given him. If he considered Cunningham bound to make good this land, he ought to have given him notice of the vacant land before he had perfected the title himself; and he should not demand an allowance of the full value of ninety acres, with all the improvements, for what cost him not more than ten dollars.

Wickham, in reply. The distinction, between this case and Jolliffe v. Hite and Pendleton v. Stuart, is, that, in each of those cases, the purchaser got all the land within the specified limits: the deficiency was only in the number of acres. But here, Hull does not get the land within the limits by which he purchased: an important part of the land contracted for was not conveyed at all; being admitted not to be the property of the vendor.

As to Cunningham's not being acquainted with the lines; he certainly must have supposed the houses and other improvements to have been on the tract which he held,
335 and *must have contemplated conveying them to the purchaser. Nelson v. Matthews, (c) and Quesnel v. Woodlief, (d) are conclusive authorities to shew that he was bound to make good the deficiency; since the boundaries expressed in his own title papers contained less than the specified quantity; and the words "more or less" do not cover so great a deficiency as that dis-

covered in this case, but only a reasonable allowance for small errors in surveys, and variations in instruments." The measure of damages should be the value of the land at the time of the contract; according to the case of Nelson v. Matthews.

The smallness of the sum paid by Hull to save the land is a matter of no consequence. Suppose he had sued for the land, and been defeated, after spending one hundred pounds. He could not have recovered that sum, in addition to the value of the land. When, therefore, he has got the land for a smaller sum, Cunningham is not entitled to the benefit of his successful speculation.

April 28th, 1810. The Judges delivered their opinions.

JUDGE TUCKER (after stating the case) observed. This case in many of its circumstances so nearly resembles that of Pendleton v. Stuart, that the same reasons which governed in that case appear to apply to this, in part. In both, the purchaser had a much better opportunity of knowing the lands than the seller. Here the words of the bond do not amount to a warranty of the quantity; inasmuch as, in speaking thereof, there is this caution used; "said to contain 370 acres, be it more or less, to wit, "all that tract left him by his father John Cunningham, deceased." These circumstances indicate a contract in gross, and not by the specific number of acres. Neither the seller nor the buyer appears to have had access to any title-deeds. The old marked lines and corners noticed by the surveyor may have misled them both; or may, in fact, be the true lines of the original survey, or patent, lost
336 or mislaid among *the records of the General Court; and, if so, Cunningham was entitled, perhaps, to a patent for the surplus under the 46th section of the land-law. Be that as it may, here has been no actual eviction or expulsion of Hull from the lands not comprehended within the lines of Cunningham's deed. What then is the damage he has sustained? Exactly what the Chancellor has supposed. Had he brought a suit at law upon the bond, after he had taken up and patented the lands, and thereby secured them to himself, a Jury could not have given him more than the Chancellor's decree probably allows him. Having elected to come into a Court of Equity, he certainly cannot have vindictive damages. Compensation for his trouble, and actual expenses in securing his title, seems to me to be the just measure that he is entitled to. Perhaps the decree ought to have directed that Cunningham should execute a release of the lands which he has taken up and patented; inasmuch as, by possibility, the original patent may be found, and the lines thereof comprehend the whole tract, which Hull now holds. But I lay no stress upon the omission, as that possibility seems very remote. Upon the whole, I think the decree ought to be affirmed, and the cause remanded to be proceeded on to a final decree, with this further direction, that Hull should be decreed to deliver up the title bond given him by Cunningham, and enjoined from bringing suit thereon.

JUDGE ROANE. The grounds of the decision of this Court in the case of Pendleton v. Stuart, are decisive of the present case, and

(a) 1 Call, 301.
(b) MS. April, 1804.
(c) 2 H. & M. 164.
(d) Ibid. 174.

even go beyond it. That was a judgment upon a written agreement, whereby Stuart agreed to sell Pendleton "1,100 acres of land, more or less," for 3001. A bill to enjoin the judgment was brought by the defendant, stating a pro rata sale, and also a deficiency of 160 acres appearing by an ex parte survey. There was no evidence, however, supporting the allegation of the bill, as to
 337 *the pro rata sale, or varying the contract as appearing upon the face of the written agreement. The bill of injunction was dismissed by the Chancellor, and his decree of dismissal affirmed, pro tanto, by this Court; though the same was corrected as to an omission in the decree, to provide for procuring a title to the land actually contained within the patent. One of the judges was of opinion, that, if the case had stood upon the written agreement merely, he should probably have been of opinion, on the authority of *Jolliffe v. Hite*, (a) to allow for the deficiency, as that deficiency was greater than was reasonably imputable to the variation of instruments; and this the rather, because the agreement was not to sell "a tract of 1,100 acres," but to sell "1,100 acres of land;" but that the bill having asserted a pro rata sale, and the answer which was substantially responsive thereto, having stated a verbal communication, in which the buyer agreed to take the risk upon himself, (there being no contrary proof or circumstances,) he was of opinion to affirm the decree upon the merits. Another judge lays great stress upon the contiguity of Pendleton's residence to the land, and his better knowledge of the quantity than Stuart's; circumstances which emphatically exist in the case before us.

These principles are decisive of the present case, unless we say that a party is not as competent to take upon himself a risk, with respect to the manner in which the lines of a tract of land may run, as with respect to the actual number of acres contained in the tract. In the case before us it is fully proved, that that risk was taken upon himself by the appellant, and that there was no concealment, fraud, misrepresentation, or deception, on the part of the appellee. It is also evident, that the appellee was not only as ignorant of the actual lines of his tract, as the appellant, (and probably more so,) but sold the land by the gross, and was particularly careful not to lay himself responsible for any particular boundaries or number of acres.

(a) 1 Call, 301.

Unless, therefore, we are prepared to say, that it is immoral and inequitable for a man to pay, and another to receive, money
 338 *for more land than the one parts with and the other gets, under all possible circumstances whatsoever, (thus excluding the competency of a contracting party to take upon himself any risk as to lines and quantity,) a position that was negatived in the said decision of *Pendleton v. Stuart*, and by the opinion of Judge Pendleton and the Court in the said case of *Jolliffe v. Hite*, the appellee was entitled to recover the stipulated price in the case before us.

My opinion is, that the decree should be affirmed.

JUDGE FLEMING. This is a very plain case. The decree is right, and I am not for disturbing it.

Decree affirmed by the unanimous opinion of the Court.*

*Note by the Reporter. From this and other cases it appears that, where a purchaser is entitled to relief in equity on the ground of a deficiency, the measure of relief depends upon circumstances. If the deficiency be very considerable, and the parties can be put in statu quo, the contract should be rescinded, if the purchaser request it. If the parties cannot be put in statu quo, or the purchaser do not apply for a rescission of the contract, an allowance should be made for the loss sustained; which allowance is, in general, the value of the land at the time of the contract, with lawful interest; (*Nelson v. Matthews*, 2 H. & M. 164;) the purchase-money furnishing (as it seems) a proper standard of that value, where the actual value does not appear to be different; (*Lowther v. The Commonwealth*, 1 H. & M. 201, and *JUDGE FLEMING's* opinion, 2 H. & M. 179; but it seems, the actual value, when appearing to be greater than the purchase-money, is to be allowed. *Nelson v. Matthews*, *TUCKER's* and *ROANE's* opinions, 2 H. & M. 176, and 177. In this case, the actual loss sustained by Hull being only his expenses and trouble in getting the patent, and actual costs of suit, the court allowed him no more; the circumstances of his case making it an exception to the general rule.

It seems from *JUDGE TUCKER's* opinion in *Nelson v. Matthews*, 2 H. & M. 177, that if the purchase-money has been paid, and the purchaser be evicted by a superior title, the measure of relief is the value at the time of the eviction, and not at the time of the contract. But *CHANCELLOR Taylor*, in *Lowther v. The Commonwealth*, 1 H. & M. 202, decided otherwise. *Ideo quære*.

In case of a deficiency in land purchased, the sum to be allowed as the actual value is, in general, to be estimated by the average value per acre of the whole purchase, and not by the relative or intrinsic value of the part lost; (which rule may, however, be varied by circumstances;) 2 H. & M. p. 178; but, in case of an eviction of part, the proper estimate of damages is the actual value of the part lost; *ibid.* p. 177; in estimating which, I presume, its relative as well as intrinsic value, should be considered.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF APPEALS OF VIRGINIA,
AT THE TERM COMMENCING THE FIRST OF OCTOBER, 1810.
IN THE THIRTY-FIFTH YEAR OF THE COMMONWEALTH.

JUDGES,

WILLIAM FLEMING, ESQUIRE, *Pres't.* SPENCER ROANE, ESQUIRE.
St. GEORGE TUCKER, ESQUIRE.
ATTORNEY-GENERAL,
PHILIP NORBORNE NICHOLAS, ESQUIRE.

**Templeman, Executor of Steptoe, v. Steptoe
and Others.**

Monday, October 8, 1810.

1. **Decree—Interlocutory—What Constitutes.**—A decree, dismissing so much of a bill as claims one of two separate subjects in controversy, and as to the other, determining also the rights of the parties, but directing an account to be taken, is not final in any respect, between the parties retained in Court, and their legal representatives; but subject to revision and alteration in every part, at any time before a final decree: without the necessity of a bill of review.

2. **Same—Same—Case at Bar.**—*Quære*, in such case, whether any subsequent decree could affect the rights of bona fide purchasers of property as to which the bill was dismissed?

3. **Statute of Descents—Construction—Real Estate.**—Construction of the 5th, 6th, and 7th sections of the act "to reduce into one the several acts directing the course of descents." Where an infant, having title to a real estate of inheritance derived by purchase or descent immediately from the father, dies without issue, and with no brother or sister, or descendant of either: the father being dead, but the mother living; the right of inheritance is not in abeyance, but goes in parcenary to the brothers and sisters of the father, or their lineal descendants: and, vice versa, such estate being derived immediately from the mother; and she being dead, but the father living; it goes in parcenary to her brothers and sisters, or their lineal descendants.

4. **Same—Same—Personality.**—The law was the same

***Decrees—Interlocutory—What Constitutes.**—On this subject, the principal case is cited in *Manlou v. Fahy*, 11 W. Va. 493; *Alexander v. Coleman*, 6 Munf. 334; *Royall v. Johnson*, 1 Rand. 427; *Cocke v. Gilpin*, 1 Rob. 85; *Miller v. Cook*, 77 Va. 819; *Ryan v. McLeod*, 32 Gratt. 377; *State v. Hays*, 30 W. Va. 107, 3 S. E. Rep. 177. As to the rules determining whether a decree is interlocutory or final, see *foot-note* to *Grymes v. Pendleton*, 1 Call 54; *foot-note* to *McCall v. Peachy*, 1 Call 56; *foot-note* to *Harvey v. Branson*, 1 Leigh 108; *foot-note* to *Vanmeter v. Vanmeters*, 3 Gratt. 148; *foot-note* to *Fleming v. Bolling*, 8 Gratt. 292; *foot-note* to *Rogers v. Strother*, 27 Gratt. 417; *foot-note* to *Cocke v. Gilpin*, 1 Rob. 21; *foot-note* to *Ryan v. McLeod*, 32 Gratt. 367; *foot-note* to *Young v. Skipwith*, 2 Wash. 300; monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

†**Statutes of Descents—Construction—Reality—Per-**

as to personal estate, between the 1st of October, 1793, and the 22d of January, 1802.

This was a suit originally brought in the late High Court of Chancery by James Steptoe and others, relations * (on the part of the father) of Edward Steptoe, an infant, (who died intestate, unmarried, and without issue, on the 24th of May, 1794,) against Elizabeth Steptoe, his mother, and William Steptoe, his paternal uncle; executrix and executor of George Steptoe, his

sonality.—The true construction of the seventh section of the "act reducing into one the several acts directing the course of descents" as to the case of an infant, is, that if there be no mother, etc., and the estate was derived from the father or mother the inheritance shall not be divided into moieties, but the whole shall go to the kindred of that parent from whom the estate was derived. And the law was the same as to the distribution of unbequeathed personal estate belonging to infants who died between the first of October, 1793, and the twenty-second of January, 1802. *Addison v. Core*, 3 Munf. 279, 280, citing the principal case to sustain the proposition.

Under the fifth section of the acts of descents of 1793, where an infant died without issue, having title to certain real estate derived by descent immediately from the father; leaving no relations in the paternal line, but a grandmother and uncle, the grandmother was not entitled to inherit any part of such estate, but the paternal uncle was entitled to the whole. *Liggon v. Fuqua*, 6 Munf. 281, citing the principal case. But see *Rev. Code 1819*, ch. 96, §§ 11, 12; *Code Va. 1887*, § 2556.

In *Medley v. Medley*, 81 Va. 271, it is said: "By our statute of descents passed in 1793, the common law on this subject has been totally abrogated, as being repugnant to the spirit of our republican institutions, and a system intended to embrace every possible case that can arise, established in its stead. This was declared in *Browne v. Turberville*, 2 Call 390, by JUDGE PENDLETON, who was a member of the committee that drafted the act of 1793, and by JUDGE TUCKER, in *Templeman v. Steptoe*, 1 Munf. 339, and it was so decided in *Davis v. Rowe*, 6 Rand. 355."

On the construction of the statute of descents, the principal case was also cited in *Lightfoot v. Colgin*, 5 Munf. 74; *Davis v. Rowe*, 6 Rand. 368, 430, 437, 438, 441; *foot-note* to *Browne v. Turberville*, 2 Call 390; *foot-note* to *Tomlinson v. Dillard*, 3 Call 105.

father, for an account and division of certain property, real and personal, of which he the said Edward Steptoe died seised and possessed, as his absolute estate, derived immediately from his father. The great questions in dispute were, 1st. The same with that decided in *Tomlinson v. Dilliard*, 3 Call, 120, and ante, p. 183, viz. whether Elizabeth Steptoe, the mother, was excluded from succeeding to such personal as well as real estate; and, 2dly. If she was excluded, whether the plaintiffs and the defendant William Steptoe were entitled to take the said real and personal estate; there being no brother or sister of the infant, nor any descendant of either. The defendant, Elizabeth Steptoe, in her answer, observed, that "if she had a right to her son's estate, some of her near connections might be benefited by it;" but did not mention who they were; and nothing farther appears in the record to shew the names or degrees of consanguinity of her relations.

The plaintiffs were James Steptoe, (a brother, of the whole blood, to George Steptoe, the father,) and the descendants of four sisters, of the half blood, to the said George Steptoe. The defendant, William Steptoe, was also a brother of the whole blood.

The facts in the case were generally agreed by the parties; and, on the 17th of March, 1797, the cause came on to be heard; when the Court, "being of opinion that the plaintiffs were not entitled to any part of the slaves and personal estate" in question, "adjudged, ordered, and decreed, that the bill, as to the part thereof which claimed the said slaves and personal estate, and demanded an account of the administration thereof, be dismissed; but the Court was of opinion that, by the 5th, 6th, 7th, and 14th sections of the act to reduce into one the several acts directing the course of descents, the defendant Elizabeth was excluded from succession to the real estate;" and

341 that the same descended *to the plaintiffs and the defendant, William Steptoe, in certain proportions specified in the decree. Commissioners were therefore appointed to state accounts of the said real estate, and of the profits thereof since the death of the said Edward Steptoe; to allot the same, according to the said proportions, (subject to the defendant Elizabeth's right of dower,) and to report the said accounts and allotments to the Court.

After this, (the late High Court of Chancery having been divided by the act of January 23, 1802)(a) a bill was exhibited to the Superior Court of Chancery for the Williamsburg District, on behalf of the same plaintiffs and others omitted in the former bill, and of the widow and children of the former defendant, William Steptoe, (who now were plaintiffs,) setting forth the former proceedings in the original suit, "which by this bill was sought to be revived," and stating that "before any further proceedings were had in the said cause, or upon the said interlocutory decree, the said Elizabeth Steptoe and William Steptoe had both died, (the said Elizabeth between the 16th of April and 13th of February, in the year 1802, and the said William in April, 1803,) whereby the said

suit and all proceedings thereon became abated;" that Samuel Templeman was executor of Elizabeth Steptoe, and, as such, had possessed himself of all the real and personal estate of which Edward Steptoe died seised and possessed; and that William Steptoe had died intestate. The plaintiffs had been advised that, "so long as a decree remains interlocutory it is amendable by the judge who pronounced it; and that the decree above mentioned was amendable by the present judge, to whom all the powers respecting it, which that judge had, were transferred by legislative authority. They had also been advised that, according to the true exposition of the acts of Assembly severally entitled, "An act to reduce into one the several acts directing the course of descents," and "An act reducing into one the several acts concerning wills, the distribution of intestates' estates, and the duty of executors and administrators,"(b) "the same were in opposition to that part of

342 the said decree which tended to *deprive them of the surplus of the slaves and personal estate late of Edward Steptoe aforesaid, deceased, which exceeded the funeral expenses, the debts and all other just expenses chargeable on the said estate." They therefore prayed "the benefit of all the proceedings in the original suit, except the said interlocutory decree, which ought to be set aside, partly for error apparent on the face of it, and partly because the execution of certain parts of it had become impossible;" that the said Samuel Templeman, "being in possession of all the books of accounts of the said Elizabeth Steptoe, should render an account of her administration of the estate of George Steptoe, and of her receipts and expenditures out of the estate of her infant son Edward Steptoe, derived to him from the said George, together with the receipts and expenditures of the said Samuel out of the said estates, since they came into his hands; and the amount and particulars of which they severally consist; and that a writ of subpoena, to revive and answer, be directed to the said Samuel Templeman, executor as aforesaid," &c.

To so much of this bill as claimed the slaves and other personal estate, the defendant pleaded, in bar, the decree of March 17th, 1797, which, as to those subjects, he contended was final; alleging that he "was proceeding to execute the provisions contained in the will of his testatrix, when he was arrested by a notice of the complainants' claim, very unexpectedly; for, from the length of time which had elapsed since the said final decree, he had thought that the complainants, perceiving the weakness of their title, had acquiesced in the decision, and no longer insisted on their right to the said slaves and personal estate: since that period this defendant had hired out the slaves whereof his testatrix was seised at the time of her death, and was ready to give an account of the same, and of their hires, if the Court should so decree." As to the other matters, he answered, and said that the Commissioners had assigned "to the said Elizabeth Steptoe her dower in the real estate of inheritance whereof Edward Steptoe, her infant son,

(a) 1 Rev. Code, p. 426.

(b) 1 Rev. Code, p. 164, s. 27.

343 was seised at the *time of his death, and to which she became entitled at the death of her husband George Steptoe, but had not proceeded to state an account of all the said real estate, or to allot the same to the parties mentioned in the decree, agreeably to the proportions therein established; because the parties entitled to the said real estate of inheritance were most of them infants, and had no representatives known to the Commissioners; and because other difficulties afterwards occurred, (such as the death of some of the Commissioners,) neither did the said Commissioners settle and adjust an account (as they were directed in the said decree) of the profits of the real estate since the death of the said Edward Steptoe, because, upon investigation, they found that no profits accrued therefrom; that, after the allotment of her dower, the said Elizabeth Steptoe had nothing to do with the residue of the said real estate, but it remained subject to the disposal of the parties entitled thereto; and that the defendant had never interfered with, nor received any profits of, the real estate of which Edward Steptoe died seised."

The plaintiffs filed a special replication to the plea of the defendant; in which they deny that the decree of March, 1797, was final in any respect; especially because "it could not have been signed and enrolled agreeably to the language formerly spoken in Courts of Equity, and did not authorize the clerk of that Court to enter all the pleadings in the suit and other matters relating thereto, together, in a book to be kept for that purpose, according to the act of Assembly, in that case made and provided, entitled "An act reducing into one the several acts concerning the High Court of Chancery."(a)

On the 8th of November, 1805, "the cause came on to be heard on the bill, supplementary bill, the answer of Elizabeth Steptoe and William Steptoe, in their life-times, the plea and answer of the present defendant, the replication thereto, the exhibits, and was argued by counsel; on consideration whereof, the Court overruled the said plea, and was of

344 opinion that all the real and personal estates of Edward *Steptoe, which came to him from, or through his father George Steptoe, became divisible among his relations on the part of his father; his mother, though then alive, and her relations on her part, being entitled to no share or proportion thereof. It further appearing that the said infant, Edward Steptoe, at the time of his death, left two uncles of the full blood, and the descendants of four aunts of the half blood, on the part of his father George Steptoe, deceased," (plaintiffs in this suit,) the Court was of opinion, and decreed, "that the real estate, the slaves and all the other personal estate whereof the said Edward Steptoe died seised or possessed, in possession, reversion or remainder, whereunto he derived title from or through his father George Steptoe aforesaid, as well as the rents, issues, and profits thereof since his death, be divided, by Commissioners, into eight equal parts; that two such parts, or one fourth of the whole, be by them allotted to the said James Steptoe; other

two eighths, or one fourth, to the family of William Steptoe, deceased;" and one eighth to the descendants of each of the four aunts aforesaid; according to certain proportions, specified in the decree. It was also ordered, that the defendant settle an account, before the said Commissioners, of the said Elizabeth Steptoe's administration of George Steptoe's estate, and of her receipts and expenditures of the estate of her infant son Edward, derived to him from his father; and also an account of his own receipts and expenditures of the said Edward Steptoe's said estate." And, on the prayer of the defendant, an appeal was granted him from the said decree.*

Wickham, for the appellant. The case of Tomlinson v. Dilliard, precludes my making a point I intended; that the Chancellor's decree of March, 1797, was right, so far 345 as it *respected the personal estate. I will substitute another; that, during the life of Edward Steptoe's mother, the right of inheritance was in abeyance.(b)

But, whether right or wrong, that decree was final as to the personal estate. The claim of partition of the real estate was entirely distinct from that for division of the personal. The widow, as executrix, had nothing to do with the land. I do not deny that several distinct claims may be included in one bill; but, where such is the case, if the Court dismiss the bill as to one of those claims, the parties are out of Court as to that. The decree was therefore final; and, of course, the bill now in question is a bill of review.

But, being a bill of review, it was not filed within the time the law requires. Though when it was filed is not precisely stated in the record, it sufficiently appears to have been more than five years after the date of the decree; and this length of time, by analogy to the law relating to writs of supersedeas,(c) is a bar to a bill of review. The rules in Courts of Equity concerning limitations of suits are framed by analogy to those which govern the Courts of common law. In England the time within which a writ of error may be brought is, by an act of parliament, twenty years. The Court of Chancery, therefore, will not permit a bill of review to be brought after twenty years;(d) which are to be computed not from the time of the enrolment, but from the time of pronouncing the decree. Applying the same principle to this country, the limitation here, on bills of review, should be five years; that being the limitation upon writs of error or supersedeas, by our act of Assembly. If, in this case, there were infant plaintiffs, not barred by the limitation, others had certainly no excuse: and, if their rights are joint, (which, in my opinion, they are not,) the disability of those who are of full age, to prosecute the bill, might subject the infants to the same disability.

*Note. This appeal (being from an interlocutory decree) was granted by virtue of the discretionary power vested in the Chancellor by the act "enlarging the right of appeal in certain cases," passed the 23d of January, 1798. See 1 Rev. Code, p. 875.—Note in Original Edition.

(b) 2 Tuck. Bl. App. 28-42.

(c) 1 Rev. Code, p. 82, s. 52.

(d) Coop. Eq. 92, 93, and the cases there cited, particularly *Edwards v. Carroll*, 5 Bro. Parl. Cas. 466, and *Smith v. Clay*, 8 Bro. Ch. Cas. 639, in note, and *Ambl. 645*, S. C.

(a) 1 Rev. Code, p. 67, s. 49.

346 *Warden, contra, relied on the cases of *Grymes v. Pendleton*, (a) *M'Call v. Peachy*, (b) *Fairfax v. Muse's Ex'rs*, and *The President and Professors of William and Mary College v. Hodgson* and others, (c) as cases in which it was repeatedly decided, that a decree is not final when any thing remains to be done. In this case the Chancellor might, on the final argument, (even without any supplemental bill,) have set the decree aside as to the personal estate. The bill could therefore be considered only as a bill of revivor, rendered necessary by Mrs. Steptoe's death. But, if it was a bill of review, there is no law of limitation upon that subject in this country. The 52d section of the District Court law relates only to writs of super-seedeas or error to judgments of inferior Courts; between which, and bills of review, granted by a superior Court to its own decrees, there is no analogy.

JUDGE ROANE referred to *Gaskins v. The Commonwealth*, (d) as having established a contrary doctrine.

Warden. I do not recollect that case. But, at any rate, the rights of infants are saved. It appears that many of the plaintiffs were infants when this bill was filed; and, I believe, a considerable part are infants now. How could those of age (where the parties were so numerous, and some of them infants) have brought their bill of review without making them all parties? The whole must be considered as bringing their suit together; because all persons interested must be parties.

As to the question of abeyance, Judge Tucker, in his note to 2 Bl. p. 107, has referred us to *Fearne*, 513, and 526, which shew that, in a case of this kind, the estate could never have been in abeyance; for that cannot happen unless there be no heir known. Is there any resemblance between this case, and either of those stated by Blackstone?

347 *Williams, on the same side, quoted the 49th section of the Chancery law, (e) to shew what the legislature considered a final decree. If the decree of March, 1797, was final, the Clerk ought to have recorded all the papers. Yet the cause remained on the docket. There might be twenty records of the same case, if dismissal as to part should be considered as final. In *Grymes v. Pendleton*,* there was such a decree as this, though not inserted in the report of the case: yet it was decided to be interlocutory only. But if this point be

against me, the decree was nevertheless correct. It is not at all important that Courts of Equity have, by analogy, adopted the rules of limitation at law; for, if so, the analogy must hold throughout. The act of limitations must be pleaded; which is not the case here. So in *Hite's Heirs v. Wilson* and *Dunlap*, (f) this Court decided that a release of errors must be pleaded.

As to the right of inheritance being said to be in abeyance, the question is raised on the 7th section of the act of descents. (g) But the case of *Brown v. Turberville*, (h) settled that question as to an adult: and, from the opinions of the Judges there pronounced, it appears that the 5th and 6th sections ought to be construed as disposing of the estate in the case of an infant, so that, where the mother is excluded from inheriting, it shall go to the brothers and sisters, or their descendants, of such infants, on the part of the father; or, if there be none, then to the brothers and sisters of the father, or their descendants. But I do not consider this *question important in this case, there being no proof in the record that there are any maternal kindred. By the 14th section, then, if there be no kindred on one side, the whole must go to the other.

Call, on the same side, to shew that the appellant could not avail himself of the act of limitations, since it had not been pleaded. cited *Coop. Eq. 304*, and 2 *Veaz. sen. 109*, *Greger v. Molesworth*. In 1 *Bro. Parl. Cas. 96*, *Sherrington v. Smith*, a demurrer was allowed on the ground of length of time: but it appears, from the report of the case, that the equitable bar was set up in the demurrer; and, according to *Pryor v. Adams*, (i) the form is unimportant, whether by plea or demurrer; provided the fact be stated, and relied upon as a bar. But, here, it was neither pleaded nor relied upon. Mr. Wickham's argument, that adults may be barred while infants are not, is not applicable to this case; the decree being entire and joint, though the respective proportions of the plaintiffs are several. The only case where (an adult and infant being joined in a judgment) one is bound, and the other not, is that of a fine, or common recovery; but those are considered as conveyances; and the adult is bound by his conveyance. A joint judgment, naught in part is naught in all. (k)

The decree here is joint to every intent and purpose. A reversal, then, as to the infants, must enure to the benefit of the adults. But, in equity, as the bar by the act of limitations arises only from analogy, it is regulated by the sound discretion of the Court, according to the circumstances of each case. (l) For example, the rule at law that, where the act begins to run, it does not stop, though descents to infants or femes covert intervene, is not permitted to operate, in equity, to their injury, though it may to their benefit. But

2. The decree of March, 1797, was not final;

(a) 1 Call. 54.

(b) *Ib.* 55.

(c) 2 H. & M. 557.

(d) 1 Call. 194.

(e) Relied on in the replication, ante, 1 Rev. Code, p. 67.

*Note. It appears from the record in the case of *Grymes* and others v. *Pendleton* and *Lyons*, Administrators of *John Robinson*, deceased, that the Chancellor's decree, (pronounced the 26th of September, 1793,) after ascertaining the sum to which the plaintiffs were entitled, subjecting the unadministered personal estates of *Philip Grymes* and *Presley Thornton* to satisfy the same, and directing an account of the said personal estates to be taken by a Commissioner, "dismissed so much of the bill of the plaintiffs as sought to subject to their demand the real estates of the defendants derived from their ancestors and testators." From this decree the defendants prayed an appeal, which was granted by the Court of Chancery, but dismissed by the Court of Appeals at October term, 1797, and the cause remanded for farther proceedings.—Note in Original Edition.

(f) 2 H. & M. 268.

(g) 1 Rev. Code, p. 169.

(h) 2 Call. 390.

(i) 1 Call. 391.

(k) *Styles*, 400, 406.

(l) *Wyatt's Pr. Reg.* 307, 3 P. Wms. 8, *Mills v. Banks*; 1 *Veaz. sen.* 206; *Kemp v. Squire*, 1 Sch. & Lef. 418. *Bond v. Hopkins*.

for a final decree is that only which puts an end to the cause, and puts it off the docket.

The reasoning of the Court in Metcalf's 349 *case, (a) shews what is a final judgment at common law; and may, by analogy, be applied to the question concerning what constitutes a final decree. It is there said, that "a writ of error shall rehear all which be parties to the original writ;" which shews that a writ of error brings up the whole case, though there may have been judgments as to part from time to time. The same doctrine is recognised in Courts of Equity. In *Ormston v. Hamilton*, (b) a decree, in Scotland, for part, was considered there as a final decree, but reversed in the House of Lords on that ground. What is the difference between a decree for part in favour of the plaintiff, (which is ever considered not final,) and a decree dismissing his bill as to part? Surely if in one case it be not final, neither is it so in the other. In *Grymes v. Pendleton* (before cited) there was a decree as to part: yet the whole decree was decided to be not final, and the whole cause was sent back for farther proceedings; on the ground that the appeal was premature. If the Court considered any part of that decree final, why did they not affirm that part?

The decree then not being final, a bill of review was unnecessary and improper. In *Triplett v. Dunlop*, (MS.) this Court have decided that there cannot be a bill of review to an interlocutory decree.* In England, there may be a rehearing at any time before enrolment; and there the practice is to obtain it by petition. Until the cause is matured, so as that the Clerk should record the papers, the rule here is the same as in England before enrolment: but the practice is by motion.

3. On the merits of the last decree. The difficulties suggested have arisen from the fallacy of considering the 5th and 6th sections of the act of descents as disposing or donative clauses, when, in fact, they are only except-

ing clauses; excepting, in a certain 350 event, a certain description *of persons.

Every other person is left to take precisely as if those exceptions did not exist. The 7th section is predicated upon the non-existence of the mother, brothers, &c.; but the effect is the same as if there were no mother; there being none capable of taking. The act of 1785 destroyed the common law rule of resorting to the blood of the first purchaser: that of 1790, c. 13, restored it sub modo. The question then is, always, whether there be a person of that blood which is heritable.

Let us suppose that a citizen dies leaving an alien brother. The words of the section are, "if there be no mother, nor brother," &c.: but, in fact, there is a brother, though not entitled to inherit. What then is to become of the estate? The answer should be, "the case is precisely the same as if there were no brother." The case of a half brother before the act of 1785 was similar to this. Monstrous consequences would follow from a contrary doctrine; a multitude of cases would exist in which there would be no canon of descents.

The right of inheritance can never be in abeyance in a case like this. The rule is universal that there must be a tenant to the præcipe: otherwise, there can be no abeyance. While the freehold is in abeyance, some person must hold. But here no person can hold, but as heir under the act of Assembly: and, if there be no heir, it must go to the Commonwealth.

But the doctrines laid down by the Judges in their several opinions pronounced in the case of *Brown v. Turberville*, 2 Call, 390, are amply sufficient to remove all these difficulties; either by considering the act of 1785 as still in force, where not repealed by the act of 1792; (c) or by construing the last mentioned act according to its evident spirit and meaning; (d) or by taking the whole of that act, and all other acts made on the same subject, into one view, and moulding them so as to effectuate the intention of the legislature. (e) And this decree is right, if either of those modes of construction be adopted.

351 *Wirt, in reply. 1. The decree of March, 1797, was final as to the personal estate; being a decree which absolutely decided the right, and left nothing farther to be done. (f) There was no condition to shew cause against it; no fact left open for a Jury to try; and no reference to a Commissioner. On the contrary the bill was dismissed on a hearing, and the cause, as to this subject, out of Court.. We admit it is still in Court as to the real estate; and, so far, the decree is merely interlocutory. But there is no weight in that circumstance, unless our adversaries establish the proposition that a decree cannot be final as to any party or any branch of a subject, as long as there shall be a party or any remnant of a subject in Court.

The constant practice of this country disproves the proposition. Whenever a cause comes on, regularly matured for a final hearing, our Courts dismiss any defendant who, they may be convinced, ought not to be before the Court, or any subject of the controversy which they are satisfied ought not to be detained and suspended in Court. The inconvenience and absurdity of a contrary practice is evident; since it would occasion, 1. The detention of a multitude of parties for the default of one; in which they are in no wise implicated, and for which, from the nature of the case, they cannot be responsible; and, 2. The unnecessary detention of a distinct estate in Court, which, the Court shall be satisfied, can in no event be changed by a suit.

Let us suppose the case of a suit brought against several persons as distributees of an estate, and claiming, of each of them, specific negroes by name. The suit comes on for final hearing; and the Court are satisfied that one of the persons charged as a distributee is in fact not one, and in no wise liable to the claim; but that the other defendants are liable, and that multifarious accounts are to be settled, which threaten a long, troublesome, and vexatious contest. Must the innocent defendant be

(a) 11 Co. 39.

(b) 8 Bro. Parl. Cas. 364.

*Note. See also *Elzey v. Lane's Executrix*, 2 H. & M. 589.

(c) See JUDGE FLEMING'S opinion, 2 Call, 397-400.

(d) See JUDGE CARRINGTON'S opinion, ib. 401, 402.

(e) See JUDGE LYONS' opinion, ib. 408, and JUDGE PENDLETON'S, ib. 404-408.

(f) 3 Fowler's Exc. Pr. 195.

kept in Court? or may the Court dismiss the bill as to him? They may: they do: and, as to him, such dismissal is final: 352 and, if so, it follows that "a decree in part may be final, and yet another part of the cause remain in Court.

Again suppose, in the case put, the Court should be of opinion that, as to certain slaves charged by the bill to have been received by one of the defendants as a distributee, they were acquired by purchase from a different quarter, and never had any connection with the estate? Must those slaves be kept in Court for twenty years, and their owner's hands tied, till the other branches of the cause are decided? Reason, right, and practice are otherwise. The bill may be dismissed as to them; and, from that day, they are out of Court, and their owner's hands untied.

Suppose, again, a debt attempted to be charged in Chancery upon the heirs and executors of a man; being different persons; and the Court should be of opinion that the heirs were not liable, (from the nature of the debt, or because they had received no portion of the estate,) but the executors were: must the heirs be still kept in Court? Or, if it should appear that the personal estate was fairly exhausted, or demanded for payment of simple contract debts, but that the land was liable to the claim; might they not discharge the executors, and detain the heirs?

So, here, the plaintiffs demand the real and personal estate: the cause is matured for a hearing, and comes on for that purpose fully before the Court: and the Judge is of opinion that the plaintiffs have no right to the personal estate; and, as to that subject, dismisses the bill. The decree is final.

If, in March, 1797, when the decree was pronounced, Elizabeth Steptoe had held only the personal estate, as administratrix to her son; and other persons calling themselves heirs had held the real estate; and the Chancellor had given this opinion, dismissing the cause as to her and the subject in her hands; would she not have been out of Court? Would the pendency of a different and distinct claim against others have operated to keep her in Court, after she had been dismissed? Might she not, in such case, consider herself as discharged, and act accordingly; selling and 353 administering "the estate? Would a purchaser under her, after such dismissal, be deemed a *lite pendente purchaser*, and forced to refund the property? Could the Court proceed to decree any thing against the party so dismissed, without the notice of new process? Those who hold the affirmative of these propositions, must find a new dictionary of the English language, and shew, by it, that an absolute decision of a right means the expression of a doubt, and to dismiss a party out of Court means to keep him in it.

If, then, the decree would be final, where the heirs and administratrix are different persons, does it make any odds that the two rights concur in the same person? The subjects are in their nature distinct, real and personal, capable of being the subject of distinct suits, and held by different

persons. The characters in which they are held are distinct; as heir and administratrix; their functions distinct; their responsibilities distinct. And the maxim is, that, when two distinct rights concur in the same person, they are regarded by the law in the same light as if they were in different persons. The opinion of the Judge treats the subjects and characters as distinct; the expression of opinion as to the right is just as absolute, and the terms of dismissal as strong, as if the persons were different; and those expressions and terms of dismissal must mean the same thing as if the persons were different. The effect of the decree of dismissal is the same as to the rights of the administratrix and of purchasers.

But the decisions of this Court are relied upon as establishing the doctrine that a decree is not final, until all the parts of a cause are disposed of, and all the parties out of Court.

The cases of *M'Call v. Peachy*, (a) *Fairfax v. Muse*, (b) and the *President and Professors of William and Mary College v. Hodgson*, (c) were all cases where the subjects in controversy and the decrees were of a totally different character from that now in question. In each of those cases, the subject was one; not only incapable of being held by different persons, but incapable of division; much more of distinct

354 *suits. The decrees were not, as here, decrees of dismissal, but of satisfaction of debts in part. We defy the counsel on the other side to produce a case where, in a suit claiming two subjects in their nature distinct, a decree, absolutely deciding the rights as to one of them against the plaintiff, and dismissing the bill as to that, has been held *interlocutory quoad hoc*.

The appeal in the case of *Grymes v. Pendleton*, (d) (as will be seen by reference to the original record,) did not present the question whether that part of the decree which dismissed the bill as to one of its objects was or was not final. The defendants (who were the appellants) could not complain of that part of the decree which made in their favour; as has been frequently settled in this Court. The other part, therefore, which was against them, could alone be drawn in question upon their appeal; and that part was clearly *interlocutory*. If the plaintiffs had appealed from the decree dismissing the bill as to the land, they might have raised the question whether this branch of the decree was or was not final: and if, on their appeal, it had been adjudged *interlocutory*, there might have been some colour for the argument on the other side.

Mr. Call, aware of this obvious answer to the argument drawn from that case, has asked, "if the Court considered any part of that decree final, why did they not affirm that part?" Because there was no party before them authorised to ask it. The appellants had no right to ask an affirmation; nor had the appellees, who repre-

(a) 1 Call, 55.

(b) 2 H. & M. 557.

(c) *Ibid*.

(d) 1 Call, 54.

sented the personal estates of Grymes and Thornton, any interest in, or right to, the real estates. The question then was not raised. By the mere appeal of the defendants, they were not called on to consider any part of the decree in their favour. Why then should the Court have affirmed it?

The 49th section of the Chancery law, (a) furnishes no argument to shew that this was not a final decree. The object of that section is only, "for the more entire and

better preservation of the records of the Court," to impose a "certain duty

on the Clerk when a cause is finally determined in all its parts. But it does not declare what is a final decree; for no such phrase occurs in the section. Indeed the "final determination," there intended, is always understood as not taking place till after the decision of this Court upon the appeal from the final decree; for not until then does the Clerk of the Court of Chancery record the papers. The Clerk's recording the papers gives no new authority to the decree: the pleadings thus made out are never signed by the Judge. The decree is perfect before; this book being merely for safe keeping. Nor is the enrolment, in England, an act which at all changes the nature of the decree, as to its being final or interlocutory: for, if it did, as the bill of review lies only after the final decree, the time which runs against it would run from the enrolment; whereas it is counted from the time of pronouncing the decree. (b) Indeed enrolment "is now much disused." (c) So that the final nature of the decree, in England, is decided by its terms, its intrinsic character, and not any formality used in relation to it. And in this country the rule is the same: or if any act, equivalent to the enrolment in England, were requisite to complete the final character of a decree, it is found in this, that the record of each day's proceedings is regularly drawn up by the Clerk and signed by the Judge. In Metcalf's case (d) there was a judgment quod computet; which clearly was not final; and no writ of error lay till after judgment on the account; as was evident from the very form of the writ: (e) but that case has no resemblance to this. Ormston v. Hamilton (f) is a short note in the index, in these words: "Decree, in Scotland, taken for part of a demand, with reservation of the other part not determined. Decreed there that it was *lis finita*; but reversed." The case itself is not reported in the book: but this little shews clearly that it has nothing to do with this argument. It was determined in Scotland, not that such a decree was final *pro tanto*; but that it finished the whole controversy; and the lords very rightly determined that it did not.

So that the position remains
356 *untouched, that this decree, deciding against the right of the plaintiffs to the personal property, and dismissing the bill as to that subject, was so far final. If so, the controversy is at an end as to Tem-

pleman, the only defendant now before the Court, who, as executor of Elizabeth Step-toe, is interested in maintaining no other part of the decree of 1797: for he is protected by a final decree, unreversed, and unappealed from, and which, in fact, no proceeding has ever been instituted to affect. Mr. Wickham, willing to place this case on the most liberal ground for the plaintiffs, considered their last bill as a bill of review. They disclaim it, and call it a bill of revivor; and rightfully, I incline to think: and, if a bill of revivor, it cannot reach this part of the decree; but only those proceedings which were alive but abated by the deaths of the defendants. The plea and replication do not consider this as a bill of review. The parties join issue upon the point whether the decree of 1797 was final as to the personal estate; and the Chancellor on this issue overrules the plea; thereby deciding that it was not final but interlocutory. This we say is an error; and, if so, the case is with us.

2. But if the bill against Templeman is to be considered as a bill of review, it is too late, according to the authorities heretofore cited; to which add *Cook v. Arnham*. (g) But it is said that we ought to have pleaded the limitation; and the authority of *Hite's Heirs v. Wilson and Dunlap* (h) is relied upon. But that case goes no farther than to settle the doctrine that every thing, out of the record, that is, every defence which is matter in pais, must be pleaded. But here the objection did appear by the record: the intervening time was shewn on the face of the last bill and its exhibits. *Coop. Eq. p. 304*, is admitted to say expressly that this matter must be pleaded; and this on the authority of 2 Vezey, 109. The same author had before asserted this doctrine, (p. 216,) on the same authority; expressly laying it down that it will not do by demurrer. Yet in the note he refers to 1 Bro. Parl. Cas. 95, (i) as contra.

357 *The case of *Edwards v. Carrol*, in 1760, (k) a still stronger and later case, and on higher authority than that of Vezey, settles the principle that the Court will notice it *ex officio*: for there was a general demurrer: and this upon very good reason; for the party who files a bill of review must take it out of all exceptions appearing by the record. The defendant needs no plea to introduce his objections: the record operates as a plea.

It is said too that the infancy of some of the plaintiffs shall save the rest; because the decree of dismissal, being joint, if void as to any, is void as to all; and *Styles*, p. 400, is quoted. But it is not proper to deduce conclusions from the common law forms of entry, as governing cases in equity. The case in *Styles*, is one of a joint judgment at common law and cases are reported which shake this rule as applicable to all cases of joint judgments in which an infant is a party. (l) But the decree now in question

(a) 1 Rev. Code, p. 67.

(b) *Coop. Eq. 92*.

(c) *Ibid. 78*.

(d) 11 Co. 89.

(e) *Ibid. 88, b*.

(f) 5 Bro. Parl. Cas. 364.

(g) 3 P. Wms. 287.

(h) 2 H. & M. 208.

(i) *Sherrington v. Smith*.

(k) 5 Bro. Parl. Cas. 466.

(l) 1 Salk. 205, *Cone v. Bowles*; and *Carthew*, 122. S. C.

is not joint but several in every thing. Was it not competent for the adults to proceed to review it, whether the infants would join, or not, as plaintiffs? There is nothing, therefore, in the infancy of some of the parties to take the adults out of the operation of time: and as to them, at least, the decree of 1797 cannot be set aside.

The plaintiffs have not made a case which justifies the decree of November, 1805. Under the act of 1785, the mother would have taken the whole estate in this case. How far does the 5th section of the act of 1792 repeal that provision? Mr. Call says totally: it destroys her heritable blood altogether; it annihilates her existence.

Be it, then, that the mother is excluded from the inheritance. Who takes next? Do the paternal uncles and aunts? Certainly not under the act of 1785: because, by that act, where there were neither children, father, mother, brothers or sisters, or their descendants, the paternal uncles and aunts did not come in; but the estate was divided into two moieties, one of which was to go to the paternal, the other to the maternal line. If, then, the act of 1785

358 *would not give the whole estate to these plaintiffs, does the 5th section itself, of the act of 1792, give it to them? No: for Mr. Call says, and says truly, that section is not donative, but only excepts a particular case out of the canon of 1785. On what then do they found their title?

It is clear that Mr. Call thought that, on his removing the mother, these plaintiffs would stand next under the general law. In pursuit of this idea, he advanced the position that, if the person who stands next to the propositus have no heritable blood, the estate passes on to the next, as if such intermediate person had no existence. This is not believed to be true: certainly not universally: for, at common law, where the blood of the eldest son was attainted, the next, though free from attainder, could not take. So, in the case of the eldest being an alien, the next son a citizen; it is a moot point whether the latter could take: our law of descents considered it so, and therefore provided for it. (a) So the statute of 1 Jac. I. c. 4, s. 6, having pretermitted popish recusants, but not prescribing who should take the inheritance, another statute was necessary. (b)

But, admitting the principle correct, and that the mother is to be considered dead, the 5th section merely excludes from the inheritance the mother, and "any issue which she may have by any person other than the father of such infant;" but leaves the ascending and collateral relations of the mother where they stood under the act of 1785.

What decree then is right? and where shall the rule be found? *Brown v. Turberville* (c) was on a different case; the only question there being, whether the words interpolated in the 7th section covered the case of an adult: and, except an obiter dictum of Judge Pendleton, there is nothing in that case touching this.

Upon the whole, then, the plaintiffs have

not made a case to justify the decree; which, therefore, should be reversed.

359 *Wickham requested leave to make a few additional observations. If the plaintiffs had brought separate suits for the real and personal estates, the decree as to the personal would have been final. If their coupling both in one bill makes it otherwise, it follows that the plaintiff has it in his power to oust the Court of Appeals of jurisdiction, at his own discretion, by the manner of bringing the suit: a conclusion too monstrous to be tolerated.

As to the inheritance, the case of *Dilliard v. Tomlinson* (d) shews that the words of the act, when plain, are binding, and construction is not admissible against them. Therefore, here, as the words only exclude the mother, and do not say to whom the estate is to go, the Court cannot supply a disposal of the estate. As to the personal property, (the law not providing,) the mother, as administratrix, is in possession, and the plaintiffs have no claim upon her; like the case of a husband administering on his wife's estate, who is not to be called upon for distribution. (e)

Wednesday, October 24. The Judges pronounced their opinions.

JUDGE TUCKER. This is a case arising upon the construction of our law of descents, and of distribution of personal estate; where an infant of the age of thirteen years died possessed of real and personal estate derived from his father; leaving a mother, (and other relations on the mother's side, as it would seem,) but no brother, or sister, whatever, nor any descendant from them.

A preliminary question, however, arises from the following circumstances. The infant, Edward Steptoe, died in May, 1794. His mother administered upon his estate, and entered into possession of the whole, both real and personal. A part of the present plaintiffs, uncles and aunts on the part of the father, or descendants from them, brought their bill against the mother for a division of the estate, claiming the whole.

In her answer she states, that she had 360 been advised *she had a right to her son's personal estate; and, if so, some of her near connections may be benefited by it: which seems to shew she had near relations who were no parties to the suit. On the 17th of March, 1797, Mr. Wythe, then Judge of the High Court of Chancery, pronounced his decree, whereby he decided that the complainants had no right to the slaves, or personal estate, and dismissed the bill as to the part thereof which claimed the same, and demanded an account of the administration thereof. But, being of opinion that the complainants were entitled to the lands, he directed partition thereof to be made among them in certain proportions, and appointed Commissioners to state an account thereof, and to settle and adjust an account of the profits, since the death of the infant Edward Steptoe, to be reported to the Court. But, before any farther proceedings were had, Elizabeth Steptoe, the mother, died, having made a will, and appointed the appel-

(a) 1 Rev. Code, p. 160, c. 98, s. 18.

(b) 2 Tuck. Bl. App. p. 83, note.

(c) 2 Call, 300.

(d) Ante, p. 188.

(e) 1 Rev. Code, p. 164, c. 92, s. 27.

lant, Templeman, her executor; and William Steptoe, another defendant, having also died, the suit abated as to both those original parties.

After the division of the High Court of Chancery into Districts, (the act for which passed in January, 1802,) the present complainants filed a bill (the date of filing which does not appear) in the Williamsburg Chancery District Court; in which they speak of the former decree as interlocutory, and still amendable by the Court, and therefore pray that they may have the benefit of all the proceedings in the original suit, except the said interlocutory decree, which, as they are advised, ought to be set aside, partly for error apparent on the face of it, and partly because the execution of certain parts of it has become impossible; and pray process of subpoena to revive and answer against the appellant Templeman, as executor of Elizabeth Steptoe. One of the suggestions in this bill, which states that William Steptoe died in April, 1803, shews that the filing of the bill was after that period, so that more than six years elapsed
361 *between the time of pronouncing the first decree, and the preferring the present bill.

To this bill Templeman, the executor of the mother, after disclaiming any connection with the real estate, pleads the decree of March, 1797, as a final decree in bar of the claim to the slaves and personal estate, and account of their hires, since the death of his testatrix, or of the administration of his testatrix on the personal estate of her husband, George Steptoe, deceased, &c.; and insists on the length of time, and acquiescence of the plaintiffs under that decree.

The replication to that plea denies that the decree of March, 1797, was final, in any respect, but says nothing of the lapse of time or acquiescence under the decree.

In November, 1805, the cause was heard before the Chancellor of the Williamsburg District, who pronounced a decree overruling the defendant's plea, and declaring that, neither the mother, though alive at the death of her son, nor any relations on her part, were entitled to any share or proportion of the infant's estate, real or personal, and directing that the whole should be distributed among the complainants, as heirs on the part of the father, in the several proportions therein mentioned, together with an account, &c. in order to a final decree.

From this decree the defendant Templeman prayed, and obtained an appeal to this Court, by virtue of the act of 1797, c. 5, authorizing the High Court of Chancery, in its discretion, to grant appeals from interlocutory decrees. Before which period no appeal could be granted until a final decree.

The counsel for the appellees contend, that the original bill having been dismissed, as to the personal estate, by the decree of March, 1797, that decree was final as to that matter; and that the plaintiffs were barred by length of time from filing a bill of review.

If the premises be correct, I think the conclusion must be so too. For the utmost

362 period within which an appeal from a Superior Court of Chancery to this Court lies, seems to be three years, as was fully discussed in the cases of *Tomlinson v. Dilliard*, and *Mackey v. Bell* (a). By analogy, then, I should suppose that a bill of review would not lie after that period. For that would be granting more power to the Judge of the same Court to reverse the decrees (pronounced by his predecessor perhaps) than the law vests in this Court. Instead of resorting to the period assigned to writs of error at common law, I think it far more reasonable that the period which the law has assigned to appeals from the Courts of Chancery be adopted as that which bars a bill of review. In England the statutory law is silent as to appeals from the High Court of Chancery. Therefore, the analogy to writs of error at common law was adopted. But our law having assigned a period within which appeals in Chancery must be brought, that period appears to me the proper standard by which the granting of bills of review should be governed. It is unnecessary, I conceive, to consider how far the saving in favour of infants might operate: the analogy must be observed throughout; and, if any of the parties were infants, their case is provided for.

But the counsel for the appellants insist that the decree was not final, but merely interlocutory, and therefore still in the breast of the Court. The inconveniences of such a construction were most ably commented upon, and illustrated by the opposite counsel. They are such as, in my opinion, to deserve not only the attention of the Courts, but of the Legislature. That a decree of dismissal, which in its nature seems conclusively to determine every question of right, after being acquiesced in for six years, should be liable to be set aside by the successor of the Judge who pronounced it, and thereby affect, perhaps, the rights of bona fide purchasers for a valuable consideration, actually paid, upon the principle that they were purchasers pendente lite, seems so far repugnant to every idea that I have of justice, or equity, that I cannot well imagine a case that would

363 call more loudly for legislative aid and protection, if the offended *dignity of Courts should pronounce against the claim of such bona fide purchaser. But that case is not before us, and I hope never will be, though not unlikely to happen very frequently, if the practice be permitted to prevail; which it certainly ought not, so as to affect others, now that the law allows appeals from interlocutory decrees. In the present case, however, as the law stood at the time the decree was pronounced, no appeal lay; for, however cogent the arguments to the contrary appear in my eyes, I am constrained by former precedents to say that the decree of March, 1797, was not a final decree between the parties, all of whom were still retained in court, although the bill, as to a part of the subject claimed, was dismissed. (b) The succeeding bill is, therefore, to be taken as a bill of revivor and supplement, by which the cause was

(a) 8 H. & M. 199-217.

(b) *Grymes v. Pendleton* 1 Call, 54.

brought regularly before the Judge who pronounced the second decree.

By that decree, as I have already noticed, the Chancellor decided that, neither the mother of the infant, nor any relations of the infant, on the part of the mother, were entitled to any portion of his estate, real or personal.

That decision, so far as it respects the mother herself, or any of her descendants, other than children by the father of the infant, or their descendants, appears to me to be perfectly correct. But I differ with the Chancellor so far as respects the father or mother of the mother, or any of her collateral relations, all of whom, in the events which have happened, appear to me (if in being at the time of the infant's death) to be entitled to a portion of his estate, real and personal.

The following principles appear to me not to require any argument, or authority, in support of them.

1. That the laws of descent, or rules of succession ab intestato, to property real or personal are merely creatures juris positivi.

2. That, by the act of 1785, c. 60, all former rules and canons of inheritance and succession to estates real and personal within this Commonwealth, whether established by the common law or by statute, were entirely rescinded, abrogated and annulled: and that they cannot be revived in any manner, but by some express legislative provision for that purpose. (a)

3. That, if, by any subsequent act, any case provided for by the act of 1785 shall now happen not to be provided for, the Legislature only is competent to provide for such omitted case. (b)

4. That the case of an infant having lands by descent or purchase from his father, already deceased, dying in the lifetime of the mother, and leaving no child, nor brother, nor sister, nor any descendant from either of them, was fully provided for by the fourth section of the act of 1785, c. 60.

5. That the same happens now not to be provided for, by the operation of the act of 1792, c. 93, s. 5. The law declaring only that, in such case, the mother shall not succeed to the same: without designating any other person or persons to whom the succession shall belong during the life of the mother: neither the seventh section of that act, nor any subsequent part thereof, providing for the succession in any such case.

From these principles, as premises, it appears to me that, in the case above supposed, (which is the same with that before the Court,) the succession to the inheritance during the life of the mother was in abeyance; and that, at her death, the whole estate, real and personal, ought to go to the same persons, and in the same proportions, as the same would have descended, if there had been no mother, nor brother, nor sister of the infant, nor any descendant from either of them, at the time of the death of the infant. And, consequently, that, after the death of the mother, the estate, both

real and personal, ought first to be divided into two moieties, one of which moieties ought to be allotted to the plaintiffs in the several proportions, by which the Chancellor in his decree has directed that the whole shall be allotted; and that the other moiety be reserved for the benefit of those relations on the part of the mother (of which by her answer to the original bill it appears probable there were some living at the time of the infant's death) who may within a reasonable time assert and prove their claims thereto. But if no such relations on the part of the mother shall assert their claim within a reasonable time, to be limited by the Court of Chancery, that the other moiety be then divided among the plaintiffs in the same proportions as the former.

It also appears to me, that, as no person was capable of succeeding to the inheritance as heir, during the life of the mother, the account of rents and profits, subsequent to the death of the infant, ought not to be decreed to be taken for that period which elapsed between the death of the infant and the death of his mother. The inheritance, during that period, being, as I have already said, in abeyance, the first occupant, who might enter and possess himself thereof during that period, might, as I conceive, lawfully hold the same, and take the rents, issues, and profits thereof to his own use, so long as the mother lived, without being in any manner chargeable or accountable for the same to the persons to whom the succession may belong, after the mother's death. (c)

My opinion, therefore, is, that so much of the Chancellor's decree as is in opposition to these principles be reversed, and that a decree conformable thereto be now made: and that the remainder of the decree be affirmed.

To prevent any misconception of this opinion, I beg leave to add that, if there had been any brother or sister of the infant on the part of his father living at the time of his death, or any descendant from them, such brother, sister, or their descendants, would have been entitled to take the estate immediately, notwithstanding the mother was then also living; as, in such a case, the inheritance would not have been in abeyance for a moment.

*JUDGE ROANE. With respect to the first question made in this case, I consider it as the established doctrine of the Court that a decree of the inferior Court is not to be considered as final, until the cause is completely dismissed therefrom. Until that is the case, the Court below has, itself, the power to correct any errors it may have committed, and any decree it may have rendered is, therefore, not to be considered as final. Most of the arguments now used on this topic have been used and overruled on former occasions.

As to the question now made upon the act of descents, I believe it will be admitted that I have borne my testimony* against

(c) See Tucker's Blackstone, vol. 2, App. p. 28-42, for the reasons at large upon which this opinion is founded.

*In the two decisions in the case of Tomlinson v. Dillard, &c.

(a) See Acts of 1780, c. 9.

(b) See 1 T. R. p. 52.

the policy which gave rise to the act of 1790, restoring, in a measure, the feudal principle of the blood of the first purchaser. But, while I shall never be in favour of extending that principle in doubtful cases, by construction, I do not deny the power of the Legislature to make the innovation. The question before us is then purely a question of construction upon the intention of the Legislature as manifested in the act itself.

No man can be more sensible than I am, of the impropriety of extending the construction of an act by mere implication; especially to further an odious or unjust principle; but I apprehend that an implication may be so strong and necessary as to be equivalent to an express declaration by the Legislature. This I take to be the case in the present instance. The exclusion of the mother in the event that there is a brother or sister on the part of the father, or a brother or sister of the father, is substantially equivalent to an express declaration that the persons last mentioned shall themselves succeed; and this the rather, as the first section of the act of descents purports to provide a rule of inheritance as to all cases, and which idea is entirely supported by the opinion of this Court in the case of *Brown v. Turberville*.

I consider that decision as a complete authority *to overrule the idea that the inheritance is in abeyance in the case before us. The succession in this case, therefore, does not rest upon a mere naked implication, but upon an implication so strong and necessary, (all the circumstances considered,) as to be equivalent to an express declaration by the Legislature. In this last respect this case differs from the one put in a note to 2 Tuck. Bl. App. p. 33, where an elder child being disabled from inheriting by receiving a popish education, and the statute which disabled him (1 Jac. I.) containing no declaration who should have the land, a subsequent statute was deemed necessary to be made in favour of the next of kin.

It is a sound rule of construction that, if it can be prevented, no clause, sentence, or word, shall be rendered superfluous, void, or insignificant. (a) In the case before us it is difficult to say wherefore the brothers and sisters on the part of the father, and *e converso*, were mentioned in the act, but for the purpose of following up the principle on which the change of the rule was founded, and giving the estate to them, instead of the excluded parent.

Upon the whole, my construction of the act of 1792 is, that it is entirely similar to that of 1785, with the single exception of the amendment made by the act of 1790; (which is kept up and extended by the 5th and 6th sections of the act of 1792;) and that those sections operate by way of exception from the general law in the cases put therein, as well by substituting one heir, as excluding another. The error on this point seems to be in considering the canons of the act of 1785 as still in force, (for example, in favour of the paternal grandfather and maternal grandmother,) while at the same time the succession is

changed, in a particular case, in favour of the maternal uncles and aunts, &c. As to the justice of this alteration, the power of the Legislature being admitted, we are compelled to say "*stet pro ratione voluntas*."

I therefore concur with the Chancellor in his construction *in the present instance, which is also that of the public at large, and thereby avoid the great evil (as almost all infants derive their property either on the part of the father or the mother) which would result from deciding that, in cases like the present, no rule of descent is provided by law, and that the estates are, consequently, in every instance, to be considered as in abeyance.

JUDGE FLEMING. The counsel for the appellant, in their statement, rested the cause on two points only:

1st. That the original decree was right; and,

2d. That the bill having been dismissed as to the personal estate, the decree was final as to that matter; and the plaintiffs were barred by length of time from filing a bill of review.

The cause was argued with great ability on both sides, but much the greater part of the arguments of the appellant's counsel seemed predicated on the assumption of facts which, in my apprehension, did not exist; to wit, that the decree of March, 1797, was final; and that the bill against Templeman, as executor of Elizabeth Step-toe, was a bill of review. In order to prove that the decree of 1797 was final, it was strenuously argued that there ought to have been two separate and distinct suits; one for the real, and the other for the personal estate: but, for what good purpose there should have been more than one suit, I am at a loss to discover. The counsel proceeded to argue that, as the Chancellor decided the right, respecting the personal estate and dismissed the bill, as to that subject, the decree was final: but this Court has never considered a decree to be final, so long as the parties remained in Court; but every order and decree made during that space, has been considered as interlocutory, and subject to revision; as in the cases of *Young v. Skipwith*, (b) *Grymes v. Pendleton*, (c) and *M'Call v. Peachy*. (d) In the former case, Skipwith brought his bill against Young for the moiety of a tract of land, according to contract. The Chancellor decreed for the plaintiff a moiety

369 *of the land, (which completely decided the rights of the parties,) and appointed a Commissioner to make a partition accordingly. Young appealed to this Court, which, after a long and solemn argument on the merits of the cause, decided unanimously that the decree was interlocutory, dismissed the appeal, and remanded the cause to the High Court of Chancery; as was likewise done in the cases of *Grymes v. Pendleton*, and *M'Call v. Peachy*, noticed above: and in several subsequent cases, after the act of January, 1798, allowing appeals (by the Court of Chancery) from interlocutory decrees; particularly, in the

(b) 2 Wash. 300.

(c) 1 Call. 64.

(d) *Ibid.* 55.

(a) 6 Bac. 380.

cases of the President and Professors of William and Mary College v. Lee's Executors, and of Fairfax v. Muse's Executors. (a) In the latter case, there was a decree to foreclose the equity of redemption of mortgaged lands, and the premises ordered to be sold: yet this Court unanimously dismissed the appeal, as having been improvidently allowed, in vacation, from an interlocutory decree; which was not authorized by law. And, had an appeal been allowed, in the case before us, from the decree of March, 1797, there is not a doubt on my mind but it would have been dismissed, as having been prematurely granted. Considering that decree then as interlocutory, and not final, the argument, that a bill of review was barred by length of time, falls to the ground. But, in my apprehension, it is not a bill of review, but a bill of revivor and supplemental bill, which the several deaths of Elizabeth and William Steptoe, who were the executrix and executor of George Steptoe, deceased, made necessary, in order to bring the whole subject in controversy properly before the Court; and in which the widow, and the children of William Steptoe, (eight in number,) were made parties, plaintiffs; and who, by the last decree, are made distributees of one fourth part of the estate of the said Edward Steptoe, deceased, the widow's dower therein being first allotted to her; all which appears to me to have been correct and proper.

As to the length of time that the appellees acquiesced in, and left undisturbed, the decree of March, 1797, it may be
370 *well accounted for. The Commissioners appointed, by that decree, to state an account of the real estates whereof the said Edward Steptoe died seised, and to settle and adjust the profits of the said estate, since his death, had made no report of their proceedings, before the deaths of the said Elizabeth and William Steptoe, when the bill of revivor, and supplemental bill, became necessary for the purposes aforesaid. I come now to consider the cause on its merits, and to decide, according to the best of my judgment, the rights of the parties to the estate of Edward Steptoe, deceased, under our several acts of Assembly. And here a difficulty seems to arise, and a difference of opinion among the Judges, respecting the exposition of those acts; which circumstance, and the very ingenious arguments of the counsel, induced me to consider the subject with more than ordinary attention; and, after the most mature deliberation, the difficulty to me appears easily solved, by giving to those acts such a construction as I conceive to have been the sense and intention of the Legislature, at the several periods when they were passed; and, as I believe, agreeably to the general sense and understanding of the community at large.

It was objected by the appellees' counsel, though not much relied on, that the fifth clause of the act of 1792, under which the appellees claim, is only a proviso, or an exception, to the general principles, words, and meaning of the preceding clauses; and ought not to have the same force and effect

as if it had been declaratory, and an enacting clause.

Our first act of Assembly, altering the course of descents from that of the common law, was passed in the year 1785; in which the sense of the Legislature was expressed in general terms; as it was likewise in the 24th section of the act of distribution, passed the same session, and referring to the act of descents, for the distribution of goods and chattels: but, in the year 1790, an important change was made, in cases of infants dying without issue; and, by an act passed the 24th of December, in that year, entitled "An act to amend the act entitled an act directing the course
371 of descents," it is *enacted (section 3,) that, "where an infant shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from the father, the mother of such infant shall not succeed to, or enjoy the same, or any part thereof, by virtue of the said recited act, if there be living any brother or sister of such infant, or any brother or sister of the father, or any lineal descendant of either of them:" in which act there is another clause, vice versa, excluding the father, &c. where the estate is derived from the mother. In the same act there is a repealing clause in the emphatic words following: "So much of all acts as comes within the purview of this act, and particularly of the act entitled an act directing the course of descents," (viz. the act of 1785,) "shall be, and the same is hereby repealed." The above clauses, respecting cases of infants dying without issue, are declaratory and explicit, and not exceptions to clauses of general import. It is true that, when they are incorporated into the act of 1792, "to reduce into one the several acts directing the course of descents," they are there inserted as said provisoes to the general course of descents in the preceding clauses; with the exclusion of any issue which the mother may have by any person, other than the father of such infant; which latter exclusion was not in the act of 1790: and so in the clause excluding the father, &c. from inheriting any estate derived from the mother.

But it is contended, in the present case, that the 5th clause of the act of 1792, which excludes the mother from the inheritance, is in negative words, and no express declaration who shall inherit the estate; and therefore it is a casus omissus; and, during the life of the mother, the estate was in abeyance, there being no person in existence capable of inheriting; as the infant died, leaving neither brother nor sister; and that, on the death of the mother, (there being no provision for the case in the act of 1792,) so much of the act of 1785 as directs that the inheritance shall be divided into moieties, one of which shall go to the paternal, and the other to the maternal kindred, is revived, and in force; (the course of descents by the common law being
372 *done away by the statutes; and it

being a rule, that a statute cannot be repealed by implication.) But we have already seen that the act of 1785, so far as it was within the purview of the act of 1790, which completely embraced, and, in my

(a) 3 H. & M. 557, and note (2), 558.

conception, provided for, the case before us, was repealed in as express terms as language could devise.

And, further, in the act of 1792, directing the course of descents, there is a clause declaring that all and every act and acts, clause and clauses of acts heretofore made, containing any thing within the purview of this act, shall be, and the same are hereby repealed. The act, then, of 1785, or so much thereof as was within the purview of either the act of 1790, or the act of 1792, was clearly repealed. And it is a rule of equal force with the one mentioned above, that a statute once repealed shall not be revived by implication. There is also another important rule of construction that well applies to the case before us; which is, that force and efficacy is to be given to every sentence, and significant word, in a statute, which does not contradict or obscure some other part of the same statute; and that, where words or expressions are ambiguous, and of doubtful meaning or effect, such interpretation and application shall be given them, as to fulfil the object and intention of the Legislature, if the will of the Legislature can be fairly deduced from such words or expressions. And here let me premise that, in my conception, the Legislature intended to provide, and hath provided, for every possible case that could happen, (and such was the sense of all the Judges in giving their opinions in the case of *Brown v. Turberville*,) and, particularly, is there provision made for the one now under consideration; and others of a similar nature; and that, as Edward Steptoe died under age, and without issue, having an estate of inheritance derived by purchase from his father, neither his mother, nor any issue which she might have had by any person, other than his father, could succeed to, or inherit, any part thereof: and, as there was no brother nor sister of the said Edward Steptoe, nor descendants of such, living at the time of his death, the 373 brothers* and sisters of his father George Steptoe, deceased, and their descendants, (the present appellees,) have a right to the inheritance; which I conceive to have been clearly the will and intention of the Legislature; or why was the mother, and any issue which she might have by any person other than the father, excluded from the inheritance, "so long as there should be living any brother, or sister of the father, or any lineal descendant of either of them?" To give the latter words any other construction would, to my mind, render them nugatory, and so many dead letters: and they are certainly of too important signification to be thus considered. And I construe them on the principle that a devise of lands to a son, after the death of his mother, gives to the mother an estate for life by implication.

I am therefore of opinion, that the decree is correct, and ought to be affirmed; and (the decree being interlocutory) the cause remanded to the Superior Court of Chancery of the District of Williamsburg, for farther proceedings to be had therein.

By the majority of the Court, decree affirmed, and cause remanded for farther proceedings.

Paynes v. Coles and Others.

Thursday, October 11, 1810.

1. *Evidence—Record in Another Suit.**—A record of one suit cannot be read as evidence in another, unless both the parties, or those under whom they claim, were parties to both suits; it being a rule that a document cannot be used against a party who could not avail himself of it, in case it made in his favour.

2. *Evidence—Answer.*—An answer in Chancery (though, in form, responsive to a question put in the bill) is not evidence, where it asserts a right, affirmatively, in opposition to the plaintiff's demand; but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill.

3. *Issue Out of Chancery—When Improper.*†—An issue out of Chancery ought not to be directed to try a claim altogether unsupported by testimony, or a

**Evidence—Record in Another Suit.*—A record of one suit cannot be read as evidence in another, on the ground that the defendant and one of the plaintiffs in the latter suit, were parties to the former, and that the same point was in controversy in both: another plaintiff, and the person under whom both the said plaintiffs jointly claim, not having been parties to such former suit. *Chapmans v. Chapman*, 1 Munf. 398, citing with approval the principal case.

On the same point, see the principal case cited in *Brown v. Johnson*, 18 Gratt. 650. See further, monographic note on "Evidence" appended to *Lee v. Tapscott*, 2 Wash. 276.

Where depositions in one chancery cause have been read in another, no formal order of the court permitting them to be read seems to have been made. *McCoy v. McCoy*, 29 W. Va. 811, 2 S. E. Rep. 819, citing *Paynes v. Coles*, 1 Munf. 373, and *Chapmans v. Chapman*, 1 Munf. 398.

Judgment—Conclusiveness.—The principle is universally acknowledged that no one can be bound by a verdict or judgment unless he be a party to the suit, or be in privity with a party, or possess the power of making himself a party. The reason is obvious. He has no power of examining witnesses, or of adducing evidence in maintenance of his rights; in short, he is deprived of all means provided by law for ascertaining the truth and consequently it would be repugnant to the first principles of justice that he should be bound by the result of an inquiry to which he is altogether a stranger. *Dent v. Ashley*, 7 Fed. Cas. 498, citing *Wood v. Davis*, 7 Cranch (11 U. S.) 271; *Davis v. Wood*, 1 Wheat. (14 U. S.) 6; *Paynes v. Coles*, 1 Munf. 373; *Turpin v. Thomas*, 2 Hen. & M. 139; *Jackson v. Vedder*, 3 Johns. 8; *Case v. Reeves*, 14 Johns. 79. To the same effect, the principal case is cited in *Baring v. Fanning*, 2 Fed. Cas. 794.

†*Issue Out of Chancery.*—Whatever may be the practice elsewhere as to the cases appropriate for an issue, and in which the discretion of the chancellor is wisely and properly exercised in directing it, there can be little doubt that in Virginia, where the allegations of the bill are expressly and directly denied in the answer, and are wholly unsupported by proof, or supported by the evidence of one witness only, the court should not direct an issue, but should dismiss the bill. *Wise v. Lamb*, 9 Gratt. 306, 306, citing the principal case, and *Pryor v. Adams*, 1 Call 382. See further on this subject, foot-note to *Pryor v. Adams*, 1 Call 383; monographic note on "Issue Out of Chancery" appended to *Lavell v. Gold*, 25 Gratt. 473. The principal case is also cited in *Lewis v. Mason*, 84 Va. 738, 10 S. E. Rep. 529.

title not alleged in the bill, but suggested in the answer, without proof. Neither is this rule to be varied by the circumstance that infants are interested.

4. **Chancery Jurisdiction—To Set Up Marriage Promise.**

—The aid of a Court of Equity ought not to be afforded to set up a marriage promise when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage.

5. **Same.**—Quære, whether a Court of Equity ought, under any circumstances, to assist, to the prejudice of a posthumous child, the claim of devisees under a will (made before the 1st of January, 1787) by a testator who had no child living, and was ignorant that his wife was in a state of pregnancy?

John Payne and Mary Payne, infants, by Mary Payne, their mother and
374 next friend, filed their bill in the *late High Court of Chancery, on the 1st of March, 1796, against Walter Coles, Isaac Winston, and Lucy his wife, Garland Anderson, and Mary his wife, Thomas Price, executor of William Darracott, deceased, and John Syme, and Sarah his wife; setting forth that Williams Coles, late of Colehill, in the County of Hanover, (being the father of three children, to wit, a son named Walter, and two daughters, Mary, the mother of the plaintiffs, and Lucy, the wife of Isaac Winston,) on the 4th of September, 1768, wrote a letter to Mrs. Darracott, the mother of Mary Darracott, to whom his son was then paying his addresses, informing her that the match would be very pleasing to his wife and himself; that he intended to give his son, immediately, to the value of 3,000l. current money, in land, slaves, and other things; and, at his own and his wife's death, he would leave him the land he then lived on, "with his possession in Ireland, and some more slaves," &c.

The bill farther stated that (whether before or after the said letter was written, the plaintiffs knew not) the said Williams Coles told William Darracott, brother of Mary Darracott, that "if the match should take place, he would give his son at the time of the marriage his plantation in Goochland County, and sixteen or eighteen negroes, seventy or eighty head of cattle, and other stock upon the said plantation, and that at his death he would give his said son the plantation whereon he then lived, and other negroes, and some other estate; that the marriage took effect, but the agreement was not executed; that, some time in the year 1769, Walter Coles, the son, departed this life, having made a will, in which, after bequeathing to his wife Mary all the slaves, horses, and all other things that he had with her as a marriage portion, and ten pounds current money, and to each of his sisters a mourning ring, he "gave and bequeathed to his father and mother all and singular the remaining part of his estate of any nature or kind soever, to them and their heirs forever;" that the defendant

Walter was his posthumous son; he
375 having had no child living at *the date of the said will; which, as the plaintiffs were advised, passed his rights under the marriage agreement from his infant child to his father and mother. They were

farther advised, that the father and mother took under the will as joint-tenants; that William Coles, the father, dying about the year 1781, intestate, his moiety survived to Lucy Coles, the mother; and that, upon her death in the year 1784, the whole right to the benefit of the said marriage agreement devolved (by virtue of the residuary clause in her last will) on the plaintiffs. The bill moreover set forth that William Darracott administered on the estate of Williams Coles, and Walter Payne qualified as executor of Lucy Coles; but that Darracott, as administrator of her husband, had previously taken possession of her whole estate, (alleging that her lands had descended on the defendant Walter Coles, his nephew, as heir at law of the said Williams Coles, and that the slaves and personal property belonged to the estate of his intestate,) and made such distribution of the estate as to him seemed meet; leaving the defendant Walter Coles in possession of the land, and far greater part of the other estate; and allowing no part of it to the plaintiffs; thereby preventing Walter Payne, the executor, from performing the duties of his office; that the said Walter Payne, having gone beyond sea, had not been heard of for seven years; and thus, the plaintiffs had been deprived of all benefit from the devise aforesaid in their grandmother's testament; notwithstanding she therein appointed Sarah Syme, wife of Col. John Syme, trustee and manager for them; the said Sarah having never interfered, under the trust, to have justice done them; that the defendant Walter Coles had held the estate, allotted him, ever since the distribution; that William Darracott is dead, and Thomas Price, his executor, is the only person who can account for his acts in relation to these estates.

The prayer of the bill was for an account of so much of each of the estates of Williams and Lucy Coles, as was received by the defendants, Walter Coles, Isaac
376 Winston, *and Lucy his wife, and Garland Anderson, and Mary his wife; for an account of the administration by William Darracott, to be rendered by the defendant Thomas Price, his executor; "that the said Walter Coles be decreed to convey to the plaintiffs all lands, whether in this country or in Ireland, to which they are equitably entitled under the above devise of the testament of their grandmother, and which (independently of the above recited letter and conversations, the testament of his father, and the testament of his grandmother) would have descended to him by right of inheritance, or any other title; and that the defendant, Sarah Syme, be compelled either to accept of or relinquish her trust aforesaid, and, in the former case, to execute the same agreeably to the principles of equity in like cases."

The defendant Walter Coles answered, saying that "it may be true that Williams Coles his grandfather did, on the 4th of September, 1768, write such letter as is set forth in the bill, but for greater certainty refers to such proof as the complainants can bring concerning the same: he has understood that the said letter was written at the instance of Mrs. Darracott, grandmother

of this defendant; and that the said Williams was induced to write it by information received of her, or from some other relation of his mother, that her fortune was much more considerable than it was afterwards found to be. He admits that the marriage took effect, but denies that the said Walter Coles, this defendant's father, became possessed of the property mentioned in the said letter. He further saith, that his said father, when he made his last will, had no knowledge of the pregnancy of his wife: and this defendant submits it to this honourable Court whether, as the said will was made when his father had no child, the subsequent birth of this defendant did not operate as a revocation thereof; but, if it shall be thought otherwise, he insists that, as his said father was not possessed of the estates mentioned in the said letter, the same did not pass by his will; more especially, as it evidently

appears, from the will itself, and the then situation of the parties, that the said estates were not in the contemplation of the testator when the will was made. This defendant does not admit the parol agreement between his grandfather and his uncle, stated in the bill; and supposes that, if any such conversation took place, it ought to be considered as having no effect, so far as the same is different from the letter referred to by the complainants."

The same answer farther states that "Williams Coles, the grandfather, proved the will of the said Walter, whereof he was appointed executor, but never held any of the property, mentioned in his letter, under the devise from his son, but as his own several property; in like manner as if the said will had never been made; that Lucy Coles never held any part of it, except as widow of the intestate; and, if she made such will, (which, however, the defendant contested, having instituted a suit in Chancery to set it aside,) she never meant that this property should pass by it; that Darracott, the administrator, made distribution of the property of his intestate (as he had a right to do) between Mary Payne, the mother of the plaintiffs, Isaac Winston and Lucy his wife, and this defendant; they being the persons entitled thereto; that this defendant never has had possession of any property which he conceives to have belonged to his grandmother, Mrs. Coles, and only received his share as heir and distributee of his grandfather; that the plaintiffs cannot set up any legal claim under the marriage contract alleged by them to have been made by this defendant's grandfather, and he submits it to the Court, whether the same ought to be carried into effect, in equity, to the prejudice of the issue of the marriage, for whose benefit it must have been intended; insisting that, if the same ought to be performed, he, being the sole issue of the marriage, ought to receive the benefit thereof. He further saith, that, as no claim was ever set up under the said letter, either by his grandfather or his widow; and, as the complainants claim under the letter; he conceives himself entitled to, and prays the benefit of the act of limitations."

378 *Garland Anderson and Mary his wife answered separately; the former alleging total ignorance as to Mrs. Coles, or any of her affairs; the latter stating that she did not remember ever to have seen Mrs. Coles's will; had heard that a legacy was left her; but had never received it.

Only one deposition was taken in the cause; and that went to prove the execution of Mrs. Coles's will.

The exhibits were the wills of Walter Coles and Lucy Coles.

The plaintiffs also exhibited the proceedings in the suit in Hanover County Court, on behalf of the defendant Walter, (when an infant about two years old,) against Williams Coles, his grandfather; claiming the benefit of the marriage agreement. The bill in that suit relied upon the letter above mentioned as the foundation of the plaintiff's claim; and the answer admitted the said letter to have been written; but contended that it ought not to be binding; having been produced by a deception as to the amount of Mary Darracott's fortune; and being unreasonable in itself; and that the will of Walter Coles operated as a release from the said agreement.

Sundry depositions were taken, but no decision appears to have taken place.

To the admission of the bill, and proceedings thereon in that suit, as evidence in this, the defendant Walter Coles, by his counsel, filed a written exception.

The suit was dismissed, by order of the plaintiff's counsel, as to the defendants Isaac Winston and Lucy his wife; and, on the 4th of October, 1803, the cause coming on to be heard as to the other defendants, the Court dismissed the bill with costs; from which decree the plaintiffs appealed.

The record also contains a copy of the proceedings in a suit brought in Hanover County Court by the defendant, Walter Coles, against the present plaintiffs and others, for the purpose of setting aside the will of his grandmother Lucy Coles; which suit was removed by a writ of certiorari to the High Court of Chancery, and decided on the same 4th of October, 1803, by a decree dismissing the bill with costs; from which decree no appeal was taken.

In that suit, Mary Payne, one of the defendants, and daughter of Lucy Coles, alleged in her answer, (among other things,) that the said Lucy was twice married; first to Cornelius Dabney, and afterwards to Williams Coles; that, by Cornelius Dabney, she had issue a son, William Dabney, who had issue several sons, of whom Isaac Dabney was the eldest, and he, dying in the life-time of the said Lucy, and after the death of his father, left issue several children, of whom William Dabney was his eldest son; and that the said last-mentioned William Dabney (who is still alive) was, at the time of the death of the said Lucy, and now is, her heir at law; and, "as the estate came by the said Lucy altogether, or as to the greater part thereof, as her inheritance, this defendant is advised that, if the said Lucy had died intestate, and if the said estate had been left to pass by the rules of inheritance at the time of her death, the complainant never could have claimed it as

her heir, so long as any of her descendants of the name of Dabney were in existence."

A number of depositions were taken in that suit; proving, on the one hand, that Lucy Coles's will was duly executed, and, on the other, that she had no idea that the property now claimed belonged to her, but considered it as belonging to Walter Coles, her grandson. No evidence appeared, either to support or contradict the allegation, that "the estate came by the said Lucy altogether, or, as to the greater part thereof, as her inheritance."

Warden, Nicholas and Wirt, for the appellants.

Wickham, for the appellees.

On the part of the appellants, the subjects in controversy were considered in two points of view:

1. As to the real estate, which Lucy Coles held in her own right; and,

2. As to the estate comprised in the marriage promise.

380 *1. It must be clear that, if Lucy Coles held any real estate in her own right, it belongs to her devisees under her will. In the bill exhibited by the appellee Walter Coles to set aside that will, he called upon the defendants, Mary Payne and others, to say, whether the said Lucy Coles in her life-time did not at all times declare that she considered the title to the land and other property which he held, derived from his grandfather, to be completely vested in him, independent of her, and that she could not dispose of the same by will or otherwise. To this question Mary Payne answered that Lucy Coles had said, (and this defendant moreover asserted that the fact was so,) that the greater part of the Virginia estate in question did not belong to him as heir of his grandfather, but was her own inheritance. In this particular the answer was responsive to the bill, and therefore evidence: at any rate, if not direct or conclusive, it was sufficient evidence to have produced a reference to a Commissioner, or a Jury, to ascertain the fact, for the benefit of the infants who were co-defendants. The decree was, therefore, erroneous in not directing such reference.

2. As to the estate comprised in the marriage promise of Williams Coles to Walter, the appellants say that this promise gave to Walter Coles an interest which he had a right to dispose of either by will or contract; that he did dispose of it by his will to his father and mother jointly; that Lucy Coles took it by survivorship, and devised it to them. They do not claim, as being originally the objects of the marriage promise, nor by virtue of consanguinity, but as purchasers under him for whom the promise was made, and who exercised his lawful right in devising it.

On the other side, it was contended, 1. That, since the appellants had no right to sue at law for the property in question, a bill will not lie in their behalf, for the specific execution of the supposed marriage agreement; their claim being highly inequitable: for a Court of Equity has a discretionary power of withholding relief, and will not compel specific performance in a hard case.

381 *2. There is no sufficient proof of

the agreement charged in the bill; for the record from Hanover is not evidence in this suit. It is true that the appellee claims under Williams Coles, the defendant in that suit, and was himself the plaintiff; but the appellants were not parties; neither was Lucy Coles (under whom they claim) a party; and the rule must be reciprocal. The record could not be used as evidence against her; and, therefore, cannot be for her. Besides, a bill in Chancery, when not sworn to, is merely suggestion of counsel, and not evidence against the plaintiff.(a) But, if it were evidence against an adult, it cannot be against an infant; for even the answer of an infant by his guardian, is not evidence against him. And, as to the answer of Williams Coles; he says he was deceived and imposed upon in writing that letter; and his statement must be taken altogether.(b)

3. Admitting the agreement to be proved; the real estate agreed to be settled did not pass by the will of Walter Coles, as he had neither an equitable nor legal seisin; and the personal estate being devised jointly to his father and mother, and being in their possession, the whole vested in the father, in his own right, and as husband, and no part survived to his wife.

4. The birth of the appellee Walter Coles operated as a revocation of his father's will, in reason, though not by authority. A subsequent marriage and birth of a child are a revocation: but no good reason can be assigned why, at common law,* the birth of a posthumous child, for whom no provision is made in the will, should not be considered a revocation, as to such child; especially since, according to the case of Brady v. Cubitt,(c) an implied revocation may be rebutted by parol evidence of the actual intention of the testator. No authority can be shewn against the right of the posthumous child in such a case. In Yerby v. Yerby,(d) it was decided that, where a man had children at the time
382 of the will, the subsequent birth of a child was no revocation; but that case was not like this.

5. Supposing a right to have survived to the wife; the property did not pass, and was not intended to pass by her will.

6. Possession having been delivered to the appellee in her life-time, and retained by him, the appellants are bound by length of time.

7. The appellants as residuary legatees of Mrs. Coles are not entitled to sue on the death of her executor, but the suit can only be maintained by an administrator de bonis non of her estate.

8. If their suit be maintainable, all the legatees of Mrs. Coles should have been parties.

9. The suit has not been properly followed up against Price, the administrator of Daracott, and other defendants.

(a) Doe, lessee of Bowerman, v. Sybourn, 7 T. Rep. 2, 3, Peake's Ev. 54.

(b) Peake's Ev. 55.

*Note. By our act of 1785, c. 61, (see 1 Rev. Code, p. 160, 161.) such is now the law, as to every last will and testament made when the testator had no child living.—Note in Original Edition.

(c) Doug. 3540.

(d) 3 Call. 324.

In reply, to the first of these points, it was said, there was no injustice, or hardship, in the claim of the appellants. The marriage promise was made for the benefit of Walter Coles, between whom and Miss Darracott the match was about to take place; not for the benefit of the issue; about whom nothing was said. Suppose it had been complied with, and a settlement made: Walter Coles might surely have sold or devised the property. In like manner, his devise of his interest in the promise was equally good in equity. The enforcement of marriage articles is uniform in Courts of Equity; the construction there being the same as at law; and this is always done according to the terms expressed in the articles. The cases of settlements are very numerous; and it will be found that the issue is always expressly provided for, where it is intended; and this is done by a covenant that the estate shall be conveyed to the husband and wife for their joint lives, and afterwards to trustees for the benefit of the children of the marriage; to prevent the remainder in their favour from being defeated by alienation. (a) But,

383 if this be not done, no case can be found of a refusal *to decree execution of a marriage agreement, on the ground that the issue was not provided for, and would, therefore, lose the estate. In *Chichester v. Vass*, the suit was brought by Vass, in his own name, and he recovered; though that case was not so strong as the present, in favour of the exclusive right of the husband. There are cases, too, which shew that Courts of Equity are not so active on behalf of the rights of issue, as it is supposed, even where designated in the settlement. (b) Courts do not enter into ideas of abstract justice in enforcing agreements, where parties are explicit. The circumstance, then, that the issue was not provided for, is no bar to our suit.

It is not true, in all cases, that, where an action cannot be brought at law on an agreement, there a suit will not lie in equity for a specific performance. (c) On the contrary, if the contract be good at law, in its origin, and a Court of Law, either from the situation of the parties, or from other causes, can give none or inadequate relief, the discretion of the Court of Equity is at an end, and it must give a decree. But, indeed, the question about specific execution does not occur in this case; the only question being whether Walter Coles had a right to devise his own property.

2. As to proof of the letter: it is faintly denied, or rather admitted, by the answer of the defendant Walter Coles. But if that be not sufficient, it appears from the bill filed in Hanover Court by his guardian, that the original letter was in his hands. The appellees, then, cannot be expected to produce it. The reason of the rule, which regards a bill as merely suggestion of counsel, cannot apply in this case. Neither ought the rule that depositions taken in a suit between different parties are not to be read to prevent our availing ourselves of

the depositions by which the letter is clearly established. The reason of that rule proves it inapplicable. It is because the party against whom such depositions are offered has had no opportunity to cross-examine: but here the case was otherwise.

384 *3. Possession was not necessary to give validity to the devise in the will of Walter Coles; for a possibility, if coupled with an interest, is devisable; (d) and so also is any equitable interest. (e) If the devise had been to Williams Coles alone, it might, perhaps, have operated as a release of his engagement: but, as it is to him and his wife jointly, thereby instituting the right of survivorship between them, (f) it must be considered as conferring a higher title. If it do not convey this equitable estate, there is nothing for it to operate upon: for it does not appear that he had any thing else to devise by the residuary clause in question. And the circumstance of his ignorance of his wife's pregnancy, though not sufficient to vacate his will, is sufficient to indicate his intention to give all his rights to his father and mother.

But it is objected that, with respect to the chattels bequeathed, they vested absolutely in Williams Coles, and did not survive. To this it may be answered, that Walter Coles's claim was not a legal but an equitable one. Williams Coles never complied with, or executed, his agreement. The case, therefore, does not stand precisely on the footing of chattels given to husband and wife absolutely. He did no act to sever the jointure; and unless some act of that kind had been done, it subsisted. In 2 Vern. 683, (g) a case is found where the right of survivorship to the wife took place as to money vested, in mortgages and bonds, in the life of the husband. But if this point be against us, it does not preclude our having an account and decree for the real estate.

4. The fourth point is clearly against the appellees: for although marriage and birth of a child, concurring, revoke a will, (h) either of those events singly does not. (i)

5. It is said that Lucy Coles never considered herself as holding under Walter Coles's will. But it is immaterial what are the impressions of parties of their legal rights: else what would become of the appellee himself, who brought a suit as claiming under the letter which in this suit he disclaims?

385 *6. The 6th objection is founded in an error in fact; for, according to the bill, answer, and evidence, possession was not delivered to the appellee by William Darracott, the administrator, until after the death of Lucy Coles. In fact, she was in possession of all the estate at the time of her death; in what character it is not for the appellee to say.

7. Walter Payne, the executor, having left the Commonwealth; there being no administrator de bonis non; all the estate of

(a) 2 Bl. Com. 171.

(b) *Cann v. Cann*, 1 Vern. 480; *Clarke v. Sampson*, Vezey, 100, 2 Com. Dig. 125.

(c) *Cannel v. Buckle*, 2 P. Wms. 244.

(d) *Jones v. Roe*, Lessee of Perry, 3 T. Rep. 88.

(e) *Perry v. Phillips*, 1 Vezey, jun. 254.

(f) 2 Bl. Com. 181.

(g) *Christ's Hospital v. Budgin* et ux.

(h) *Willcox v. Rootes*, 1 Wash. 140.

(i) 7 Bac. 306; (Gwill. edit.), *Shepherd v. Shepherd*, Doug. 86.

the testatrix being in the possession of the defendant Walter Coles; and the plaintiffs, her legatees, being the only persons entitled to the property in question; they were authorized to sue as legatees.

8. All the necessary parties have been made; for the other legatees claim no title to the property now in question.

9. If the suit has not been properly followed up against Price, the administrator of Darracott, that is no reason for refusing us a decree against Walter Coles. We go against him for the land at any rate; and further proceedings may be directed against Price.

Monday, November 5. The Judges pronounced their opinions.

JUDGE TUCKER. The history of this cause in all its branches, as spread upon the record, is complicated, and most of the facts appear very uncertain.

The bill charges that Williams Coles, grandfather of the appellee, Walter Coles, the elder, being informed that his son Walter was paying his addresses to a young lady whom he supposed to be entitled to a considerable fortune, on the 4th of September, 1768, wrote the following letter to Mrs. Darracott, then a widow, and mother of the young lady.

Coleshill, Sept. 4, 1768.

"Madam,

"My son informs me he is paying 386 his respects to your *daughter which is very pleasing to his mother and me. I intend giving him now to the value of 3,000*l.* current money, in lands, slaves, and other things. At mine, and his mother's death, will leave him the land I now live on, with my possessions in Ireland, and some slaves. I am, &c.

"W. Coles."

It may not be improper here to state, that Coleshill, the place where the writer then lived, is affirmed in the answer of Mary Payne, (the defendant in one of the suits, which were heard together in the Court of Chancery,) to have been the property of Lucy Coles, the wife of Williams Coles, the writer of the letter: and that she, having been married to a former husband named Dabney, had by him a son called William, who dying, has left a son of the same name still living, and heir at law to the said Lucy Coles, his grandmother.

The marriage between Walter Coles and Miss Darracott took effect not long after the date of the above letter. On the 28th of March, 1769, Walter Coles, being ill, made his will, which was proved and admitted to record in October following, by which he gave to his wife the property which he had with her as a marriage portion, and ten pounds for mourning; and then "gave and bequeathed to his father and mother all and singular the remaining part of his estate of any nature or kind soever, to them and their heirs for ever, and constituted his father his sole executor."

A few months after this, Walter Coles, the present appellee, and the only issue of that marriage, was born; not long after which a suit was brought in his name and behalf, by Isaac Winston, his guardian, for a specific performance of the promise

contained in the before-mentioned letter, then in the complainant's possession. Williams Coles, the defendant, put in an answer thereto, admitting the letter; which is sworn to the 17th of September, 1771. The deposition of Elizabeth Darracott, the complainant's grandmother, appears to have

been taken the 8th of February 387 *preceding; but by what authority does not appear. That of William Darracott, her son, appears to have been taken the first of June, 1780. The magistrates certify that it was taken in that suit, "according to law." The suit appears to have been no further proceeded in. Mr. Wickham, of counsel for the appellee, Coles, objected to the admission of that bill as evidence in the cause. This I think brings the case within a narrower compass.

Williams Coles died intestate, leaving the appellee, Walter Coles, his heir at law: he left also two daughters, from one of whom the appellants, John Payne and Mary Jackson, are descended, the latter being the daughter of Mary Payne, sister of John, the other appellant.

Lucy Coles, the widow of Williams Coles, and grandmother of the appellant, Walter, being the mother of his father, and one of the objects of his bounty in his will, survived her husband, Williams Coles, several years and died testate, having made a will bearing date March 5th, 1784, which was proved and admitted to record, May 5th, 1785. By that will, after several inconsiderable legacies, "she gave all the remainder of her estate, also her ready money, to her grandchildren Mary and John Payne; (above named;) also one hoghead of tobacco which was in hand." She also appointed Mrs. Sarah Syme, wife of Col. Syme, trustee and manager for her daughter, Mary Payne (who then resided in Philadelphia) and her children, (John and Mary above named,) and appointed several executors; of whom, as it is said, her grandson Walter Payne alone qualified, and soon after removed himself out of the state, and went beyond seas, without ever possessing himself of any part of her estate, and has never since been heard of.

The bill, which was originally brought by John Payne and Mary Payne, infants, by Mary Payne, their mother and next friend, suggests that William Darracott, the uncle of the defendant, Walter Coles, having obtained letters of administration on the estate of Williams Coles, the deceased husband of Lucy, previously to the probate of her will, had

388 *taken possession of her whole estate, alleging that her slaves and personal estate were the estate of his intestate Williams, her husband, and that her lands had either descended upon his nephew, Walter Coles, as heir at law of the said Williams, or was his right in consequence of the before-mentioned letter. That Darracott, having made a crop on the land, afterwards made such a distribution of the estate, as to him seemed meet, leaving the defendant, Walter Coles, in possession of the land, and far greater part of the other estate. That Darracott is since dead, having appointed the defendant Price (now also dead) his executor, who took upon himself that office.

The appellants in their bill claim the benefit of the marriage promise contained in Williams Coles's letter before mentioned; and also of a verbal promise which they allege to have been made by him to William Darracott, brother to the lady whom Walter Coles the elder married, viz. that, if the marriage should take effect, he would give his son Walter, at the time of his marriage, his plantation in Goochland County, and sixteen or eighteen negroes, with the stock upon that plantation.

The appellee, Walter Coles, in his answer to this bill, says, that it may be true that Williams Coles, his grandfather, did write such a letter as is set forth in the bill; but, for greater certainty, refers to such proof as the complainants can bring concerning the same. He has understood that the said letter was written at the instance of Mrs. Darracott, his grandmother, and that the said Williams was induced to write it by information received from her, or from other relations of his mother, that her fortune was much more considerable than it was afterwards found to be. In various other parts of his answer he speaks of that letter, and of its operation and effect, in such a manner as appears to me to manifest no doubt of its having been actually written, as charged in the bill. He positively denies the verbal promise.

389 *It will be proper to state, that, about six months after the commencement of this suit in the High Court of Chancery, the defendant, Walter Coles, instituted a suit in Chancery in Hanover County Court, against Mary Payne, then a widow, and the appellants, John and Mary, her children, then infants, and others, the object of which was to set aside the will of Lucy Coles, his grandmother, whose heir at law he states himself to have been. This suit, on the petition of Mary Payne, was removed by certiorari into the High Court of Chancery. The defendant, Mary, there filed her answer, in which, among other things, she denies that Walter Coles, the complainant in that suit, is heir at law to her mother, Lucy Coles; William Dabney, her great-grandson, then living, being her heir at law: and avers, that the estate which he has possessed himself of, or the greater part of it, was her mother's inheritance. This answer imports to be the joint and separate answer of herself and her children, John and Mary, above named. Several depositions were taken in that cause, and both causes were set for hearing by the counsel for the appellants. They were heard together, and the Chancellor dismissed both bills. Coles did not appeal from the decree against him in the suit in which he was plaintiff.

Although, by the acquiescence of the plaintiff in the decree pronounced in the last-mentioned suit, the decree in that cause cannot be reviewed here, yet as both suits related in fact to the same subject matter, (being in the nature of cross causes,) and were heard together, I am of opinion that the record and proceedings in that suit are so far to be regarded as a part of the record in that which is now before the Court, as that the evidence arising out of the record

may be applied by the Court in the consideration of the case before us. But, as to the record in the suit brought in Hanover County in behalf of the appellee, Walter Coles, then an infant of two or three years of age, by Isaac Winston his guardian, against Williams Coles, his grandfather, it appears to me that Mr. Wickham's 390 exception to the admission of it as evidence in this suit was very well founded; there being no sort of privity that I can discover between the present appellants and the defendant in that suit. But, although that record, for the reason just mentioned, ought not to be admitted as evidence in this cause; yet it furnishes a circumstance which, I conceive, might have led the Chancellor to direct an issue to determine whether Williams Coles did, or did not, write the letter charged in the appellant's bill; inasmuch as the object of the bill, thus brought by the guardian of the appellee, was to establish the existence of that very letter, and to obtain a specific performance of the promise therein contained, in behalf of his ward: referring to the said letter as then in the complainant's possession, and the answer of Williams Coles to that bill, which answer is on oath, confesses that he did write such a letter.

The letter of Mr. Williams Coles to Mrs. Darracott (as charged in the bill) contains, in my opinion, a promise founded upon a valuable consideration, the proposed marriage between his son and her daughter, which, although not made either to his son, or to the young lady, would, upon their intermarriage, enure to the benefit of both; and might also enure to the benefit of the issue of their marriage, if not performed during the continuance of it; which promise a Court of Equity might enforce in such manner as might be most beneficial for the parties claiming and entitled to the benefit thereof: (a) for, as the former part of the promise contained no specific description of the things meant to be given as a portion immediately upon the marriage, but merely a promise of giving lands, slaves, and other things, to the value of 3,000l.; if Walter Coles had died intestate, leaving his wife and several children living, I conceive that, upon a bill brought by these parties against the grandfather for a specific performance of his promise, a Court of Equity would have decreed such a performance thereof (by apportioning the lands, slaves, and money to be conveyed, purchased or paid,) as would enure to the benefit, not only of the heir at law, but of the younger children, and the widow:

391 *the marriage portion, which she brought, being one of the inducements to the promise; and the younger children entitled to participate, with the heir, in whatever slaves or personal property might have been intended to be given. As to Coleshill, if it belonged to the grandfather, that part of the promise would have enured exclusively to the benefit of the heir at law. So, probably, would the promised possessions in Ireland. With which we have nothing now to do.

Again; as this was a promise which a

(a) See *Tabb v. Archer*, 3 H. & M. 299; *Chichester's Ex'r v. Vass's Adm'r*, ante, p. 98.

Court of Equity would enforce, and execute, so, also was it capable of being released, entirely, by the husband in his life-time; or by his last will and testament wherein he should make such a provision for his widow as she should accept. It might be questionable how far a release made by a last will and testament would in this case have barred the widow's claim to a specific execution of a marriage promise, made in consideration of the portion which she brought to her husband, if she had renounced all benefit under the will of her husband, and brought a bill against his father for the performance of his promise: but, as she did not, but has altogether acquiesced under her husband's will, it is unnecessary to consider that question.

It appears that the devise in Walter Coles's will of all and singular the remaining part of his estate of any nature or kind soever to his father and mother, and their heirs for ever, operated as a release to the father, of the obligation contained in his letter to Mrs. Darracott, as far as the same was not executed, in his life-time, by the gift of lands, slaves, and other things, to the value of 3,000l.: for, quoad hoc, the promise was a chose in action; and, by a bequest thereof to the husband and wife jointly, if the subject thereof had been in the hands of another, and the husband had received it, or reduced it into possession, the whole would have rested in him *jure mariti*. But the husband being the person liable to the action on account of this chose

in action, and the same being given to him and his wife, *the action is thereby extinguished for ever: for he can neither sue himself, nor can his wife sue him: the bequest, therefore, must operate as a release; for if an action be released for an hour only, it is extinct for ever. (a)

But, with respect to the land at Coleshill, if it, in fact, did belong to Williams Coles, the promise, on his son's marriage, vested in him an equitable title to the same on his father's death, which was devisable by his will, according to the authority of *Greenhill v. Greenhill*, 2 Vernon, 679. (b) The same, I presume, may be said of the possessions in Ireland. In this case, then, there being a devise in fee-simple to husband and wife, they were properly neither joint-tenants, nor tenants in common: for, being considered as one person in law, they could not take the estate by moieties, but both were seised of the entirety, *per tout et non per my*; the consequence of which was, that neither husband nor wife could dispose of any part thereof without the assent of the other, but the whole remained to the survivor. (c) So that, whether the Coleshill lands were originally the property of Williams Coles, of his wife Lucy, the fee-simple thereof was in the latter at the time of making her will, and passed to the appellants under the residuary clause in her will. But, as to the slaves and personal property of Walter Coles, the son, I conceive that, if they were reduced into possession by his father in his life-time, as legatee, (and

not merely as executor of his son,) (d) the right of his wife thereto was merged in the marital rights of the husband; and consequently did not survive to her as the right in the lands would.

But here we must consider an objection, upon which the decree of the Chancellor, dismissing the appellant's bill, was probably founded, viz. that the existence of the letter from Williams Coles to Mrs. Darracott, as charged in the bill, is neither admitted by the answer, nor proved by any other evidence whatsoever; and, secondly, that it is not proved that the inheritance of Coleshill was in Mrs. Lucy Coles, instead of her husband.

393 *It is very true that the defendant Walter Coles has not in his answer expressly admitted the letter; neither has he directly or indirectly denied it. He refers, for greater certainty, to such proof as the complainants can bring concerning the same; and, as I have before observed, speaks of the letter in various parts of his answer in such a manner as manifests no doubt of its existence. The appellants, or their counsel, probably relying that the bill exhibited by the appellants' guardian for the purpose of establishing and enforcing a specific performance of the promise contained in that letter, would be admitted as evidence not only to establish its existence, but the fact that it was in the appellee's possession, have not given themselves the trouble to exhibit any other proof of it. Under these circumstances, I doubt whether the Chancellor ought not to have directed an issue to inquire whether such a letter was ever written by Williams Coles, or not. So, also, with respect to the title which Lucy Coles had to the estate at Coleshill, which her daughter Mrs. Payne, one of the defendants in the cross-bill, who answered in behalf of the appellants, her children, as well as of herself, states to have been the original inheritance of her mother. This, as not being responsive to any direct charge in the bill, may not be such evidence as is sufficient to establish that fact; and yet I am inclined to believe it ought to have led the Chancellor to direct an inquiry into the nature of her title to that estate; as also, what other estate real or personal she was seised or possessed of, as her own property, at the time of making her will; the residuary clause of which appears to me to furnish sufficient reason for such an inquiry, and to be sufficient to pass the same to her residuary legatees.

I am, therefore, of opinion that the decree of dismissal ought to be reversed, and the cause sent back, with directions conformable to what I have said.

JUDGE ROANE. The counsel for the appellants rightly considered this case as under two aspects; 1st. As relative to *any right to real property which the appellants, as claiming under old Mrs. Coles, may have by virtue of the letter mentioned in the proceedings; and, 2dly. As to such other real property as that lady might have had a right to as of her own separate inheritance.

As to claims to personal property, it is

(d) See *Wallace v. Talliaferro*. 3 Call, 470.

(a) Co. Litt. 280, a.

(b) *Prec. in Ch.* 330, S. C.; 1 *Pow. on Devises*, 205.

(c) 2 *Bl. Com.* 182.

not shown nor pretended that any such existed in her favour which were not reduced by her husband into possession during the coverture.

With respect to both the first-mentioned descriptions of claims, the first question is, whether the proceedings in the suit brought by the appellee against his grandfather during his minority in Hanover Court, to which his grandmother was no party, and which is particularly objected to as evidence by the appellee, in the court below, were competent to bind her; and I am of opinion they were not, inasmuch as in respect of real property a wife has, as it were, a separate existence, and therefore must be made a party to a suit respecting it before it can bind her. It is also a rule of evidence that no person can take the benefit of the proceedings in any suit, or any verdict, who would not have been prejudiced thereby, if it had gone against him. (a) The consequence of this principle applied to the present case is, that the appellants, as claiming under old Mrs. Coles, cannot give in evidence any of the proceedings in the before-mentioned suit: there is, consequently, no testimony whatever left remaining in the cause, to establish the existence, or the extent of the marriage promise on which the appellants' pretensions are bottomed: the admission of the appellee (from report) of the possibility, or even probability, of such a letter, cannot have such effect, as he expressly calls on the appellants to prove their case in this particular, and in truth admits nothing, as to the purport or extent of that letter. The claim of the appellants, therefore, as arising under the marriage promise, is left without any foundation to rest on.

With respect to a claim of land as of the separate inheritance of old Mrs. Coles, that seems to be a new idea. Such
395 *a claim is not advanced, nor charged, in the bill before us, and is wholly unsupported by any testimony, if we except some general expressions, as to this point, of Mrs. Payne, the guardian of the appellants, in her answer to the suit brought in Hanover Court, to set aside old Mrs. Coles's will: but the rule is well settled, that the answer of a defendant in Chancery is not evidence where it asserts a right affirmatively in opposition to the plaintiff's demand, but that, in such case, he is as much bound to establish it by independent testimony as the plaintiff is to sustain his bill. On this subject I would refer to the case of Beckwith v. Butler, 1 Wash. 224, as expressly, in point. In that case an executor, when called on to account and to say what were the particulars and amount of the estate of the testator, swore that a part of that was his (the executor's) property, by reason of a gift to him by the testator; and there being no other testimony of this gift, it was held by this Court to be monstrous to permit an executor to swear himself into a part of the testator's estate.

I must, therefore, also say that there is no evidence in this cause of any separate property having existed in old Mrs. Coles, in any of the lands of which her husband

was possessed. The general calls in the appellee's bill in Hanover Court which were relied on to justify the answer in this particular, on the ground of its being responsive to the bill, are perhaps far less competent to have that effect than the call for an account was in the case of Beckwith v. Butler.

I am of opinion, therefore, to affirm the Chancellor's decree, upon the testimony in this cause: but, were this testimony even supplied, my opinion on the merits would not be different.

Admitting that, in point of sheer law, the interest of this land would have passed (had the land been ascertained and identified) both by the wills of Walter Coles and old Mrs. Coles, I am strongly inclined to believe that in neither case was it intended. With respect to the former will,

we are now in the dark; but with respect to the latter, while *there is, on one hand, no iota of testimony, to shew that the testatrix ever considered this as her property, there is on the other hand abundant testimony proving that she considered it as the property of the appellant. Under these circumstances, therefore, the aid of a Court of Equity ought not to be afforded to frustrate the expectations of the testatrix herself, as well as wholly to disinherit, in favour of strangers, the only issue of that marriage, to further and promote which the promise in question is supposed to have been made. Besides, independent of all testimony on this point, it is scarcely credible, as upon the face of the will itself, that this property was contemplated: for, while this good lady was particularly parcelling out her shoebuckles and teaspoons, &c. among her descendants, it is hardly to be believed that she would not have also particularly designated this immense interest, had it been so designed or intended.

With respect to directing an issue as to the marriage promise in this case, we are told, 2 Fonb. 494, that, where the evidence is full, the Court will not direct an issue at law at all: and so, e converso, I presume, an issue will not be directed, when the claim is altogether unsupported by testimony, which is the case before us.

As to an issue respecting Mrs. Coles's separate inheritance, we are told in the same book, p. 495, that an issue ought not to be directed to try a title not alleged in the plaintiff's bill: and, although it is added, by way of exception, that if a matter does appear to the Court, at the hearing, which goes to the very right, the Court will sometimes order an issue to try it; yet in the case before us, the matter in question does not legally appear to the Court, by reason of the objection to the affirmative character of the answer in this particular as aforesaid.

JUDGE FLEMING. The claim of the appellants to the estate in controversy is founded on a letter, containing a marriage promise, charged in their bill to have been written by Williams Coles, grandfather of the appellee, and addressed to Elizabeth Darracott, when a marriage was
397 about *to take place between Walter Coles, son of the former, and Mary

(a) 2 Bac. 616 and 1 H. & M. 174, Baring v. Reeder.

Darracott, daughter of the latter, (which marriage took effect,) and the subsequent will of Walter Coles, the son, dated the 28th of March, 1769. And they come into a Court of Equity to assert their right.

The first point made in the cause, by the appellants' counsel in their statement, is of seeming importance, to wit, "that Williams Coles could dispose of no part of the lands which descended to Lucy his wife, by inheritance," or to which she was entitled in her own right "by purchase." But there is neither proof, nor charge in the bill, that any of the lands in the seisin of Williams Coles, were either the inheritance or purchase of Lucy his wife; and all that appears in the record on that subject is in the answer of Mary Payne, to the bill of the appellee to set aside his grandmother's will; wherein she uses this expression—"notwithstanding that the greater part of the Virginia estate, then in question, and now in question in this Court, was the inheritance of the said Lucy;" which I conceive to be a mere idle suggestion that ought to have no effect on the cause.

It is the unanimous opinion of the Court, that no part of the record in the suit brought in Hanover Court, by the guardian of the appellee, in his behalf, in the time of his early infancy, is proper or admissible evidence in this cause: and that being altogether rejected, it may, with propriety, be asked, where is the evidence to be found to prove the existence of the letter, or to substantiate the marriage promise charged in the bill? There is none that proves it to my satisfaction. And, as to directing issues to try whether any of the land in question was the inheritance of Lucy Coles, the appellee's grandmother; and whether such a letter from Williams Coles to Mrs. Darracott, as stated in the bill, did exist; I think it improper to direct an issue to try any fact not charged in the bill; and I am not for hunting evidence that may tend to deprive an only child of the estate and inheritance of his father, in whose

398 *will (it must be obvious to every one) he was pretermitted, solely, for want of knowledge in the father, when he made his will, or at the time of his death, that the mother was in a state of pregnancy. Any other supposition would be against every principle of justice, natural affection, and humanity. Nature has implanted in the birds of the air, and in the beasts of the field, a strong affection, and tender regard for their own offspring. And, had the marriage promise been sufficiently proved, as stated in the bill, I might, perhaps, have been of opinion that, in equity, it ought to operate in favour of any issue that might be the fruit of the marriage; for such issue must, undoubtedly, have been in the contemplation of the parties to the contract at the time of the making it: and I should have made a long pause, before I could have decided in favour of the appellants, to the exclusion of the appellee from any part of the estate, rights and interests of his father. And such have been the impressions of our Legislature on the subject, that, so long ago as the year 1785, in the "act concerning wills and the distribution of intestates"

estates," ample provision is made for posthumous children, and such as are pretermitted in any last will and testament, though in life at the death of the testator. (a)

I am of opinion, upon the whole, that the decree is correct, and ought to be affirmed.

Chapmans v. Chapman.

Thursday, November 8, 1810.

1. Evidence—Record in Another Suit.*—A record of one suit cannot be read as evidence in another, on the ground that the defendant and one of the plaintiffs in the latter suit were parties to the former, and that the same point was in controversy in both; another plaintiff, and the person under whom both the said plaintiffs jointly claim, not having been parties to such former suit.

2. Same—Same—Objection in Appellate Court.—In such case, the circumstance that the "writings and evidences" in the former suit were read at the hearing of the latter, without any exception taken at that time appearing on the record, is no proof that this was done by consent of parties, and does not preclude the objection from being taken in the appellate Court; the defendant in his answer having objected to the admission of the verdict and other proceedings in the former suit, but offered to agree that the depositions only might be read: to which offer no assent appeared on the part of the plaintiff.

Upon an appeal from a decree of the late Judge of the Superior Court of Chancery for the Richmond District, in 399 "a suit brought by Nathaniel Chapman against George Chapman, sen. his uncle, and revived, on the death of the said Nathaniel, by a bill of revivor on behalf of George Chapman, jun. and John Chapman, his brothers and co-heirs.

The original bill stated that Nathaniel Chapman, grandfather of the plaintiff, and a second Nathaniel Chapman, heir at law of that grandfather, had successively died seized and possessed of a very considerable real and personal estate; and that, upon the death of the latter, the same descended to Pearson Chapman, whose eldest son and heir at law the plaintiff was: that Constant Chapman, widow of the elder Nathaniel, (whose children were the second Nathaniel, the said Pearson, George the defendant, and sundry daughters,) prevailed on the said Pearson to convey to the said defendant, by three deeds, a tract of land in Fairfax County, some lots in the town of Alexandria, and a tract of land, lying in Fauquier County, called the Pig-Nut tract; by promising to secure to him, either by will or deed, as much, or nearly as much, of the estate which then was at her disposal, as she should leave to the said defendant; that these deeds expressed the "consideration of natural love and affection, and of ten shillings current money,

(a) 1 Rev. Code, c. 93, s. 3.

*Evidence—Record in Another Suit.—See the principal case cited in *Baring v. Fanning*, 3 Fed. Cas. 794; foot-note to *Paynes v. Coles*, 1 Munf. 373, for the proposition laid down in the first headnote.

The principal case is also cited in *Brown v. Johnson*, 13 Gratt. 660.

paid to the said Pearson by the said George;" but the actual, or principal consideration was the promise aforesaid; that two of the three deeds were acknowledged by the grantor, in open Court, in the year 1766, and duly recorded, but the third (which was for the Pig-Nut tract) was acknowledged in the presence of two witnesses only; that, having seen his mother's will, giving nearly all her estate to her son George, the defendant, the said Pearson obtained that deed, and suppressed it; that the defendant had sued the said Pearson in the County Court of Fauquier, to compel a renewal of that deed; and that suit abating by the death of Pearson, brought another in the High Court of Chancery against George Chapman, jun. his devisee; that, in the year 1793, George Chapman, jun. claiming as devisee, commenced an action of

400 ejection, for the said Pig-Nut tract of land, in the District Court *of Dumfries, against the said George Chapman, sen. who thereupon filed an amended bill, in the High Court of Chancery, praying an injunction to stay proceedings on the ejection; which was granted upon the condition of confessing a judgment at law, and relying upon his equitable title alone; (in which bill of injunction he alleged that the number of witnesses to the deed for the said Pig-Nut tract, not being sufficient to have it admitted to record, it was returned to Constant Chapman to get it more fully authenticated, and was, for that purpose, by her delivered to her son Pearson the grantor; under a solemn assurance from him that he would acknowledge it in the presence of a third witness, and return it to her; instead of doing which, he had destroyed it, on the pretext that he had found a will, executed by her, wherein she had violated her promise, made him when he executed those deeds; having left him no part of her estate, or, at most, a very inconsiderable legacy;) that the said George Chapman, jun. the devisee as aforesaid, answered, and stated the said Pearson's motive for executing the deed which he had afterwards suppressed; that, after taking much testimony on both sides, the Court directed an issue to be tried to ascertain whether the said Constant made the promise before mentioned; and the Jury found that she did; that, thereupon, the Chancellor dismissed the said bill of injunction, and George, the devisee, obtained possession by virtue of the judgment in ejection; which decree of dismissal was affirmed by the Court of Appeals.

The bill proceeded to state that the record in the said suit between George Chapman, sen. and George Chapman, jun. so far as the same concerns the said promise, had an intimate connection with the present suit; the present defendant having been a party thereto, and having had an opportunity of cross-examining all the witnesses: it therefore prays that the said record, with all the exhibits in that suit, may be taken as part of this bill, and that all matters contained therein, tending to the establishment of that promise, may be received as proper evidence in this cause; averring

401 *that the promise so found by the Jury in that suit was never complied with,

but fraudulently broken by the said Constant Chapman; and therefore that the said deeds were obtained from him by fraud.

The prayer of the bill was for a full answer to the premises, a surrender of the deeds, and general relief.

The defendant answered very fully; admitting the possessions, deaths and intestacies of the first two Nathaniel Chapmans, and the descent on Pearson Chapman; but denying that Constant Chapman made the promise mentioned in the bill; and alleging that Pearson Chapman could not have seen his mother's will before he refused to return the deed for the Pig-Nut tract; for the refusal was in 1766, and the will was made in 1767. He objected to the admission of the verdict, and proceedings in the former cause, as evidence in this; but was "willing to consent that all depositions in the said suit should be read by mutual consent; a right being retained to either party to examine such of the same witnesses as are now alive, and to exhibit other new testimony." No such consent appears to have been given on the part of the plaintiff.

To this answer there was a general replication; after which the plaintiff died intestate, and the suit was revived by his co-heirs above mentioned; the bill of revivor, praying "that the suit and the proceedings therein stand revived in their names, and be in the same plight and condition they were in at his death;" and seeking also a discovery of rents and profits. The defendant answered this bill; discovering, in general, the rents and profits, and averring that they arose principally from the possessor's improvements. Commissions were awarded, (without any replication to the last answer,) and some depositions were taken.

The cause came on finally to be heard, "on the writings and evidences formerly read in the cause between two of the parties," (George Chapman, sen. and George Chapman, jun.) "and on the present bill and answer;" on consideration

402 *whereof the Chancellor dismissed the bill with costs; from which decree the plaintiffs appealed.

This case was argued by Warden and Wickham, for the appellants, and Botts and Wirt, for the appellee. Many points were made, and elaborately discussed: but the decision of this Court having turned on one point only, and that being sufficiently illustrated by the ensuing opinion of Judge Tucker, (with which the other Judges agreed,) the arguments of counsel are omitted.

Saturday, November 30. The Judges pronounced their opinions.

JUDGE TUCKER, after stating the case, proceeded as follows.

A preliminary question in this case is, whether the record, verdict, depositions and exhibits in the before-mentioned suit between George Chapman, the uncle, defendant in the present suit, and George Chapman the nephew, one of the parties complainant in the present suit, originally brought by his elder brother Nathaniel, and now revived in the names of himself and his brother John, as co-heirs of Na-

thaniel, are to be considered as evidence in this cause, or not.

The general rule as to giving verdicts and judgments in evidence (a) is, that they are not to be admitted but between parties, or privies; to which general rule there are some few exceptions, one of which is that, where a fact to be proved is such whereof hearsay and reputation are evidence, a special verdict between other parties stating a pedigree would be evidence to prove a descent; for, in such a case, what any of the family, who are dead, have been heard to say, or the general reputation in the family, entries in family books, &c. are allowed. (b) But this is not such a case: hearsay was never yet permitted as evidence

to prove a promise, or the consideration upon which a deed *was made.

403 The general rule, then, must prevail. A corollary from that rule is, that nobody can take benefit by a verdict, that would not have been prejudiced by it, had it gone contrary. (c) According to the general rule and its corollary, Nathaniel Chapman could not avail himself of the verdict between his younger brother, then in full life, and his uncle; for he was not his heir, nor did he claim the lands under him. Neither could he be prejudiced by that verdict between those parties; because he claimed as heir to his father Pearson Chapman, whose heir his younger brother was not, nor, as the laws then stood, could be. Consequently, had there been no abatement of the suit, the record and verdict in the former suit, between George the uncle, and George the brother, could not have been admitted as proper evidence in this suit. Is the case altered by the abatement, and the revivor in the names of George the brother and John his brother, as heirs of Nathaniel? I conceive not. Whatever right George the brother might have, in an original suit between himself and his uncle George, to avail himself of that verdict, he is to be regarded, in the present suit, only as one of several heirs of his brother Nathaniel, all of whom collectively, represent that brother as his heirs, or more properly as his heir; according to the known rule of law that all the heirs in parcenary make but one heir. (d) As, therefore, he comes to revive and continue the suit jure representationis, the suit must remain in the same plight and condition, according to the prayer of his bill of revivor, as if his brother Nathaniel, the original complainant, were still alive.

Again; whatever personal right George might have to avail himself of that verdict, that right was not communicable to another, not claiming as a privy under him. Therefore George, in a joint suit brought by himself and his brother John, who does not claim under him, but independently of him, cannot be entitled, from the bare circumstance of their being joint complainants in the same suit, to communicate

404 *to that brother the benefit of that verdict, to which John was neither a

party, nor privy; and by which he could not possibly have been prejudiced. Therefore, taking the matter either way, I think the record in the former suit inadmissible as evidence in this cause. This case appears to me to be much stronger than that of *Payne v. Coles*, lately decided: in the decision in that case I cheerfully acquiesce, and think it furnishes an additional reason for my present opinion.

As to the depositions; the offer by the defendant to admit them to be read, alone, without the verdict or other parts of the record, not being accepted by the complainant, who insisted on the whole being admitted as evidence, the matter remains as if no such offer was made; and the same reasons will apply for rejecting them, as for rejecting the verdict.

I am therefore of opinion that the decree be affirmed.

JUDGE ROANE would have assigned his reasons for affirming the decree, had they not all been anticipated in the opinion just delivered. He contended himself, therefore, with expressing his concurrence; observing that the record of the former suit was not admissible as evidence in this; and, that being excluded, there was no evidence to prove the promise, alleged in the bill to have been made by Constant Chapman, on which the plaintiffs' claim is founded. Of course, the bill was properly dismissed.

JUDGE FLEMING. It is the unanimous opinion of the Court that the decree dismissing the bill be affirmed.

405

*Mayo v. Turner.

Thursday, October 11, 1810.

Mill-Case—Verdict—Conclusiveness.*—The finding of a Jury, in a mill-case, that "probably the health of certain families who live near the pond will be annoyed by the stagnation of the water," is conclusive against the petitioner.

On a petition of John Mayo to the County Court of Hanover, for leave to erect a water grist-mill, the Jury, on the writ of *ad quod damnum*, found that "it is probable that the health of the families of Lewis Turner and of William Ragland, who live near the pond, if the mill is erected, will be annoyed by the stagnation of the waters." The County Court, "after hearing witnesses, and weighing all the circumstances," decided that leave should not be granted to

***Mill-Case—Verdict—Conclusiveness.**—In *Leigton v. Maury*, 76 Va. 875, the principal case was cited as holding, that if in the opinion of the jury of inquest, the health of the neighbors will not be annoyed by the erection of a milldam, a person supposing himself to be aggrieved thereby may appear as a contestant, and contest the finding of the jury by their evidence. If, on the contrary, the jury reports that the health of any part of the neighbors will in its opinion be affected, or will probably be affected, this is conclusive: no evidence can be adduced to controvert it; for the law says that in such case, the court shall not give leave to build the mill and erect a dam. *Miller v. Trueheart*, 4 Leigh 574, citing the principal case.

See further, monographic note on "Mills and Mill-dams" appended to *Calhoun v. Palmer*, 8 Gratt. 88.

(a) See *Pegram v. Isabel*, 3 H. & M. 200.

(b) *Bull. N. P.* 231, 233.

(c) *Hard. 473*; *Gillb. Evid.* 34, 35, *Viscountess Pembroke v. Currier*.

(d) *Co. Litt.* 163.

build the mill; and that decision was affirmed by the District Court, upon inspection of the record, without hearing evidence; whereupon Mayo appealed to this Court.

Peyton Randolph, for the appellant, on the authority of *Home v. Richards*, (a) contended that the District Court ought to have heard the evidence of witnesses, and not to have determined the cause on inspection of the record only, whereby the appellant was precluded from offering testimony which might have produced a different decision.

Wirt, contra, relied on the 5th section of the act of Assembly, (b) as conclusive for the appellee, and said there was nothing against him in the case of *Home v. Richards*.

Friday, October 12. The Judges pronounced their opinions.

JUDGE TUCKER. The only question in this case is, whether the inquest of the Jury finding that the health of certain persons in the neighbourhood, of whom the appellee's family were a part, will be annoyed by the erection of a mill-dam, &c. be conclusive against the petitioner; or whether it be competent for him to examine witnesses to impugn that finding.

406 *The second section of the act concerning mills, after directing several distinct matters to be inquired of by the Jury, concludes with a direction that they shall certify whether in their opinion the health of the neighbours will be annoyed by the stagnation of waters.

The fifth section enacts, that "If, on such inquests, or on other evidence, it shall appear to the Court that certain inconveniences may result, or the health of the neighbours be annoyed, they shall not give leave to build the mill and dam.

From hence it appears to me that if the opinion of the Jury be affirmative, (as in the present case,) that the health of the neighbours will be annoyed, the same is conclusive against the party applying to build the mill: but that, if it be merely negative, a person supposing himself likely to be aggrieved thereby may controvert such opinion of the Jury by other evidence; and if, by such other evidence, it shall appear to the Court that the health of the neighbours will be annoyed, they are bound by the terms of the law not to give leave to build the mill.

JUDGE ROANE was of the same opinion, and observed that the finding of the Jury was substantially that the health of the neighbours would be injured.

JUDGE FLEMING. It is the unanimous opinion of the Court that the judgment be affirmed.

Saunders v. Wood, Late Governor.

November 2, 1810.

Bond—Joint and Several—How Suit Must Be Brought Thereon.*—Same point decided, as in *Leftwich v. Berkeley*, 1 H. & M. 61.

(a) 2 Call. 507.

(b) 1 Rev. Code, p. 198.

***Bond—Joint and Several—How Suit Must Be Brought Thereon.**—See *foot-note* to *Leftwich v. Berkeley*, 1 Hen. & M. 61; monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

This case depending upon the same principles as that of *Leftwich v. Berkeley*, 1 H. & M. 61, the judgment against the appellants was reversed by the whole Court, (consisting of all the Judges,) for the reasons given in that case.

407

***Sutton v. Mandeville.**

Thursday, October 18, 1810.

Assumpsit—Implied Promise.*—Assumpsit for use and occupation of land, by permission of the plaintiff, lies on an implied, as well as express promise.

Sutton brought an action against Mandeville for the use and occupation of a house in Alexandria. First count, indebitatus assumpsit for the use and occupation of the house for the space of — years: Second count, in consideration that the plaintiff had, at the special instance and request of the defendant, before that time permitted him to hold and occupy another messuage or dwelling-house of the said plaintiff with the appurtenances, &c. and that the said defendant had, according to that permission, held and occupied the same for a long time, to wit, — years, before then elapsed, the defendant undertook, and to the plaintiff faithfully promised, to pay the plaintiff so much money as he reasonably deserved to have, &c. and avers he deserved other five hundred dollars, &c. On non assumpsit pleaded, the Jury found a verdict for the plaintiff for 500 dollars damages, subject to the opinion of the Court whether it was necessary for the plaintiff in that action to prove an express promise to pay some rent for the house: if such promise be necessary, they find for the defendant. The District Court decided in favour of the defendant; from which judgment the plaintiff appealed.

Thursday, October 25. The Judges pronounced their opinions.

JUDGE TUCKER. In considering a similar question to the present in the case of *Eppes v. Cole*, 4 H. & M. 161, (except that in that case an express promise that the plaintiff should be paid to his satisfaction was proved,) I had occasion to cite a passage from Wooddeson's lectures, vol. 3, p. 152, in which he says that such an action as this is maintainable, to obtain a recompense for the occupation of the plaintiff's land, by his permission, where there is no stipulation for any precise rent; and 408 adds, that scarce any *thing is more usual than such an action of assumpsit for the use and occupation of the plaintiff's house by his permission. I cited also the opinion of Judge Buller, in the case of *Birch v. Wright*, 1 T. R. 387, in corroboration thereof. He there said, the action may be maintained either upon an express

***Assumpsit—Implied Promise.**—The action of assumpsit lies at common law, on an implied as well as an express undertaking. *State v. Harmon*, 15 W. Va. 125, citing principal case. See also, monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 183.

See principal case cited in *Bolling v. Lersner*, 26 Gratt. 65.

or an implied promise. I beg leave to refer to the case itself for further particulars; and shall conclude with giving it as my opinion, that the judgment of the District Court is erroneous, and ought to be reversed, and judgment rendered for the appellant.

JUDGE ROANE and FLEMING were of the same opinion.

By the whole Court, judgment reversed, and directed to be entered for the appellant, according to verdict.

Marine Insurance Company of Alexandria v. Stras.

Wednesday, October 17, 1810.

1. *Marine Insurance—Construction—Case at Bar.*—A marine insurance, "at and from Norfolk to Curacao, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond," must be understood as an insurance "at and from Norfolk to Curacao, in the first place, with liberty of going from Curacao to any other island," &c.
2. *Same—Same—Same—Deviation.*—If, therefore, the vessel put into the island of St. Thomas, and thence return to Norfolk, without ever going to Curacao, it is a deviation from the voyage; and, there being no proof that such deviation was occasioned by stress of weather, or other unavoidable accident, the person insured is entitled to no return of premium; such being the terms of the policy.
3. *Same—Same—Same—Evidence—Protest—Quære.*—A protest before a Notary Public, by the master of the vessel, after his return to Virginia, is no evidence in such case: and quære, would such a protest, made at St. Thomas's, have been any evidence; the person who made it being alive, and no impediment to prevent his deposition from being regularly taken?

This was a controversy about a return of premium upon two policies of insurance effected by William Hodgson, on behalf of George Frederick Stras, on a voyage "at and from Norfolk to Curacao, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond;" the first policy being "upon any kind of lawful goods and merchandises, valued at 6,000 dollars, 409 laden or to be laden on board *the good schooner called the Sophia, George C. Leacy, master, and to continue and endure until the said goods and merchandises should be safely landed at Richmond aforesaid;" the second, "upon the body, tackle, apparel and other furniture of the said schooner, valued at 4,500 dollars," and to continue "until the said vessel be safely arrived at Richmond aforesaid, and until she be moored twenty-four hours in good safety."

In each policy there was a clause expressing that "it should and might be lawful for the said vessel in her voyage to proceed and sail to, touch and stay at any port or places, if thereunto obliged by stress of weather, or other unavoidable accident,

without detriment to the insurance." The rate of premium was 27 1-2 per cent. "to return five per cent. if the vessel did not proceed to a second port, and five per cent. (a) if the property returned in the said vessel, (b) and no loss happened: in all cases of return premium, one half per cent. on the sum insured to be retained by the assurers: and it was mutually agreed by the parties, in each policy, that no part of the premium should be returned, or abated, on account of any deviation which should be made by the owners, or their factors, from the present voyage."

Hodgson, the agent of Stras, having, on the 2d of December, 1799, given his own note negotiable at the Bank of Alexandria for the amount of the premium being 2,754 dollars, with James Patten and James Dykes, endorsers, payable in six months; Stras, on the 13th of May, 1800, filed a bill in the late High Court of Chancery against The Marine Insurance Company and the said Hodgson, and obtained an injunction to inhibit the defendant Hodgson from paying 1,825 dollars, part of the said note, until the further order of that Court.

The bill stated that "the said schooner, while on her direct course to Curacao, was chased by an armed vessel, which overtaking her fast, the Captain, to escape being captured, thought it most prudent to put into the island of St. Thomas, then not far to the leeward, where he arrived in 410 *safety; that, on his arrival, he was deterred from proceeding to Curacao, from the information he had, of the way thither being greatly infested with privateers, so as to render it almost impossible to have escaped capture, had he continued his voyage; in consequence of which, and by the advice of his supercargo, he thought it for the benefit of all concerned to remain at St. Thomas's, sell the cargo, and take a return one, on freight, to Norfolk; that he accordingly did so, and left St. Thomas's on the 11th December, and arrived at Norfolk on the 30th of the same month, without touching at any port or place in the West Indies other than St. Thomas's; that the risk on a voyage to St. Thomas's being considerably less than on one to Curacao, the rate of insurance was of course less, and could have been effected at 10 per cent. on the outward voyage, and at the same rate on the return; so that the putting into St. Thomas's was a benefit to the insurers, whose risk was thereby considerably diminished. The plaintiff did not claim any thing on account of that difference of risk, but conceived himself, within the express terms of the policy, entitled to a return of 10 per cent. on the insurance, (which would amount to 1,000 dollars,) and to a farther deduction of premium on the return cargo, as no return cargo was taken on board, and no risk incurred; (this at 13 1-2 per cent. on the said cargo amounts to 825 dollars;) that, on the return of said schooner, it appeared the Captain had neglected to make any protest at St. Thomas's, or immediately on his arrival in this country; and, as it was deemed necessary, for obtaining the return premium, that such proof should first

*See monographic notes on "Insurance, Fire and Marine" appended to Mutual, etc., Soc. v. Holt, 29 Gratt. 512.

(a) If she was not sold (in the policy on the vessel.)
(b) In the policy on the cargo.

be presented to The Marine Insurance Company of Alexandria, the Captain was written to at Norfolk, and requested to make out a protest stating his reasons for going into St. Thomas's; which was accordingly done; as would appear by his protest annexed to and made part of this bill."

William Hartshorne, President of The Marine Insurance Company, answered, for and in behalf of the said company; averring the true intent and meaning of the policies to have been to insure from Norfolk to Curracoa, with liberty, after arrival at Curracoa, to go to any other island

411 in the West Indies, or any one port on the Spanish Main, and at and from thence to Richmond; that so the contract, though a little vaguely expressed, was to be understood among mercantile men; that the going to St. Thomas's, without ever going to Curracoa, was therefore a deviation from the voyage, and a breach of the contract on the part of the insured; on account of which there was, by the terms of the policies, to be no return of premium. "The defendant did not admit that the said schooner while on her direct course to Curracoa was chased by an armed vessel, so as to make it necessary or prudent to put into the island of St. Thomas, or to excuse the said schooner from proceeding to Curracoa; or that any other sufficient cause for the deviation from Curracoa did exist. If any such sufficient cause existed, the usage of trade, for the purpose of obviating frauds, required that the same should have been stated in a regular protest at St. Thomas's immediately after the arrival of the vessel there. And the said protest should have been subscribed by the master and mate, or master and some of the seamen, and duly sworn or affirmed to. Such an instrument would have been entitled to credit; but the protest produced was not entitled to any; having been made at Norfolk, and at a considerable distance of time after the alleged cause of deviation had happened." Neither did "the defendant admit that the said vessel returned empty from St. Thomas's; but saith she brought, in money, 592 dollars; so that a deduction of the premium upon the whole sum home, (viz. 6,000 dollars,) cannot, upon any principle, be correct."

The protest exhibited was the only document (except the two policies) filed in the cause; no depositions being taken. In that instrument, the captain sets forth the circumstances which induced him to put into St. Thomas's, much in the same manner as alleged in the bill; but does not say whether any return cargo was taken on board at that place; though he mentions that it was his intention, when he went thither, to take, on freight, a cargo for the port of Norfolk." He farther says that he sailed from St. Thomas's, and arrived

412 "at Norfolk; but says nothing about returning to Richmond, at which place, according to the policies, the voyage was to be ended.

The cause was heard on the 8th of March, 1804, and the late Chancellor was of opinion that the true construction of the policies was that the schooner Sophia, and goods and merchandise laden or to be laden on

board of it, were insured in a contemplated voyage from Norfolk to Curracoa, or some other island in the West Indies, and any port on the Spanish Main and back again; that therefore the diversion to St. Thomas's was no deviation from the voyage. He was also of opinion that the phrase "goods and merchandise laden or to be laden" was to be construed as applying to a return cargo; and that as no return cargo was taken on board, there ought to be a deduction of premium on that account. He therefore made the injunction perpetual; except as to the 1-2 per cent. which the company, by a clause in each policy, was authorized to retain: from which decree the defendants appealed.

Call and Williams, for the appellants, relied on two points; 1. That the vessel was bound to go to Curracoa, before she was authorized to go to any other island in the West Indies. Without this construction, that part of the policy which mentions a second port (after going to Curracoa) would be senseless. The general course of decision is that, where several ports are mentioned to which the vessel may go, but the order in which to take them is not prescribed, their geographical position furnishes the rule; but, where a particular order is prescribed in the policy, it must be pursued. (a)

2. The protest of the master, even if made at St. Thomas's immediately on his arrival, would not have been evidence; (b) the person who made it being living. But if any credit should be given to any protest, none is due to the protest in this case, which was not recent; nor immediate; 413 *but since this controversy began.

Even the deposition of the master, taken ex parte, would not be evidence.

Wickham, contra. The vessel's going to St. Thomas's was no deviation. The contract did not require that she should go to Curracoa first; and, that being silent, she had a right to touch at St. Thomas's, which is in the direct route to Curracoa. But, indeed, she was not bound to go to Curracoa at all; and, upon failing to do so, might claim a return of the premium. There are different opinions, whether the insured has a right not to proceed on the voyage: but the law is laid down that he has such right; and, in case he chooses to exert it, the premium ought to be returned; for risk is the essence of the contract; (c) and it is not necessary to stipulate for a return of premium, where ex æquo et bono it ought to be returned. (d)

As to the evidence. The protest was read at the hearing, and not excepted to. If an objection had been made, we might have regularly taken the deposition of the captain. The protest, therefore, ought to be received. But if it be not evidence, the only effect should be to open the cause, and give the parties leave to take their testimony again. As the case now stands, rejecting the protest, there is no proof of the deviation; for the policies prove nothing.

(a) *Beatson v. Haworth*, 6 Term Rep. 581. *Marshall on Ins.* p. 395, 396.

(b) *Senat v. Porter*, 7 Term Rep. 158, *Marsh.* 616.

(c) *Marshall*, 563, 564.

(d) *Marshall*, 565, 568, 6 Burr. 1337, *Stevenson v. Snow*.

ing;(a) and then there is nothing to prevent a return of premium.

Argument in reply. The principle, that, where there is no stipulation to the contrary, and the risk is not run, the premium shall be returned, does not apply to this case: for here the stipulation is express, that, in case of deviation, there should be no return of premium.

The plaintiff states in his bill that he went to St. Thomas's from necessity. The answer admits that he went there but denies the necessity. The plaintiff then must prove it: the burden of proof does not lie on the defendants. The evidence on the part of the plaintiff being altogether illegal, it was not necessary for us to make an objection in the Court below: for the rule is

414 *that, where a party means to object "to a paper which on the face of it appears to be evidence, he must shew his objection: but that is not necessary as to a paper which, on its face, is no evidence. Mr. Wickham's position that the cause should be sent back, and leave given to the parties to take new testimony, would produce an endless circle of litigation. Where the parties are prepared and go to trial, this Court must take the record as it stands, and, if no evidence appears in support of the decree, it must be reversed.

Friday, October 26. The JUDGES FLEMING and TUCKER (JUDGE ROANE not sitting in the cause) pronounced their opinions.

JUDGE TUCKER. This was a bill brought by the appellee Straas, for a return of premium on the schooner Sophia and her cargo "at and from Norfolk to Curacao, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond."

The bill suggests that the schooner, while on her direct course to Curacao was chased by an armed vessel, which overtaking her fast, the Captain, to escape being captured, put into the island of St. Thomas, then not far to the leeward, where he arrived in safety; that he was deterred from proceeding to Curacao from information that the way thither was greatly infested with privateers, so as to render it almost impossible to escape capture. He therefore sold his cargo at St. Thomas's, and took a return cargo on freight to Norfolk, where he arrived on the 30th of December, 1799, without touching at any port or place in the West Indies, other than St. Thomas's. There was a condition in the policy for a return of premium in case the Sophia should not proceed to a second port; and also for a further return if the property (the cargo) should return in the vessel, and no loss should happen.

The policies contain two other material clauses; "first, that it shall and may be lawful for the said vessel in her

415 *voyage to proceed and sail to, touch, and stay at any port or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to that insurance." Secondly; "it was mutually agreed by the parties that no part of the premium should be returned, or

abated, on account of any deviation which shall be made by the owner, or their factors, from the present voyage."

The sole question then is, was, or was not, the going into St. Thomas's a deviation?

If the case stated in the bill be made out, there is no ground to call it a deviation; the first recited clause in the policy expressly providing, that if thereunto obliged by stress of weather, or other unavoidable accident, she might lawfully go into St. Thomas's (or twenty other different places, under the like circumstances) to avoid the danger.(b) The case is expressly within the terms of the policy.

But what is the proof of this danger, and necessity? Not the complainant's bill surely! So much of it as relates to this necessity is expressly denied by the answer. There remains then no shadow of proof of such necessity but a paper purporting to be the copy of the Captain's protest, made in Norfolk (not St. Thomas's, nor corroborated by the oaths of his mate and seamen, as is usual when a vessel is forced out of her course into a different port) on the 5th day of February, 1800, near six weeks after his arrival in Norfolk. Whatever may be the effect of a protest taken in a foreign country, to which not only the master but the mate and mariners of the vessel may make oath immediately after their arrival in a port into which they have been driven by stress of weather, or by an enemy, according to the ordinary usage in such cases, (on which I mean not to give any opinion,) such a protest as this, taken at so remote a period of time, and in a different port and country from that where the vessel first arrived, after the insurance upon her could operate, appears to me to be entitled to no more respect as evidence, in a case of this nature, than any other voluntary affidavit, made by a person re-

specting any controversy which

416 *had happened, or might happen, between any persons whatsoever. Therefore, without relying on the decision in the case of *Senat v. Porter*, 7 T. Rep. 158, I am decidedly of opinion that this protest is no evidence at all in the present case. The consequence is, that the complainant has failed to prove his case to have been such as to entitle him to the benefit of that clause of the policy which would have justified his sailing into, and staying at, St. Thomas's, if the facts stated in his bill had been supported by proper testimony. The case, therefore, falls under the last clause of the policy before recited, by which it was agreed that no part of the premium should be returned or abated on account of any deviation which should be made by the owners, or their factors, from the intended voyage; unless the description of the intended voyage contained in these words of the policy, viz. "at and from Norfolk to Curacao, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond," will apply to the voyage which has been performed.

Mr. Wickham, for the appellant, con-

(b) See *Marshall on Insurance*, 409. *Park on Insurance*, 308.

tended that the true intent and meaning of the policy was, that the schooner might lawfully go to any two ports in the West Indies, of which Curracoa must be one; but that she was not bound to go first to Curracoa, but might go first to any other port in the course of the voyage to Curracoa, and then proceed to Curracoa, from whence she was in that case to return back to Richmond. But the words of the policy do not admit of that construction; for the word thence refers to the last-mentioned description contained in the policy, viz. any other island in the West Indies, or any one port on the Spanish Main, and at and from thence (i. e. such last-mentioned island or port on the Spanish Main) back to Richmond. The sense is so clear that I am somewhat surprised that so much stress was laid upon that point. The *Sophia* did not then proceed upon the voyage described in the policy. This was a deviation;

417 by which *is meant a voluntary departure, without any necessity, from the usual course of the voyage insured. (a) From the moment this happens the voyage is changed, the contract (of risk) is determined; the insurer being discharged from all subsequent responsibility; yet he is entitled to retain the whole premium; for the effect of a deviation is not to vitiate or avoid the policy, but to determine the risk from the time of the deviation. The proper course of the voyage being once interrupted cannot be resumed in the eyes of the law. The shortness of the time, or of the distance, of a deviation makes no difference as to its effect on the contract. Whether it be for one hour, or a month; or for one mile, or one hundred, the consequence is the same. (b) The true reason (as it is said) why a deviation discharges the insurance, is not the increase of the risk, but, that the party contracting has voluntarily substituted another voyage for that which was insured. (c) So, here, the *Sophia*, by returning back from St. Thomas's (supposing her going into that port was matter of necessity to avoid capture, and therefore justifiable) to Virginia, instead of proceeding to Curracoa, substituted another voyage from that which was insured, which vitiated the policy from that time. So that the underwriters were not only discharged from all future liability, or risk upon the policy, but, also, from the condition of an abatement, or return of premium on any account whatsoever.

But this is not the only deviation that the *Sophia* made from the intended voyage, if the charges in the bill be evidence against the complainant, or the captain's affidavit, or protest, as it is called, be admissible evidence in this cause. The voyage intended and insured against was from Norfolk to Curracoa, &c. and back to Richmond. But, instead of returning back to Richmond, the *Sophia* took in a freight at St. Thomas's for Norfolk, and there discharged her cargo. It does not appear she ever did return to Richmond: if she did, the taking in a freight, and going into Norfolk to discharge it, was such a

418 deviation, as, from that *time, (if nothing which happened before had done so,) discharged the policy, by substituting an entirely different return voyage from that insured. The cases of *Fox v. Black*, *Townson v. Guyon*, and *Elliott v. Wilson*, cited *Marshall*, *ibid.* 394, and *Park*, *ibid.* 295; and that of *Beatson v. Haworth*, cited *ibid.* 396, and 298, and reported in 6 T. R. 531; with the case of *Clason v. Simmonds*, there cited by Judge Lawrence, all going to the same point, are conclusive in my opinion to shew that the taking in a freight for Norfolk, instead of Richmond, was the substitution of a different voyage from that insured against, and a voluntary abandonment of the terms and condition of the policy. I am therefore of opinion, that Mr. Stras was not entitled to any return of premium; but that his bill ought to have been dismissed: consequently, that the decree be reversed, and the bill now dismissed.

JUDGE FLEMING. It is a sound general principle that whoever comes into a Court of Equity to ask relief against any part of his contract, ought to shew by the clearest evidence that he has done every thing on his part to entitle him to such relief.

There can be no doubt but the *Sophia's* having put into the port of St. Thomas's, before she arrived at Curracoa, the first destined port of her voyage, was a deviation from her course; which would have been justified, had there been legal evidence that it was to avoid capture by an enemy, as alleged by the appellee; but, there being no such evidence, or of any other justifiable cause, proved, or even alleged, the deviation must have the same effect upon the insurance if she voluntarily had gone a hundred leagues out of her direct or usual course. The consequences of such deviation, and the authorities on which they are founded, have been so fully stated by Judge Tucker, that I shall only add my concurrence in the opinion that the decree be reversed, and the bill dismissed with costs.

419

*Yancey v. Hopkins.

Thursday, October 18, 1810.

1. Tax Sale—Land Listed to Wrong Person*—Equitable Relief.—If land be listed by the Commissioner of

*Tax Sale—Land Listed in Wrong Name—Effect.—If land be listed by commissioners in a wrong name, and sold in that name for nonpayment of taxes, the sale will not affect the title of the true owner. As so holding, the principal case is cited in *Nalle v. Fenwick*, 4 Rand. 593. The principal case is also cited in *Nalle v. Fenwick*, 4 Rand. at pp. 591, 593. See principal case also cited in *Balley v. McClaugherty*, 48 W. Va. 546, 37 S. E. Rep. 702.

†Same—Same—Equitable Relief.—In *Carroll v. Brown*, 28 Gratt. 798, the principal case was cited with approval to the point that, if land be listed by the commissioner of the revenue to a wrong person, sold by the sheriff as the property of such person, and conveyed by deed to the purchaser, the proper resort of the rightful owner for relief is to a court of equity, by which the deed may be cancelled and a release or conveyance of the land decreed. In this case (*Carroll v. Brown*, 28 Gratt. 798), it was

(a) *Marshall on Insurance*, 392; *Park*, 294.(b) *Marshall*, *ibid.* 392, 393, 394; *Park*, *ibid.* 294, 298.(c) *Marshall*, *ibid.* 394, 401; *Park*, 294.

the revenue to a wrong person, sold by the Sheriff as the property of such person, and conveyed by deed to the purchaser: it seems that the proper resort of the rightful owner for relief is to a Court of Equity, by which the deed may be cancelled, and a release, or reconveyance of the land decreed.

2. Statute—Forfeiture—Strict Pursuance.—An au-

decided that a court of equity has jurisdiction of a suit brought by the owner in possession, to set aside a deed which has been put upon record, whereby the complainant's land has been wrongfully conveyed to a purchaser at a tax sale. In *Stearns v. Harman*, 80 Va. 48, the court, after expressly affirming the rule laid down in *Carroll v. Brown*, 28 Gratt. 791, held that under Code 1873, ch. 31, §§ 4, 5, the proper remedy is by an action of ejectment where the owner holds the legal title to the land, but has not actual possession, and another asserts an adverse claim to the land but has not actual possession of it; and that, in such case, equity has no jurisdiction.

The jurisdiction of courts of equity to remove clouds from title, where the party complaining has no adequate remedy at law, is well settled. This is particularly the case where he is the owner of the legal title, and is in possession of the land upon the title to which the cloud rests. *Va. Coal & Iron Co. v. Kelly*, 93 Va. 239, 24 S. E. Rep. 1020, citing *Otey v. Stuart*, 91 Va. 714, 22 S. E. Rep. 513; *Stearns v. Harman*, 80 Va. 48; *Carroll v. Brown*, 28 Gratt. 791; *Hale v. Penn.*, 35 Gratt. 261, and *Yancey v. Hopkins*, 1 Munf. 419. See principal case also cited on this point in *Burlew v. Quarrier*, 16 W. Va. 152.

Tax Sales—Parties Claiming under—What They Must Show.—Few principles of law are more firmly settled, and from their influence on the transactions of others, more widely known than that where the validity of a deed depends upon an act *in pais*, the party claiming under it is bound to prove the performance of the act; that, in the case of a naked power not coupled with an interest, the law requires that every prerequisite to the exercise of such power should precede it: that the claimant under a sale made to enforce a forfeiture must show that the law has been strictly complied with; that the recitals in a deed of an officer selling for taxes, are not even *prima facie* evidence of the regularity of his proceedings, and that these facts must be proved by evidence *aliunde*. *Flanagan v. Grimmet*, 10 Gratt. 426, citing principal case; *Christy v. Minor*, 4 Munf. 481; *Nalle v. Fenwick*, 4 Rand. 586; *Allen v. Smith*, 1 Leigh 281. But in this case (*Flanagan v. Grimmet*), this rule, so long established, was reversed, and, instead of making it incumbent upon the claimant under a sale of delinquent land to show that every prerequisite to the sale has been complied with, it made the deed itself *prima facie* evidence of such compliance, and sufficient to pass the title of the former owner, until it is successfully impeached by proof of irregularity coming from the contesting party. See *foot-note* to *Flanagan v. Grimmet*, 10 Gratt. 421, and cases there cited. *Dequaise v. Harris*, 16 W. Va. 352, 353, cites the principal case for the same proposition for which it is cited in *Flanagan v. Grimmet*, 10 Gratt. 426.

It is well settled that he who claims under a forfeiture must show that the law has been exactly complied with. *Boon v. Simmons*, 88 Va. 265, 13 S. E. Rep. 430, citing principal case; *Willsons v. Bell*, 7 Leigh 22; *Nalle v. Fenwick*, 4 Rand. 586; *Allen v. Smith*, 1 Leigh 281, 248; *Jesse v. Preston*, 5 Gratt. 120.

Statute—Forfeiture—Strict Pursuance.—Any authority given by law to any officer, whereby the estates or interests of other persons may be for-

feited or lost, must be strictly pursued in every instance.

3. Tax Sale—Infant's Land Wrongly Listed—Suit Six Years after Majority.—The land of an infant being, by mistake, listed by the Commissioner of revenue as the property of another person, and sold, as such, for taxes, in December, 1786; being bought by the Deputy Sheriff, who sold it; conveyed to him by the High Sheriff in February, 1795; and afterwards sold by the Deputy Sheriff; the right of the infant was established against the last purchaser; (who bought with full notice of all the circumstances;) notwithstanding the suit was not brought until six years after the plaintiff attained his full age.

Lund Hopkins of the County of Powhatan, on the first of March, 1799, filed his bill in the late High Court of Chancery, against Robert Yancey and Richard Faris; setting forth that "Joseph Hopkins, father of the plaintiff, was in his life-time seised in fee of a tract of land in the County of Louisa, containing by estimation 400 acres, and, being so seised, departed this life in the year 1780, having first made his last will, by virtue of which the plaintiff became entitled in fee to the whole of the said land, after deducting his mother's dower; that, while the plaintiff was an infant, (but in what year he could not ascertain,) the defendant Robert Yancey, a Deputy Sheriff of the County of Louisa, pretending that taxes were due on the plaintiff's part of the said land, affected to expose the same to public auction, to raise the amount of those taxes; that no such taxes were due; or, if any, not more than 3l. or 4l.; that no notice was given of the time and place of sale; or, if any was given, it did not describe to whom the land belonged; that no persons were present, except Robert Yancey himself, and two other persons, (neither of whom bade,) when the plaintiff's part aforesaid, being worth from four to six dollars per acre, was struck out, by the said Yancey's direction, to himself, at the price of 4l. or some other equally trifling; that he not only acted fraudulently, but never was authorized in his conduct by the High Sheriff whose Deputy he was; that, combining with the defendant Faris, he had pretended to sell the said land to the said Faris; that both of them knew that the plaintiff was an infant at the time of the sale by auction, and did not exceed twenty-six years of age on the 23d day of 420 November, *1798; that the plaintiff, in the year 1785, had removed from Louisa to the City of Richmond; that no application was ever made to his guardian, Anthony Hayden, for any taxes due from

feited or lost, must be strictly pursued in every instance. As so holding, the principal case is cited in *Carroll v. Brown*, 28 Gratt. 798.

Where a naked power is given by law to an officer or other person, that power must be strictly pursued, especially if such proceeding involves a forfeiture, and it devolves on him who claims a right under the exercise of such power, to show that it was, in all respects, exactly pursued. *Nalle v. Fenwick*, 4 Rand. 586, citing principal case. See also, *foot-note* to *Jesse v. Preston*, 5 Gratt. 120.

him; that he had never returned to live in Louisa; that Faris was well acquainted with all the circumstances of the said sale at auction; he leaving, at the time, on that part allotted to the plaintiff's mother for dower; that there was sufficient personal property on the said land to satisfy any taxes due thereon; that the said Faris had paid little or no money for the purchase made by him of the said Yancey; and that they both had derived considerable profits, having been in possession of the land ever since the auction aforesaid."

The bill therefore prayed "a perfect answer, from both the defendants, as to the premises; that all official or other writings, whether deeds or obligations, which had passed between them concerning the said land should be directed to be cancelled; that they should be decreed to surrender to the plaintiff possession of the land, and account with him for all rents and profits arising therefrom; or that he might receive any other or further relief more agreeable to equity."

The separate answer of Robert Yancey admitted "that he sold a part of the tract of land mentioned in the bill for the taxes due thereon for the years 1784 and 1785; but averred that he was fully authorized so to do both by law, and by his principal the High Sheriff; that he this defendant had paid the taxes of said land into the treasury, or that there was a judgment against his principal, he does not now recollect which, but inclines to believe the latter; that there was no property that this defendant knew of on said land, of the estate of Hopkins, whereof these taxes could be made; and, as the law then stood, there was no other alternative but to sell a part of the land for the taxes due; that the quantity of non-resident lands in the County of Louisa is very considerable; that, at the rate of taxation on lands at that time, the amount thereof, being unpaid, would have completely ruined this defendant, who was then just beginning to
421 act for himself; *that the land was sold in the name of Elizabeth Hopkins; that, in that name, it was charged by the Commissioners of the land tax, who by law make out the book for the Sheriff; that there was no land charged to Joseph Hopkins, or Lund Hopkins; that, by the will of Joseph Hopkins, then deceased, this land was left to his wife Elizabeth Hopkins,* who, at the time the assessment was made, occupied and possessed the same; consequently, the land was charged in the proper person's name; at all events, the land owed taxes to the Commonwealth, and it was the duty of the owner to come to the Sheriff and pay it."

This defendant further said, that "the land was advertised four weeks in the Virginia Gazette, according to law; nay, that it had been twice advertised; that, on the last day, no person coming to pay the taxes, and this defendant knowing not to whom to apply, the said Elizabeth Hopkins having intermarried, and gone off, God knows where, the land was exposed to sale,

and sold on one month's credit at the most noted place on the premises; that there were several persons present, either of whom this defendant believes could have purchased if they chose; that he did not wish to buy himself, and requested the bystanders to bid; none of whom making a bid, it was, after crying a considerable time, knocked out on this defendant at his bid; that he then gave notice that he would give up his purchase, if the executor of Hopkins, one Anthony Hayden, would come and pay up the taxes and expenses of selling the land a short time; that he believes that said Hayden was advised thereof, for that he made application some time after (this defendant thinks about six or eight months) to know if the land would then be given up if the taxes were paid; that this defendant then offered to give up the same if he, Hayden, would repay him what he had advanced, and his expenses, &c.; that Hayden said he had no estate of Hopkins in his hands, but would try to settle it
speedily; but so it is that this defend-

422 ant has not *received one single penny, nor has said Hayden communicated with him about the land since; nor has any other person;" that, after waiting several years, "and having the annual taxes to pay thereon, this defendant had a deed made to him by the High Sheriff therefor, and, to indemnify himself for the original purchase, and the taxes which he had paid for about fourteen years, sold the same to the other defendant."

This defendant insisted "that the lands of infants were not exempt from the payment of those taxes more than any other person; there being no provision in their favour in the law as it then stood;" that from an acknowledgment in the bill it appeared "that the complainant had been of age more than six years in November, 1798; which is double the time the law, as it now stands, allows infants to pay the arrears of taxes; yet, during all this time, the complainant had not applied to this defendant to repay him the taxes which he had paid on said land: if an application of this nature had been made even three years ago, this defendant is confident that he would have given up the land upon the payment of the taxes, &c.; that this defendant did not have a deed executed until the year 1795; one reason for which was, that he did not wish to hold the land; but, in all this time, no person coming to repay him what he had actually advanced, he then determined to have a deed therefor." He farther denied having received any profit or emolument whatever from the said land, except the money arising from the sale thereof; averring that he always considered the land as poor, and of little value, and the rent no object; "the plantation which was on it being old field, and no improvements to accommodate a family."

The defendant Richard Faris in his answer averred "that he conceived himself a fair and bona fide purchaser;" that he was present at the sale by auction, relative to which, and to Yancey's declaration that he would give up the land, on receiving the taxes, &c. he mentioned the circumstances nearly according to Yancey's own state-

*Note. This allegation in the answer was plainly incorrect: the land being devised in the will to Lund Hopkins only.—Note in Original Edition.

ment; "that there was no property of the complainant, or of the estate of Joseph *Hopkins, deceased, on said land, at the time of the sale, nor for some considerable time before, whereof the taxes could be made; that Anthony Hayden lived out of the County of Louisa; that this defendant is well assured that the said Hayden knew of the taxes being due; that the land had not been occupied by any person since the sale, until the last year; except a part which Anthony Hayden rented out, and for which payment was made to him, and the complainant; that, after the death of Joseph Hopkins, Elizabeth Hopkins, widow of said Joseph, resided and lived on the said land, and held the whole tract as her own until she intermarried with one Samuel Baber; after which she took her third part of said land."

A number of depositions were taken and filed, from which, taken together, it appeared that Yancey's account was in substance correct, of the manner in which the sale by auction was conducted; of the declaration made by him at the time, and of the subsequent transactions; that, at the time, and before the sale took place, the said Yancey inquired of the persons present what part of the land would be least injurious to the tract, to be sold off for the taxes thereof; that the east end was generally agreed to be that part, and, accordingly, the part sold was laid off on the east end; that the land in question (together with many other tracts) was first advertised to be sold at Louisa Court-house on a Court day; but none were sold; it being doubtful whether a sale at the Court-house would be legal; that Charles Yancey, sen. one of the Deputy Sheriffs consulted Edmund Randolph, then Attorney-General; and, upon his advice, the sales were appointed to be upon the respective premises, and accordingly advertised as long as the law directed in Thomas Nicholson's paper, printed in the City of Richmond, specifying the day of sale of each tract; (which, as to the tract in question was the 19th of December, 1786;); that the same advertisement was set up at the Court-house, at Trinity Church, in the said County, and at other public places;

(but it did not appear in evidence that it was set up at the Church *of Frederickville Parish, in which the land in controversy in this suit lay; which Church was in the County of Albemarle, but was nearest to the said land, and was the one that the Episcopalians resorted to from the neighbourhood thereof;); that there was no personal property on the land belonging to the estate of Joseph Hopkins, but there was property of Richard Faris, the defendant, who then lived on that part of the land which was allotted to the widow as her dower, having (before the sale for taxes) purchased her dower-land of Samuel Baber or Beaver, her second husband, after residing for some time thereon as a tenant; that, about the time the said Faris bought the land in dispute, he was heard to say "he expected to be sued for said land, but that he bought it to spite the rascal," alluding to Lund Hopkins, as a witness supposed.

It was also proved by Captain William Hughes, that, about the time of the sale,

by auction, the price of unimproved lands was exceedingly low, and that sales were difficult to be made; that lands of a middling or lower class would scarcely sell at any price; that the land in dispute was poor, and situated in the upper end of the County, where lands were more unsaleable than lands nearer the centre; but, on the other hand, it was proved by Paul Jones, (third husband of the widow Hopkins,) that there is a considerable proportion of uncleared land on the tract in dispute; three-fourths, if not more, of which is prime tobacco land; and that there is a considerable proportion of the uncleared as well as the cleared land very valuable for meadow; that, in his opinion, the whole of the land in controversy is worth five dollars at least per acre; and that he knows of land adjoining thereto, and by no means superior in quality, that is now held up at forty shillings per acre." It appeared moreover from the deposition of Charles Yancey, jun. that the sales for taxes were generally favourable to the purchasers, owing to the scarcity of money; and the people, not having been accustomed to such sales, seemed to want confidence in them. It was *also proved that Anthony Hayden, the executor, lived in Campbell County at the time of the sale; and that the plaintiff, Lund Hopkins, was then an infant.

Among the exhibits in the cause were, 1. The will of Joseph Hopkins; 2. The deed from Waddy Thomson, late Sheriff of Louisa, to the defendant, Robert Yancey, for the land in controversy, dated the 19th of February, 1795; 3. A writing dated September 10, 1785, signed (but not sealed) by Samuel Beaver, obliging him, his heirs, &c. to make a good right, for his wife's life, to Richard Faris, to 133 1-3 acres of land; being the place "where" the said Faris rented of Samuel Beaver, and likewise the place whereon the said Beaver lives;" 4. A certificate of the Clerk of Louisa, proving that on the 9th of September, 1782, the Court appointed Commissioners to lay off and allot to Elizabeth Beaver her dower in the estate of her late husband Joseph Hopkins; and that, on the 10th of April, 1799, their report was returned and ordered to be recorded; and, 5. A certificate of the auditor of public accounts, that the Sheriff of Louisa was debited with the revenue and certificate taxes for the years 1784, and 1785, on a tract of land in said County containing 400 acres, in the name of Elizabeth Hopkins, and that judgment was rendered on behalf of the Commonwealth against the said Sheriff for the certificate tax of 1784.

September 27, 1804, the Court of Chancery "being of opinion that the sale of the land which the plaintiff claimeth, by the defendant Robert Yancey, was a fraud, adjudged and decreed that the indenture among the exhibits between Waddy Thomson, of the one part, and the defendant Robert Yancey, of the other part, be cancelled, and that the other defendant, who was privy to the fraud, and a participator in the crime, release to the plaintiff all his, that defendant's, right and title in and to the land aforesaid; and that the defendants resign to the plaintiff the possession of the

said land, and pay to him the profits thereof, since the sale thereof, after deducting the taxes then due for the same to the public; *of which profits one of the Commissioners is directed to examine, state, settle, and to the Court report an account; and the Court ordereth that a copy of this decree be recorded in the County Court of Louisa."

From which decree the defendants prayed an appeal, which was allowed them.

Nicholas and Botts, for the appellants.

Peyton Randolph and Hay, for the appellee.

On the merits of this case, all the points in controversy are so fully discussed in the ensuing opinions of the Judges, that a due regard to brevity compels the reporter not to insert the arguments of counsel.

As to the jurisdiction of the Court, it was contended for the appellants, that the plaintiff had a plain remedy at law by ejectment for the land, and trespass for the meane profits; there being no proof of fraud; and the only ground of the relief sought being, that the sale was illegal.

But, on the other side, it was said, 1. That the mistake committed by the Commissioners in listing the land to Elizabeth Hopkins, the widow, when, in fact, it was property of Lund Hopkins, her son, could be corrected in a Court of Equity only; that the Sheriff was bound to sell according to their lists; and therefore the conveyance from the High Sheriff to the Deputy was good at law, though not in equity. At any rate, it was doubtful whether the plaintiff could have succeeded in his action of ejectment, in opposition to that conveyance; and that was ground sufficient for a Court of Equity to entertain jurisdiction. (a)

2. It was insisted, that the deed was fraudulently obtained by Yancey from the High Sheriff; for, in a technical sense, fraud may be committed without any moral motive. He might have thought that he had complied with the requisites of the law in the sale of the land, and told the High Sheriff *so: but this representation was incorrect, and a deception, even if not intended as such.

Wednesday, November 7. The Judges pronounced their opinions.

JUDGE TUCKER. This was a bill brought by Hopkins to set aside the sale and conveyance of 200 acres of land, (part of a tract of 400 acres, in Louisa County,) sold on the 19th of December, 1786, by the Deputy Sheriff of Louisa County, for the taxes due thereon for the years 1784 and 1785, and purchased by Yancey, the deputy Sheriff, (by whom the same was distrained and sold,) and afterwards conveyed to him by the High Sheriff; and then sold by the defendant Yancey to the defendant Faris. The Chancellor set aside the sale, and decreed that the deed should be cancelled.

It was objected by the appellants' counsel that the complainant had a plain remedy at law, by an ejectment, to recover the premises. But I am of opinion that he had a right to come into a Court of Equity for the purpose of setting aside a deed which might have obstructed his recovery in an ejectment. And it was more beneficial to the

defendants that he should do so, as they might, by their answer, purge themselves of any imputation of fraud or collusion in making the sale. Besides, the object of the bill was to compel a reconveyance of the land from the defendant Faris, which a Court of Law could not enforce. And as a single verdict in ejectment might not have been conclusive, I think the parties pursued the most proper course.

The complainant at the time of this sale was an infant of very tender years, to whom the land was devised in fee-simple by his father, whose will bears date in June, 1780, and was proved and admitted to record in Louisa County, in August, 1782. It does not clearly appear that he had any guardian; none being appointed by the will. Anthony Hayden qualified as an executor. He resided in another County. The infant's mother removed from Louisa, 428 in *1785, having married another husband, who before that time (it would seem) sold her dower estate to the defendant Faris, who then actually resided upon the land. She did not return till 1795. Faris had property upon the land sufficient to have paid the taxes.

The land was charged in the Commissioners' books to Elizabeth Hopkins, the complainant's mother, and was sold by the defendant Yancey, and purchased by him, and conveyed by the High Sheriff to him, as the property of the said Elizabeth Hopkins, which had been sold for the taxes due thereon.

I will here premise (b) that, whenever an authority is given to any person, or officer, by law, whereby the estates or interests of other persons may be forfeited and lost, or otherwise affected, such authority must be strictly pursued in every instance. And any omission, or mistake, in the performance of those duties which the law prescribes, will vitiate the whole proceeding. More especially, where an act is in its nature so highly penal, that a man may absolutely lose his whole property, for a few days' neglect in the payment of a tax which has never exceeded one hundredth part of the valuation thereof by sworn Commissioners; and where the law has left the power of enforcing that penalty in the hands of a mere ministerial officer, who may, as in the present case, become the purchaser of the lands himself, for the bare amount of the tax due thereon. And, above all, in the case of an infant, without any guardian (as far as appears in this case) to protect him, or his property, from utter ruin and destruction.

By the act of October, 1781, c. 40, the Commissioners of the taxes are required to take an account in writing of the quantity of land belonging to all persons within their County, (except their own,) and also the name of the proprietor, or proprietors thereof; and ascertain the value thereof. And in all valuations pursuant to that act, the same rules and regulations are to be observed, with respect to and between landlords and tenants, (unless the contract 429 *between them be specially other-

(b) Johnston, Guardian of Hinton, v. Thompson, MS. S. P.; Kinney v. Beverley, 2 H. & M. 318.

wise,) as directed by the act of October, 1777, c. 2, s. 6, which provides, that, where the landlord shall reside out of the Commonwealth, or have no visible estate whereon to levy the pound rate, for the value of his land, in such case the pound rate shall be paid by, or levied upon, the tenant, not exceeding the annual amount of the rents which shall be allowed him by the landlord. The same act, sect. 8, further provides, that, where any lands shall be assessed in a County, wherein the proprietor doth not reside, nor hath any effects whereon to levy the said pound rate, and the Commissioners shall discover in what other County the proprietor lives, or hath effects, they shall transmit the assessment to such other County, there to be collected, &c.(a)

Neither the acts of 1781, c. 40, or October, 1782, c. 8, contain any specific provision on the subject of the tax on lands belonging to proprietors not residing in the County, as far as I can discover; so that the case of such proprietors is either wholly omitted, or falls under the provisions of the act of 1777, c. 2, s. 6, and 8. But, by the act for equalizing the land-tax, passed in October, 1782, c. 19, the duty of the Commissioners of the taxes is enlarged. By that act they are to make diligent inquiry of all lands within their County which had not been theretofore valued; and also of all alienations or partitions which may be made: and, for that purpose, they are to be furnished yearly by the Clerk of the General Court, and of the County, with lists of all conveyances or partitions within the preceding year in the respective Courts admitted to record; and if the purchaser or seller shall not, before a certain day, have satisfied the Commissioners as to the just value of the land, the same shall be charged as land of the best quality in the County.

From the exhibits it appears that Joseph Hopkins's will, wherein he devised these 400 acres of land to his son Lund Hopkins, the complainant, was proved in Louisa Court, two or three months only before the passage of this last act; that Beaver, who married Hopkins's widow, sold his 430 wife's right therein, viz. 133 1-3 acres, to the defendant Faris, the 10th of September, 1785; and, by the several answers and other evidence in the record, that the whole tract was charged by the Commissioners of the land tax to Elizabeth Hopkins, and not to Lund Hopkins, to whom it was devised; that she had removed away in 1785, and, probably, (though that does not appear,) carried her children with her.

By the act of 1784, c. 91, one half the taxes for the year 1783, were remitted: and, for the other half, it permitted a distress to be made on the first of September, 1785. But the act of 1785, c. 38, postponed the time of making distress for the same until the first of March, 1786: so that Faris was in actual possession, either as a tenant or as a purchaser, long before that period.

From this view of the case, it appears to me that the Commissioners of the tax either mistook or neglected their duty, by charging the whole land to Elizabeth Hopkins, to whom it was not devised, even during her

widowhood, as I apprehend. The Sheriff also mistook his duty, I think, in selling the land itself, instead of distraining the property of Faris, who lived upon and claimed a title to a part, as a purchaser from Beaver, the husband of Joseph Hopkins's widow. Or, if the act of 1777, c. 2, before referred to, may be considered as in force so far as relates to the lands of proprietors not residing within the County, if the Commissioners had discovered where the proprietor of the land resided, they ought to have transmitted the assessment to the County where he resided, or had effects. But I am not altogether satisfied that this act was not repealed by the act of October, 1782, c. 8; and, if so, it would seem that the case of non-residents' lands was omitted in that act, as well as that of 1781, c. 40. So that, whichever way the subject be taken, there has been a fatal mistake, either on the part of the Commissioners, or of the Sheriff, and consequently I conceive the sale to be absolutely void, as against the true proprietor of the land, who was the complainant, Lund Hopkins.

431 *And here I will add that I proceed entirely on the ground of mistake in the officers of the Commonwealth, and not of fraud in the defendant Yancey, by whom the sale was made. I have not considered the case as to Faris, further than to say that he must be considered as a purchaser with full notice. For, knowing the land to have been sold, under colour of an authority given by law to a public officer, who was not the proprietor thereof, he was bound to inquire, and to take notice, whether that officer, and all others whose agency was required by law, had proceeded with due regularity in discharge of their duty.

On these grounds, and not on the ground of fraud, I am of opinion that the Chancellor's decree be affirmed.(b)

JUDGE ROANE. Seldom has a case occurred in which my opinion differed more diametrically from that of the Court below, than in the one before us. Instead of having committed an odious fraud meriting the unusual reprobation of directing the decree, rendered in this cause, to be recorded in the Court of the County in which the transaction happened, the testimony has entirely convinced me that the appellant Yancey acted with all imaginable fairness touching the sale in question. There is not an iota of testimony tending to produce any other impression upon my mind.

The taxes due on the land in question were debited to the Sheriff as due from Elizabeth Hopkins, (see the certificate of the auditor,) and it was not for that officer to consider them as due from any other; or, in other words, to depart from the Commissioners' books in this respect, and take upon himself the responsibility of settling the rights of property, and scrutinizing into titles: that the Sheriff was to govern himself, in this particular, solely by the Commissioners' books, who and who only were to make the necessary alterations therein

(b) See the act of 1787, c. 42, to remedy abuses in sales of lands for taxes.

(a) See Chan. Rev. 60, 61.

resulting from conveyances, &c. is evident not only from the act of 1782, equalizing the land-tax, (which provision is also 432 kept up to the present day,) *but is moreover supported by the opinion of Judge Tucker in *Kinney v. Beverley*, (2 H. & M. 330,) who says in emphatical terms, that those books are to be "the guide of the Sheriff in collecting the taxes." There was no personal property upon the land belonging to the person to whom the tax was charged, whereof it could be made; and the Sheriff was consequently bound to sell the land itself. Nothing is more clear than that, according to the true construction of the acts by which this case is to be governed, such personal property only was liable to be taken, and not the property of other persons which might chance to be found upon the premises: and it was not until the act of 1790, c. 5, that a hint was given in our laws that the property of the tenant might be liable. The testimony in this case shews us, that this sale was duly advertised in the *Gazette*, and the deposition of Charles Yancey, sen. aided by other testimony, in the cause, entirely satisfies me that it was also duly advertised at the Court-house, and other public places in the County. Considering the great lapse of time which has occurred, and the fleeting nature of such circumstances, it is unreasonable to expect more satisfactory proof on this last point, than is furnished in the case before us. The sale was fairly and openly made at the most noted place upon the premises on a credit of one month; the bystanders were repeatedly invited to bid; their opinion was asked and followed as to the manner of laying off the land sold: it was not till after a failure to bid by other persons that the Sheriff himself made the bid which finally secured to him the land; and public notice was given at the sale, and afterwards repeatedly renewed, in particular, to the guardian of the appellee, that the land purchased might be redeemed in a reasonable time for his benefit. Yet a great length of time, amounting to many years, was suffered to elapse before any effort whatever was made to this effect; prior to which the land was sold to the other appellant.

With respect to the infancy of the 433 appellee, although the *act of 1790, c. 5, has allowed three years for an infant to save his land, after his infancy has expired, I do not find that any provision was made in favour of infants by the acts of the period at which this transaction took place. They are therefore to be bound by the general words of the act, as well as adults. On this principle, I recollect it to have been somewhere decided that infants would have been bound by the general provision in the act of limitations, but for the special exception therein inserted in their favour.

Objections, however, are made in this case, 1st. To the legality of the purchase by the Sheriff himself; and, 2dly. To the lowness of the price given for the land, whence, I presume, it was inferred, or supposed, that the transaction was fraudulent.

As to the first objection, it may be re-

marked that, while the law was imperious upon the Sheriff, under a heavy penalty, to finish his collection by a short and given day, without any other allowance than for insolvents, which certainly do not include persons having land liable for taxes; while it is a maxim of justice and sound sense, that, when the law requires a thing to be done, it also gives the necessary means of doing it; and, while there was no express inhibition at that day, in any statute, against the Sheriff's bidding for his own private emolument, such inhibition is not, on the other hand, to be inferred from the reason of the principle on which, in other cases, it has been held that certain descriptions of persons are disabled to purchase property offered for sale by themselves. The inhibition in those cases seems to arise from the confidence placed in, and the intimate knowledge acquired by, trustees, commissioners of bankruptcy, auctioneers, &c. which would enable them, if permitted to purchase, to avail themselves of facts coming to their knowledge in their several characters, and, by withholding them from others, to lessen the prices of the articles exposed to sale, to their own emolument. (a) But, in the case in question, no confidence has been

reposed in the Sheriff, and no facts 434 have come to *his knowledge, which he might abuse to his own advantage: he has no other information on the subject than is derived from the books of the Commissioners as aforesaid: it would be too much to suppose him conscious of the particular circumstances attending all the tracts of land in his County. This case then does not seem to fall within the reason of the principle before mentioned; and it is not shewn by any adjudged case that their inhibition has in England been extended to Sheriffs, or Collectors, though, I presume, the case must have occurred in a thousand instances. It is true, indeed, that the act of 1787, c. 42, premising that abuses had taken place in this particular, declared that a purchase of lands sold for taxes by Sheriff or Deputy Sheriff, and bought by himself, should thereafter be considered as held in trust for the payment of the taxes, and might be redeemed by the proprietor: but on this act it is to be remarked that it not only does not apply to this case, being posterior to it, but, on the other hand, admits and recognises the frequency of the practice of bidding by Sheriffs in such cases, or, in other words, the custom of the country in that particular; and, on this ground, brings this case within the reason of the decision of this Court in respect of executors, in the case of *Anderson v. Fox*, 2 H. & M. 245. In that case it was held, or seems to have been held, on this last ground only, i. e. the practice of the country, and the consequences resulting from departing suddenly from it, that a purchase by an executor from himself, if fair in all respects, should be supported. (See Judge Tucker's opinion, p. 263.) If such considerations were considered to have this effect in a case coming directly within the principle aforesaid, (for an executor is emphatically possessed as

(a) Sugden's Law of Vendors, 391-405.

well of the secrets, as of the confidence of the testator respecting his property,) much more so will they have that effect in cases in which such knowledge and confidence is wholly wanting: if they had this effect, in cases in which the purchase by the executor was entirely voluntary, much
 435 more so would they have *that effect where the provisions of the laws on this subject would, as it were, inflict a penalty upon the Sheriff for not bidding, and where his bidding might be absolutely necessary to counteract combinations to defeat the collection of the revenue, whether arising from the sympathy of the bystanders, or other causes. As to the general custom on this point, it does not rest only on the recognition of the act of 1787, and various other acts of Assembly, but is admitted, in this case, by the deposition of Charles Yancey, sen. who also instructed the deputies acting under him to purchase, in case no other person would do so.

With respect to the price at which this land was sold, it is true it was remarkably low; but it is also proved that the land was of very indifferent quality; that lands of that description would scarcely sell at any price; and that there were a great many tracts offered for sale in Louisa, at the same time, and for the same purpose: indeed, according to the deposition of Captain Hughes, who on one occasion acted as cryer of these lands, it may be said that this tract, comparatively, sold well; for he tells us that many whole tracts of land were sold to pay the taxes, whereas only half of the tract in question was found necessary; whence it would seem that this land sold for 100 per cent. more than some other tracts in the same County.

On these grounds, and because the appellant Yancey was compelled by the laches of the appellee's guardian to hold the land, (which is also proved to have been very unproductive,) and pay taxes thereon, for a term vastly longer than that subsequently allowed, by law, to infants to come forward and redeem their lands, I am of opinion that the bill of the appellee ought to have been dismissed. While it is very probable that many abuses may have occurred in cases like the present, the testimony in this cause (while it is not seen that the purchase was at that time interdicted by the provisions of any statute, or any equivalent principle, and was sanctioned on the other hand by the practice of the
 436 *country) convinces me that the appellant Yancey acted in the case in question with all imaginable fairness.

My opinion is to reverse the decree, and dismiss the bill.

JUDGE FLEMING. It has been well observed by Judge Tucker that, whenever an authority is given to any officer, or other person, by law, whereby the estates or interests of other persons may be forfeited, or lost, such authority must be strictly pursued in every instance: and, I will add, that penal laws of every description are to be strictly construed; and nothing therein taken by implication, or intendment; and, more especially, where the estates or interests of infants may be affected: and the

laws subjecting lands to be sold for the payment of taxes I consider as highly penal. By the act of October, 1871, c. 40, the Commissioners of the taxes are required to take an account in writing of the quantity of land belonging to all persons within their County, (except their own,) and also the name of the proprietor or proprietors thereof. Here, then, at the very threshold of the business, the direction of the law was departed from, by the Commissioners' mistaking the proprietor, and entering the whole 400 acres devised to Lund Hopkins, by his father Joseph Hopkins, as the land of Elizabeth Hopkins, when she had only a life-estate in one third part, as her dower therein. The Sheriff's books for the collection of the taxes were, no doubt, made out from those of the Commissioners; and thus the mistake was continued till the 19th of December, 1786, when the land belonging to Lund Hopkins, an infant of tender years, was sold, as the land of Elizabeth Hopkins for less, perhaps, than a fortieth part of its real value, at a time, too, when it is in evidence that, at the day of the sale, there was property on the premises sufficient to have paid the taxes due, belonging to Richard Faris, who then lived thereon, as purchaser of the dower of Joseph Hopkins's widow, who, at that time, was married to Samuel Baber,
 437 or Beaver, and *Faris afterwards became a purchaser of the land in controversy, with full knowledge of the preceding circumstances; having declared in the presence of Martha Anderson, (about the time he made the purchase,) that he expected to be sued for the said land, but that he bought it "to spite the rascal," alluding to Lund Hopkins, as the witness supposed.

For these reasons, I think the decree is a just one; though not on the ground of any fraud practised by the Sheriff: and it is an invariable rule with me never to reverse a judgment, or decree, without a thorough conviction that it is erroneous.

By the majority of the Court the decree was affirmed.

Mason's Devises v. Peter's Administrators.

Monday, October 22, 1810.

1. **Chancery Practice—Marshaling Assets*—Judgment against Executor.**—A simple contract creditor, having obtained a judgment by default against an executor, cannot maintain a suit in equity, for marshaling assets, against devisees of the landed property, until he has fully prosecuted his claim at law, against the executor and his securities.
2. **Executor—Judgment by Default against—Effect.**—A judgment by default, against an executor, is prima facie admission of assets.
3. **Heirs—Evidence against—Judgment against Executor.**—A judgment against the executor is no

***Marshaling Assets.**—See monographic note on "Marshaling Assets" appended to Carrington v. Didier, 8 Gratt 200.

†**Heirs—Evidence against—Judgment against Executor.**—In Brewis v. Lawson, 76 Va. 40, BURNS, J., delivering the opinion of the court said: "A judgment (at least by default) against a personal representative in a suit to which the heirs or devisees of

evidence against the heirs or devisees of the real estate.

4. **Devisees—Decree—Pro Rata.**—A decree against devisees holding by several and distinct devises, ought not to be joint, but pro rata.

5. **Chancery Practice—Lands Descended—Decree for Sale.**—Quære, whether, and under what circumstances, a Court of Equity can decree a sale of land descended or devised, (without any specific lien, or any charge, either general or special, by a conveyance or will of the ancestor or devisor,) to satisfy a bond, or a simple contract creditor, claiming on the principle of marshaling assets? Especially, can such decree be made, in any such case, where the rents and profits of the lands are sufficient to keep down the interest accruing on the debt?

Upon an appeal from a decree of the Superior Court of Chancery for the Williamsburg District.

The suit was originally brought in the late High Court of Chancery, by David Ross & Co. and Walter Peter, against the executors and devisees of James Mason, deceased, and having abated by the death of Walter Peter, was revived on behalf of James Freeland and Robert Kennan, his administrators. Its object was to obtain satisfaction, of certain simple contract claims upon the estate of the said James Mason, out of the lands devised to his sons; the bill suggesting that the executor refused to pay them on the pretence "that there had not come to their hands sufficient of the personal estate of their testator, for the payment of his whole debts, and that

the decedent are not parties, is not evidence against such heirs or devisees in a suit or proceeding by the creditor to subject the real estate, descended or devised, to the payment of the debt; and the reason assigned is, that there is no privity between the representative and such heirs or devisees. It was so held by this court at an early day (1810) in *Mason v. Peter*, 1 *Munf.* 437, and the decision has been since repeatedly recognized as authority. See *Foster*, etc., v. *Crenshaw*, 3 *Munf.* 530; *Chamberlayne*, etc., v. *Temple*, 2 *Rand.* 334, 336; *Shields v. Anderson*, 3 *Leigh* 729, 736; *Street v. Street*, 11 *Leigh* 498, 508; *Robertson v. Wright*, 17 *Gratt.* 534, 540. And CHIEF JUSTICE MARSHALL, in delivering the opinion of the supreme court in *Deneale v. Stump*, 8 *Peters* 531, said: 'It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, or in any manner affect them. It could not be given in evidence against them.' The same principle has been affirmed by the courts of other states. See *Harwood v. Rawling*, 4 *Har. & Johns*; *Davis v. Green*, *Id.* 270; *Birely v. Staley*, 5 *Gill & J.* 432, 453; *Sargent v. Davis*, 3 *La. Ann.* 353, 354; *McCoy v. Nichols*, 4 *How. (Miss.)* 31, 33; *Osgood v. Manhattan Co.*, 3 *Cowen*, 612, 622; *Boykin v. Cook*, 61 *Ala.* 473."

To the point that a judgment against a personal representative is no evidence against the heirs or devisees of the real estate, the principal case is also cited in *Foster v. Crenshaw*, 3 *Munf.* 530; *Shields v. Anderson*, 3 *Leigh* 736; *Street v. Street*, 11 *Leigh* 508; *Robertson v. Wright*, 17 *Gratt.* 534, 540, and *foot-note*; *Laidley v. Kilne*, 8 *W. Va.* 230; *Bank v. Good*, 21 *W. Va.* 462.

6. **Devisees—Decrees—Pro Rata.**—The principal case was cited in *Ryan v. McLeod*, 32 *Gratt.* 374, to the point that each heir shall be held responsible only for his portion of the debts of the decedent.

The principal case is also cited in *Lewis v. Overby*, 31 *Gratt.* 620.

they must first discharge the specialties, and such claims as are considered entitled to a preference in the distribution of the assets." The plaintiffs contended, that the devisees having had the benefit of the personal estate applied *for their case, in discharge of debts which would otherwise have been a lien on the real estate, and the same (the personal estate) being of sufficient value and amount to discharge and satisfy all the debts due by simple contract, the creditors by simple contract were entitled in equity to compensation for the same, and that so much of the real estate ought to be sold, as shall be sufficient to replace the personal estate applied or used in payment of debts, due by bond, and other specialties of equal or higher dignity."

No copy of the will of James Mason was inserted in the record: but, from the bill and answers, the devisees appear to have been entitled to separate tracts of land by several and distinct devises. The claim of David Ross & Co. rested on an open account, against which the act of limitations was pleaded. That of Walter Peter was also by open account originally; but a judgment by default had been obtained upon it against the executors in the County Court of Greenville, in November, 1786; on which judgment no execution had been issued.

William Mason (who seems to have been the only acting executor) having died, the surviving executors, and the devisees, in their respective answers, denied any knowledge of the claim of the said Walter Peter, and generally averred that the judgment was obtained in their absence; "but they were informed and had reason to believe the same was unjust."

The late Chancellor referred the accounts between the plaintiffs and James Mason, deceased, to one of the Commissioners of the Court, directing him "to state and report them, with the proofs thereof, and also an account of the administration of the said James Mason's goods, chattels and credits, distinguishing particularly the debts which, chargeable on his real estate, were paid out of the personal estate." In compliance with this decretal order, Master Commissioner Rose made a report, setting forth the judgment obtained in Greenville Court as the only proof of Walter Peter's claim, and a statement of the administration account, shewing a balance of 531. 14s. 1d. in favour of William Mason, the acting executor; together with a list of debts stated "to have been paid out of the personal estate in satisfaction of debts chargeable on the real estate; to the amount of 7,169l. 11s. 3d. except that 1,433l. 5s. was credited for real estate sold by the testator's direction in his will."

439 *Upon this report, the Court of Chancery for the Williamsburg District, on the 21st July, 1804, dismissed the bill as to the plaintiffs David Ross & Co.; and as to the defendants the surviving executors; but decreed, that the defendants, the sons and devisees of James Mason, deceased, out of the lands in the bill mentioned, devised to them by the will of their father, should, on or before the 1st

day of January, then ensuing, pay to the plaintiffs, administrators of Walter Peter, the amount of the judgment obtained by him as aforesaid, with interest and costs; and, in case of default of such payment, that certain commissioners should expose to sale, by auction, for ready money, the lands aforesaid, or so much thereof as would be sufficient to pay the said money, interest and costs, and pay the proceeds of such sale to the said administrators. The plaintiffs David Ross & Co., and the defendants Edmunds and George Masons, two of the devisees, prayed an appeal from this decree, which was granted; but no bond was given by David Ross & Co. for prosecuting the appeal.

Wickham, for the appellants, made several objections to the manner in which the cause had been conducted, but relied chiefly on the merits, as being decidedly in their favour. The judgment in Greenville County Court was no proof of the justice of the plaintiff's claim; being obtained by default, and it not appearing whether any writ had been served on the defendants. But, if the executors were bound by that judgment, the heirs or devisees were not. They do not claim through the executor; but by rights altogether collateral. If the executors by their answer in this suit had admitted the plaintiffs' claim, the devisees would not have been bound by such admission. Surely, then, an admission in another suit cannot bind them.

A simple contract claim cannot stand on a better footing than a bond: and, if a bond creditor had sued an executor, and obtained judgment, and afterwards had sued the heir at law, would the heir have been bound by the judgment? Could he not still have pleaded that the bond was not the act and deed of his ancestor? Suppose even one of two joint devisees were sued on the bond, and admitted the claim; could not the other plead in like manner, notwithstanding the greater privity
440 between two such devisees? "Certainly, then, the claim of the plaintiff Walter Peter, as against the present appellants, is wholly unsupported.

2. Each devisee should have been charged pro rata, instead of jointly; since, in their answers, they say they are several devisees.

A Court of Equity derives great part of its jurisdiction from the power of discriminating, so as to do equal justice. In a suit against legatees for contribution, each legatee is charged in proportion to the property received by him. It has been decided in the Federal Court (a) that, if one legatee be insolvent, he is nevertheless charged with his share, and the other legatees only pro rata; so that the creditor loses the part for which the insolvent legatee is responsible. The whole claim is not to be fixed on the competent legatees. But surely, where there is no pretence of insolvency, one legatee should not be compelled to pay for the rest. Such a decree would drive him to file a bill against the other legatees. But a Court of Equity ought so to decree as to put an end to the controversy, and not to multiply litigation.

3. In this case the Chancellor ought not to have decreed a sale of the lands, but only an extent, which is all that a bond creditor can have at law. Surely, a simple contract creditor coming to marshal assets can only be entitled to stand in the shoes of the bond creditor.

George K. Taylor, for the appellees, in answer to the first point, observed that a judgment must be presumed to be fair until the contrary appears; (b) in the same manner as an administration account settled by Commissioners is to be considered prima facie correct, unless errors of fallacies be pointed out. (c) If so much respect be due to an account, rendered perhaps by an executor himself, a judgment of a Court of Record is not entitled to less. Here, the executors and devisees are jointly sued. The executors do not allege that no writ was ever served upon them. If such had been the case, would they not have said so? But, instead of this, they only say they believe the judgment was unjust, and that it was obtained in their absence! Ought they not to have pointed out what injustice or error they complained of, in order that the plaintiff might have had an opportunity of controverting it?

441 *2. The Chancellor was not incorrect in making a joint decree against the devisees: for this plain reason. The will (under the act of Assembly) was a nullity against creditors. (d) The case in the Federal Court concerning legatees was very different from this. Legatees are considered as innocent sufferers claiming under legal title: but the claim of devisees is nullified by the law.

3. As to the power of the Court to decree a sale of the lands in a case like this, Mr. Taylor cited *Clifton v. Burt*, 1 P. Wms. 679, note I. 3 Bl. Comm. 436, 438, as to the general powers of a Court of Equity; *Stileman v. Ashdown*, 2 Atk. 608, (e) an example of a sale to satisfy a judgment creditor; *Manaton v. Manaton*, 2 P. Wms. 234, 235, the same measure resorted to in favour of bond creditors, though the lands were not devised for payment of debts; and *Powell v. Robins*, 7 Ves. jun. 211, in which case the lands would have been sold at the suit of simple contract creditors, if the defendant, the devisee, had not been an infant: but liberty was reserved to the plaintiffs to apply for a sale when the infant should come of age. In *Galton v. Hancock*, 2 Atk. 439, an account was directed to be taken of the real assets descended upon the heir, and that the same should be applied to pay off and exonerate the mortgage upon the estate devised to the defendant. How, otherwise than by a sale, could this be done? In *Donne v. Lewis*, 2 Bro. Ch. Cas. 263, Lord Thurlow lays down the order of applying assets to the payment of debts; according to which opinion, when the personal estate is exempt or exhausted, first, the real estate expressly devised for the purpose is to be

(b) *Lee, Ex'r of Daniel, v. Cooke*, 1 Wash. 806.

(c) *Anderson and Starke v. Fox*, 2 H. & M. 246: *Atwell's Adm'rs v. Milton*, 4 H. & M. 268.

(d) 1 Rev. Code, p. 48, c. 51, s. 2.

(e) *Ambl. 18, S. C.*

applied; secondly, (to the extent of the specialty debts,) the real estate descended; and, thirdly, the real estate specifically devised subject to a general charge of debts. (a) It follows inevitably, that Lord Thurlow meant that all the several descriptions of property specified by him might be sold by the decree of a Court of Equity.

Such are the authorities in England: but, in this country, the reasons for a sale are still stronger; because there estates generally bring good rents; but here it is otherwise.

Wickham, in reply, did not conceive it necessary in this case to examine Mr. Taylor's authorities concerning the marshalling of assets, and the power of decreeing a sale. But, on principle, he did not see the Court of Equity's right. They

442 have no such *right in the life-time of the debtor: why, then, should they have it after his death? But, as to the proof of the claim;

There never has been an adjudication that the heir is bound by the admission or default of the executor; neither can a judgment be presumed to have been right, except against the parties. Yet here there was no admission at all; for no writ appears in the record.

If there was any admission, it was equally an admission of assets. The plaintiff, therefore, has no right to come into equity. In every case of a simple contract creditor's applying to marshal assets, it will be found there was no judgment against the executor. No instance can be found where such a creditor relied on such a judgment as evidence against the heir or devisee. Lee, Executor of Daniel, v. Cooke, (b) is not like this case: for there a privity existed between the vendor and vendee. So, in Anderson and Starke v. Fox, (c) there was privity between the executor and legatee; but there is no privity between heir and executor. What this judgment was founded upon does not appear. By what human means can we shew it was unrighteously obtained? Our claim is not only collateral to that of the executor, but prior in point of time.

I hardly expected it would be contended that this decree is correct in being joint, and not pro rata.

The defendants have confessed the real assets devised. In a suit, at law, against devisees, the judgment is never peremptory, except for a false plea. A Court of Law then does equal and exact justice. Yet Mr. Taylor would invert the rule, as to a Court of Equity, and drive the devisees to bring another suit against each other for contribution. He says the case of devisees is different from that of legatees, because, under the act of Assembly, the devise is void. But it is void against such creditors only as have a right at law to come against the real estate. In this case, Peter claims on the ground that his remedy is merely equitable, being only a simple contract creditor. If his right was good at law, why did he come into Equity?

JUDGE TUCKER having suggested that Peter had a complete remedy, at law, against the executor and his securities; the judgment by default having been an admission of assets, Mr. Taylor begged leave to make a few additional observations.

443 *The failing to proceed to subject the executor at law, is no objection to the present claim in equity; because it appears that, in fact, the executor had no assets. The judgment by default was only prima facie an admission of assets even at law; for in *Ruffin v. Pendleton* (d) the executor was allowed to plead "fully administered" to the action for the devastavit.* A contrary doctrine is held, indeed, in the English books: but there they acknowledge the estoppel arising from the executor's failing to plead to be odious even at law, but not applying to bind a Court of Equity. In this country the Chancellors and County Courts, universally have given the executor relief, (where he failed to file the plea of fully administered,) upon the terms of his paying the costs.

In the present case, then, as it appears, from the commissioner's report, that William Mason, the acting executor, had fully administered; for what purpose should Walter Peter have prosecuted him farther? And now, after the lapse of 24 years since the date of his judgment, is it reasonable that a Court of Equity should drive him from its presence to a Court of Law again? Can the plaintiff, at this distance of time, maintain an action of debt upon his judgment? (e) If he can, may not the defendants defeat it by the act of limitations? (f) Would he not, then, by the act of this Court, be completely divested of all right to recover a just debt? and why? because he was not wiser than all the Courts of Equity in this land.

Mr. Taylor moreover observed, as to the proof in this cause, that a judgment may be given in evidence against persons not parties or privies; as if the common and ordinary case of one creditor's suing an executor and obtaining judgment: other creditors are bound by such judgment.

As to the power of the Court to decree a sale of the land; the Court of Equity is influenced by the circumstances of each case. Where the rents and profits are sufficient to pay the debt, a sale is not to be decreed: but where they are insufficient, a sale is best for all parties.

Wickham. All I contend for is, that, in a naked case, of a judgment by default against an executor, if no equitable 444 excuse *appears, he is bound. Does this record (admitting the judgment to have been regularly obtained) shew any excuse for the executor's failing to plead at law. On the contrary, it does not appear that he has fully administered according to law; for one of the debts is for

(d) 2 Wash. 184.

*Note by the Reporter. See also ante, p. 11. et seq. the case of *Gordon's Administrators v. The Justices of Frederick*, in which it was decided that an executor shall not be presumed guilty of a devastavit till it is found against him by a verdict.

(e) 3 Bac. Abr. 729; (Gwill. edit.) tit. Execution, Letter H.

(f) Ibid. 291, tit. Debt, Letter G.

(a) See also *Davis v. Topp*, cited in the note, 3 Bro. Ch. Cas. 269, and *Wride v. Clarke*, cited *ibid.* 261.

(b) 1 Wash. 304.

(c) 2 H. & M. 245.

a simple contract claim of the executor himself against his testator, amounting to 599l. 13s. 10d.; of which he could not avail himself after suffering judgment by default. The rule is that, of creditors in equal degree, he who sues first is entitled to be paid first; and the only means by which the executor can give a preference is by confessing judgment in favour of the creditor who subsequently sues. As the executor could not bring a suit against himself, he had a right to retain in his own favour, in the same manner as the creditor who sues first is entitled to a preference; but, having suffered judgment by default, in favour of Peter, he loses that advantage.

Mr. Taylor's argument, that the judgment is conclusive against us, is in conflict with his argument that it is not conclusive against the executor. If conclusive as to the amount of the debt, it must be conclusive as to the assets. The case of *Erving v. Peters*, 3 Term Rep. 685, has settled the point that, if an executor plead payment to an action on bond, and omit to plead fully administered, it operates as an admission of assets, in an action, founded on the judgment, suggesting a devastavit. Neither is there any hardship in this; since, according to *Chisholm v. Anthony*, 1 H. & M. 27, he might have amended his plea, on motion, at any time before the trial.

I never have understood the law as settled in this country, that an executor may obtain relief in equity, in all cases, where he failed to plead at law. The doctrine that a Court of Equity might give relief in every case where injustice was done, of which it was to be the judge, has been overruled by this Court. And why should that doctrine stand in the case of an executor only? It has been decided by the late Chancellor that an executor, if he thinks himself in danger, may apply to the Court by filing a bill of conformity against the creditors; in doing which he assumes the point that, without the previous interposition requested of the Court, he would be liable for a devastavit by failing to plead at law.

Friday, November 9. The JUDGES, 445 TUCKER and FLEMING *(JUDGE ROANE having been absent at the argument of the cause) pronounced their opinions.

JUDGE TUCKER. Walter Peter, in his life-time, brought a bill against the executors and devisees of James Mason, the object of which was to obtain satisfaction for a simple contract debt due to him from James Mason, deceased, out of the real estate devised to his several sons, the personal estate being exhausted by the payment of debts of superior dignity. He had before obtained a judgment (by default) against the executors, for his debt, but does not appear to have proceeded even so far as to sue out execution upon that judgment. The record in that case is either very imperfect, or the judgment was obtained without even suing out a writ; and the executors who answered speak of it as having been unjustly obtained, and without their knowledge. There is no other proof

of the debt. By the account stated by the Commissioner, there appears to be a balance due to the executor William Mason, who alone acted.

The first question that appears to me to arise in this case, is, whether the plaintiff Peter had not a plain and adequate remedy at law? He had obtained a judgment, by default, against the executors. Such a judgment amounted to an admission of assets in their hands. He might have sued out execution thereupon immediately; and, upon the return of nulla bona, he might have brought an action for a devastavit against the executors; and, finally, he had a remedy at law against their securities. After the several decisions of this Court in the cases of *Maupin v. Whiting*, (a) *Pryor v. Adams*, (b) and *Terrel v. Dick*, (c) and those of *Turpin v. Thomas*, (d) and *Morris and Overton v. Ross*, (e) and some others, I cannot conceive that such a bill as the present can be sustained in a Court of Equity. For any thing that appears, or can appear, by this record, Mr. Peter had his remedy in his own hands at law; and if, without any good reason, he thought proper to abandon it there, he cannot, under such circumstances, come into a Court of Equity.

The second question is, whether, supposing him entitled to come into a Court of Equity, against the devisees, he is, upon the proofs in this record, entitled to a decree against them. And I am clearly of opinion that he is not. There is not a syllable of proof of his claim, in the record, except the judgment, which, 446 *being against the executors only, is no proof against the devisees of land. For there is no privity between an executor, and the heir, or devisee of the land; however it may be (on which I mean not to give an opinion) between an executor and legatee of personalty; of whom the executor may require security to refund, in certain cases, before he pays, or gives up the legacy.*

One of the points insisted on by Mr. Wickham, was, that the Chancellor, instead of decreeing that the devisees should be jointly chargeable, ought to have directed a valuation of their lands respectively, and charged them pro rata. And I am of that opinion.

I deem it unnecessary to give any opinion upon the other points which were argued in this cause; as these are sufficient, in my opinion, to decide that the decree be reversed, and the bill dismissed.

JUDGE FLEMING. I have no difficulty in saying that I concur in the opinion just delivered, in every particular, for the reasons therein stated; that the bill ought to be dismissed: and the last point, made in the cause, in Mr. Wickham's statement,

(a) 1 Call. 224.

(b) Ibid. 382.

(c) Ibid. 546.

(d) 2 H. & M. 139.

(e) Ibid. 408.

*Note by the Reporter. It would seem, by analogy, from the case of *Atwell's Adm'rs v. Milton*, 4 H. & M. 253, that a judgment against an executor or administrator is at least prima facie evidence against the legatees or distributees of the personal estate; though liable to be rebutted by shewing it was fraudulently or irregularly obtained.

strikes me very forcibly; which is that, admitting the appellants (devisees of James Mason, their father) to be liable for the debt, it ought to have been apportioned among them, according to the value of their respective devises; of which an account ought to have been taken by Commissioners appointed for that special purpose; in order to prevent suits between the devisees themselves. But, as the principal point seems clearly in favour of the appellants, no farther notice need be taken of the latter.

Decree reversed, and bill dismissed.

447

***Todd v. Bowyer.**

Thursday, October 26, 1810.

1. Chancery Practice—Injunction against Judgment*—

Decree.—On a bill of injunction to a judgment at law, if it appear, on the final hearing, that the judgment ought not to be enjoined, and that the plaintiff in equity has had credit for a sum to which he is not entitled; the Court should not only dissolve the injunction, and dismiss the bill, but should moreover decree that the plaintiff pay that sum to the defendant.

2. Same—Settlement of Account—Correction of Error by Commissioner.—

During the pendency of a suit in Chancery, a settlement of accounts between the parties having been made, and reported to the Court; but, afterwards, by mutual consent, a new order of reference being made; the Commissioner was not precluded from examining the accounts generally, and correcting any error therein; especially, as it appeared that the party who was benefited by such error, had torn his own signature, and that of the other party from the settlement.

Upon an appeal from a decree of the Superior Court of Chancery for the Staunton District, dismissing a bill upon which an injunction had been granted, by the Judge of the late High Court of Chancery, on the 22d of April, 1796, to stay proceedings on a judgment obtained in March, 1794, in the County Court of Botetourt, on behalf of Henry Bowyer, Clerk, against Samuel Todd, Sheriff of that County, for 54l. 12s. damages, and 7 dollars and 43 cents, costs of suit.

The material ground of equity relied upon in the bill was, that posterior to the judg-

ment, the complainant had discovered a settlement, according to which he was entitled to a credit for 18l. 10s. 7d. 3-4.

The defendant alleged in his answer, that credit had been given on the execution for 18l., "which then appeared to him to be about the balance due the complainant at their settlement: but it would appear by accounts, furnished by the complainant at that settlement, that injustice had been done the defendant."

May 12th, 1798, upon a motion to dissolve the injunction, the Court referred the accounts between the parties to three Commissioners; two of whom, viz. James Risque and Martin M'Ferran, reported on the 30th of April, 1802, that, in the presence of the parties, they had proceeded to inspect an account exhibited to them by the complainant, which account appeared to have been settled by the parties, and shewed a balance struck in favour of the complainant of 18l. 10s. 7d. 3-4; and that no documents were shewn to induce a belief that the said account and settlement were erroneous.

By an agreement dated May 16th, 1799, written on the back of the said order of reference, with a certificate of James Risque and Martin M'Ferran also endorsed thereon, under date of April 30th, 1802, (which certificate was verified by the deposition of James Risque taken June 25th, 1803,) it appeared "that the parties agreed that they had heretofore settled all accounts between them, except the claim of Clerk's tickets, for which the judgment was obtained; by which settlement there appeared a balance,

in favour of the present plaintiff, of 448 the eighteen pounds, *which is credited on said judgment; but that balance the plaintiff alleged was 10s. 7d. more than the said credit, which the defendant was willing to admit rather than take the trouble of another investigation of their accounts;" that, "on the 30th of April, 1802, the complainant acknowledged in the Clerk's office of Botetourt, that he tore his own and the defendant's name from the said agreement, and contended he had a right so to do; it being his own paper, and in his own custody." April 12th, 1803, the Chancellor for the Staunton District decreed that the injunction be made perpetual; with liberty to either party (being first served with a copy of the said decree) to shew cause against it on or before the tenth day of the next term. On the 11th of July following, "by consent of the parties, by their counsel," the order made on the 12th of April was set aside, and their accounts referred to Master Commissioner Lockhart; upon whose report (whereby some errors in former accounts (though acknowledged by the above-mentioned agreement, of May 16th, 1799, to have been settled) were corrected, and thereupon a balance, amounting to 55l. 6s. 5d. 1-2 was stated against the complainant,) it was decreed, that the injunction be dissolved, and the bill dismissed with costs; "and that the plaintiff pay the defendant the sum of 6l. 8s. 3d. 1-2 for which he had received a credit improperly."*

***Chancery Practice—Injunction against Judgment.**—See monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425; monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

+Same—Account—Decree for Defendant for Balance Due.—There are many cases in Virginia in which it has been adjudged, that where a bill is brought for an account, and a balance reported in favor of the defendant, the court will decree in favor of the defendant for the balance. *Payne v. Graves*, 5 Leigh 509, citing *Hill v. Southerland*, 1 Wash. 184; *Fitzgerald v. Jones*, 1 Munf. 160; *Todd v. Bowyer*, 1 Munf. 447.

The principal case is also cited in *Pate v. McClure*, 4 Rand. 176. See generally, monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

†Commissioners in Chancery.—See monographic note on "Commissioners in Chancery" appended to *Whitehead v. Whitehead*, 23 Gratt. 376.

*See *Fitzgerald, Executor of Jones, v. Jones*, ante, p. 1.

From this decree the plaintiff appealed. Randolph, for the appellant. Call, for the appellee.

Friday, November 15. The President reported the opinion of the Court, that the decree be affirmed.

The following was JUDGE TUCKER'S opinion. After stating the circumstances, in substance as above, (in the course of which he observed that, "for the reasons apparent on the face of the answer, the judgment ought not to be enjoined,") he proceeded thus: "Although I approve of the principles of this decree, I have not been able to discover the particular items in the account stated by the Commissioner which would amount to the precise sum, for which the

Chancellor mentions that the plaintiff 449 had been improperly credited. I have therefore had recourse to the circumstances above stated as a basis of my own opinion. If Todd, by his unfair conduct, in tearing off his own and Bowyer's signatures from the agreement made between them on the 16th of May, 1799, (which was endorsed on the order of reference in the cause, and was evidently meant for the information and guide of the first set of commissioners appointed by that order,) had not brought himself within that rule of equity, 'He that doth iniquity shall not have equity,' I should have thought it highly improper to disturb that settlement. But, he having, by that act, imposed upon Bowyer the necessity of proving his accounts over again, I think the latter was fairly entitled to the benefit of any error which might thereafter be discovered therein. Approving, therefore, of the last commissioner's report, my opinion is, that the injunction be dissolved as to 55l. 6s. 5d. 1-2, including the costs of the judgment of Botetourt County Court; that the Chancellor's decree be reformed in that manner, as has been done on some other occasions;(a) and that the appellant, as the party prevailing here, recover the costs of his appeal here.

Green v. Price.

Thursday, October 25, 1810.

1. **Equitable Title—Effect on Mortgagee without Notice.**—A mortgagee without notice, shall be protected against a prior equitable title: if the person having such title, either encouraged him to take the mortgage, or, knowing of his intention to take it, stood by, and made no objection.

Fortunatus Green filed his bill in the Superior Court of Chancery, for the Richmond District, on the 1st of March, 1802, against Thomas Price, and the children of Richard Littlepage, deceased; for the purpose of obtaining a title to a tract of land, containing 261 1-2 acres, in the county of Hanover.

From the bill, answer of the defendant

(a) See 1 Wash. 380. Pendleton v. Vandevier.

Equitable Title—Effect on Purchaser without Notice.—See foot-note to Hooe v. Pierce, 1 Wash. 212. On the subject of mortgages, see monographic note on "Mortgages" appended to Forkner v. Stuart, 6 Gratt. 197.

Price, exhibits and depositions, the following statement of the most material facts in the case may be extracted.

Robert Bumpass sold the land in question to John Ferguson, but did not make him a deed; neither does it appear in evidence how much money was paid by Ferguson; though the bill alleges (without proof) that he paid only 50l., and the surveyor's fees. On the 7th of May, 1786, Ferguson gave a bond to Benjamin Kimbrough to make him a title to the said land, when he should himself obtain a deed from Bumpass; reciting in the condition of that bond that

Kimbrough was to pay for the land, 450 on or before the 1st of January ensuing, 150l., and on or before the 1st of January, 1788, the farther sum of 175l.; provided the said Ferguson could then make a title; and, if he could not, it was agreed that the last-mentioned sum was not to be paid until such title should be made. The plaintiff alleges in the bill that, in September, 1788, he took Kimbrough's bargain, and, in January, 1789, received possession of the land, "which he had retained ever since." It seems that, while a suit in the High Court of Chancery, by Ferguson against Bumpass, to obtain a conveyance for the land, was pending, Richard Littlepage bought the title of Bumpass, for 100l. cash paid by Fortunatus Green, the plaintiff, and for his benefit, as he alleged; but the deed, which was dated the 14th of February, 1794, was made to Littlepage himself, conveying absolutely "to him, his heirs and assigns, all the right and title of the said Bumpass, for the consideration of 100l. paid by him the said Littlepage," and warranting the right and title of the said land "against the claim of any person or persons whatsoever, except the claim of John Ferguson, or his representatives, which now is in dispute." To this deed the plaintiff was one of the witnesses, and, partly on his testimony, it was recorded the 4th of April, 1794. The next day after its date, a writing under seal was executed from Littlepage to the plaintiff: setting forth that John Ferguson had contracted with Robert Bumpass for the said 261 1-2 acres of land which the said Ferguson took possession of and sold to Benjamin Kimbrough, who then disposed of it in the following manner; "viz. 61 1-2 acres said to be sold to a certain Samuel Nuckolls, and the remainder to Fortunatus Green, who is now in possession of the said land, though the right still remains in Robert Bumpass, who had conveyed to Littlepage by virtue of a power of attorney. Now be it understood that Fortunatus Green hath this day advanced to me, (the said Littlepage,) as attorney for the said Bumpass, the sum of 100l., which sum I do oblige myself to return the said Green with interest thereon from the date hereof, or make him a lawful right to the said two hundred acres of land. And I do further oblige myself as attorney for Robert Bumpass, and in behalf of the said Fortunatus Green, that no other person shall have a right to the 200 acres of land but himself, until he is returned the 100l., with interest, as is before mentioned; for the faithful performance

of which I do hereby, as attorney for Robert Bumpass, bind myself, heirs, &c. in the penalty of 500l."

451 "The 2d of March following the plaintiff paid Littlepage a farther sum of 26l. 9s. for which he gave a receipt "promising to account for it in the same manner as for the 100l. received of him the last month on account of Robert Bumpass;" and signed "Richard Littlepage for Robert Bumpass and self." A farther payment of 8l. was made the 11th of July, and a similar receipt taken: and on the 20th of May, 1799, the said Littlepage, by a writing under seal, obliged himself, his heirs, &c. "that the balance of the money due him from Fortunatus Green, for the land whereon he lived, should remain in the hands of the said Green until he the said Littlepage should satisfy the amount of three executions which had been paid for him by the said Green."

It was fully proved, that, at the time the deed was executed from Bumpass to Littlepage, a witness advised the plaintiff, (who it seems was present,) "that it would be best for him to take the deed from the said Bumpass in his own name;" whereupon the said Littlepage observed "that, if the right should be made to him, it would put it out of the power of Ferguson ever to make the plaintiff a right; and that it would enable the plaintiff to recover three or four hundred pounds as damages of the said Ferguson; and that he would get his land clear;" to which arrangement the plaintiff assented.

It was further proved that, by the contrivance of Littlepage, and with the assent of the plaintiff, a declaration in ejectment was served upon the latter; the lawyer's fee for which appears to have been paid by the plaintiff to Littlepage; to whom he surrendered the possession of the land, and immediately resumed it as his tenant; agreeing to pay ten dollars a year rent, as long as he should remain on the land; that Littlepage afterwards declared that, after recovering the land by law of the plaintiff, he had sold it to him for a certain sum of money, and for the benefit of his claim against Ferguson; which sum of money and claim were understood, by a witness who stated what Littlepage said, to be in full discharge of the contract between them for the said land.

What became of the claim upon Ferguson does not appear in the record; but after all these transactions, (of which it does not appear that Thomas Price had any notice,) upon a settlement of accounts between the said Price and Littlepage, on the 17th of February, 1801, a balance of 156l. 2s. 452 3d. 1-2, being due from *the former to the latter; and it being proposed that that balance should be taken by Price upon the plaintiff, the plaintiff readily agreed to it, (acknowledging himself to be still indebted to Littlepage, for and on account of the same land,) and expressed great satisfaction (at that time, and repeatedly afterwards) at this arrangement. A contract was then made between Price and the plaintiff, that Price should take in payment, his produce, at the highest Richmond cash price; that

the plaintiff should do a job of brick-work towards payment of the debt, and that Price should let him have certain articles of the grocery kind for the use of his family at the Richmond cash price.*

By a writing, dated the same day, (to which the plaintiff appears to have been privy, without making any objection,) Littlepage "obliged himself, whenever called upon by the said Price, to give him an instrument of writing vesting him the said Price with all the rights and immunities that he the said Littlepage holds in the 200 acres of land on which the aforementioned Fortunatus Green now lives; which right the said Price is to hold until the above-mentioned sum (of 156l. 2s. 3d 1-2), with the interest accruing, is fully paid."† The first of March, 1801, a mortgage on the said 200 acres of land was given by Littlepage and wife to Price, to secure the payment of the same sum of money, with interest, and proved in Court by one witness, the 21st of May following; but does not appear to have been fully recorded. A bill to foreclose that mortgage was filed in Hanover County Court against the children of Richard Littlepage, without making Fortunatus Green a party, and a decree for the sale of 453 the mortgaged *premises obtained December 22, 1802; to which decree the present plaintiff obtained, on the 3d of June, 1803, from the Superior Court of Chancery, a writ of injunction to stay proceedings upon it until the further order of that Court.

The prayer of the bill in this suit was, that the mortgage be cancelled, that all the defendants be compelled to join in a deed conveying to the plaintiff in fee the land aforesaid; or that he might receive any further or other relief more agreeable to equity. No answer was filed on behalf of Littlepage's children, and no proceedings against them appear in the record; according to which, on the 28th of September, 1804, "the papers in this cause were put into the hands of the Court, upon motion, by counsel for the defendant Thomas Price, to dissolve the injunction which had been awarded the plaintiff; but the cause being regularly set for a final hearing as to that defendant, the plaintiff's counsel moved the court to proceed to hear the same in chief as to him;" whereupon, the cause was heard as to the defendant Thomas Price,

*Note. It is alleged in the answer, that "after the death of Littlepage, (which happened in a few weeks from the time of this transaction,) and not until then, the plaintiff began to prevaricate; and, after making several promises, and appointing several days to commence the brick-work according to his contract, at length declared he would do no work unless he received cash for the same; that he considered Littlepage as fully paid for the land, and that, notwithstanding his frequent promises, he would pay the defendant nothing." This allegation in the answer, is supported by several depositions, and not contradicted by any evidence.—Note in Original Edition.

†Note. This instrument of writing recited, in its commencement, that Littlepage, to secure the payment of the said balance, with interest from the date, had given an order on Green, which he had that day accepted, in favour of Price. But, probably, this was only a verbal order and verbal acceptance; for no written order is mentioned in any part of the record. In the answer it is said, (by a plain mistake,) not that Littlepage had given, but that, by the said instrument of writing, he obliged himself to give such an order.—Note in Original Edition.

and the bill, as to him, dismissed with costs; from which decree the plaintiff appealed.

Randolph, for the appellant.

Wickham, for the appellee.

Saturday, November 3. The Judges pronounced their opinions.

JUDGE TUCKER. The only question in this case appears to me to be, whether a man, who, having an equitable title to lands, and, knowing of it, stands by, and either encourages, or does not forbid the purchase, (or, what is the same thing, the mortgage thereof to another,) shall be bound by the purchase or encumbrance thus made? In the present case, the complainant Green appears from the testimony to have encouraged Mr. Price to take the mortgage from Littlepage; and, by so doing, I conceive he has bound himself, and all claiming under him. I am of opinion, therefore, that the decree dismissing the complainant's bill be affirmed. (a)

JUDGE ROANE said it was a plain case for affirming the decree.

454 ***JUDGE FLEMING.** This appears to be one of the clearest cases in favour of the appellee that ever came before a Court of Justice. There seems to have been a combination between Littlepage and Green (the latter of whom affects great ignorance) to swindle John Ferguson out of three or four hundred pounds; but in that nefarious business Price was no party: nor is he to be affected by it. The case is too plain to need further animadversion; and I shall only add that it is the unanimous opinion of the Court that the decree, dismissing the bill against Price, be affirmed.

Clay v. Ransome.

Wednesday, October 31, 1810.

1. **Ejectment—Twenty Years' Possession.**—A defendant in ejectment is protected by 20 years' possession before the action bro't: but the 5 years and 174 days, excluded by the act of Assembly, are not to be counted in his favour.
2. **Same—Same—Special Verdict.**—If, therefore, upon a special verdict in ejectment, it be uncertain whether the defendant, or those under whom he claims, had 20 years' possession, exclusive of the said 5 years and 174 days, a venire de novo ought to be awarded.

Upon an appeal from a judgment of the District Court of Prince Edward, rendered for the defendant, the 4th April, 1805, in an action of ejectment on behalf of Charles Clay against Elizabeth Ransome.

The case was submitted, without argument, by Samuel Taylor, for the appellant, and Munford, for the appellee, and is sufficiently stated in the following opinion of Judge Tucker; except that it may be proper to mention, that the claim of the lessor of the plaintiff, as set forth in the special verdict, was founded on a deed of mortgage

dated the 20th of April, 1772, from a certain Anthony Winston (who was found to have been in possession at that time) to James and Robert Donalds & Co.; a decree of foreclosure, dated the 3d of October, 1797, against the heir at law and executor of Anthony Winston; and a deed, dated the 24th of January, 1798, to the lessor of the plaintiff, from the Commissioners appointed by that decree to sell the land. No possession by James and Robert Donalds & Co., by Anthony Winston, or any person holding under him, either before or after the 20th of April, 1772, or by the lessor of the plaintiff, after the 3d of October, 1797, was found by the Jury.

Friday, November 2. The Judges pronounced their opinions.

JUDGE TUCKER. Clay brought an ejectment on the 17th of August, 1799, against Ransome. The Jury found a 455 special verdict, *which they conclude thus: "We find that Flamstead Ransome, the late husband of the defendant, was in possession of the land in question, from 1774, until his death, about ten years ago; and that the defendant hath been in possession thereof ever since;" and refer the law to the Court.

An ejectment is a possessory action, and only a competent remedy where the lessor of the plaintiff may enter: therefore, it is always necessary for the plaintiff to shew that his lessor had a right to enter; by proving a possession within 20 years, or accounting for the want of it under some of the exceptions allowed by the statute. Twenty years' adverse possession is a positive title to the defendant: it is not a bar to the action, or remedy of the plaintiff, only; but takes away his right of possession.

Every plaintiff in ejectment must shew a right of possession, as well as of property: and therefore the defendant needs not to plead the statute, as in the case of actions. (b)

Here the Jury have found an adverse possession for more than twenty years. But our statute of limitations (c) excepts three different periods, from the 12th day of April, 1774, to the 20th of October, 1783; amounting, in the whole, to five years and 174 days. If Ransome's entry was made in the month of January, 1774, or at any time before the 23d or 24th of February in that year, his possession and that of his wife would amount to a complete bar, after deducting the period allowed by the statute. If his entry were after the 25th of February, the case will be within the saving clause of the statute. I am therefore of opinion, that the verdict is not sufficiently certain upon this point, and that there ought to be a venire de novo for that reason.

JUDGES ROANE and FLEMING concurred. The judgment was therefore unanimously reversed, and a venire de novo awarded.

(a) See 1 Fonb. b. i. c. 8. s. 4: 1 Wash. 217. Hoee & Harrison v. Pierce's Adm'r: Ibid. 280. Applebury and others v. Anthony's Ex'rs: 1 Vern 186. Hobbs v. Norton: 2 Vern. 370. Draper v. Borlase: 2 H. & M. 116. Pollard v. Cartwright.

*See monographic note on "Ejectment" appended to Tapscott v. Cobbs. 11 Gratt. 172.

(b) 1 Burr. 119 per LORD MANSFIELD: Bull. N. P. 108. 2 Esp. N. P. 402. citing Stokes v. Barry. Salk. 421: 1 Lord Raym. 741: Runnington's Law of Eject. 119 accordant.

(c) 1 Rev. Code, c. 76, s. 11, p. 109.

Monday, November 26, 1810.

1. **Nuncupative Will—What Constitutes**—Case at Bar.—A man on his death bed, at his own house, and in his proper senses, sent for a neighbour to make his will, who took notes thereof in his presence, and in that of another witness who was present all the time, and heard the sick man request the first witness to make his will, and direct each note to be taken. A third witness was not present when the first began to take notes, but was present afterwards, and heard some of the notes dictated. Two of the witnesses swore that the notes, or most of them, were read to the decedent, but, were not positive that the whole were; nor did the sick man read them himself; but he was then in his proper senses. After the first witness had made a draught of a will from the notes, the decedent was incapable of reading, or hearing it read; being at that time delirious. The notes taken as aforesaid were established as a good nuncupative will.

At a Court held for Lunenburg County, the 12th of July, 1804, a paper was offered for probate as containing the nuncupative will of John Dunman, deceased.

The evidence offered in support of the probate was that of a certain John Blackwell, "who swore that he was sent for by the decedent for the purpose of making his will; that the decedent asked him whether he would write the will there, or take notes or hints upon paper or slate, or words to that effect, and go into another room to write it; that the witness took notes, in the presence of the decedent, at his dwelling, and in his last illness," (which are set forth in *hæc verba*, in a bill of exceptions,) "from which notes he drew a will in another room;" (also set forth in like manner, and bearing date on the 6th of March, 1804;) that he read over, as he drew the notes, some of them to the decedent, but is not positive that he read all of them; that, after he had taken all the aforesaid notes, he did not read them over to the decedent; neither did the decedent read them to himself; but the witness believed the decedent was of sound mind at the time of taking the notes; but that, after he had drawn the will from the notes, the decedent was incapable of reading it, or hearing it read, being at that time delirious." Sterling Davis, another witness, swore that "he

***Nuncupative Will—What Constitutes**.—A testamentary paper signed and acknowledged in the presence of witnesses, who are requested to attest it, and attested by them out of the presence of the testatrix, so that it is not good as a written will, cannot be set up as a nuncupative will. *Reese v. Hawthorn*, 10 Gratt. 548, 550, citing and distinguishing the principal case and *Phoebe v. Boggess*, 1 Gratt. 120.

A nuncupative will to be valid must be made in the last sickness of the testator, when he is in such extremity that he has not the ability and opportunity to make a written will. *Reese v. Hawthorn*, 10 Gratt. 548.

Rochelle v. Rochelle, 10 Leigh 140, cites the principal case as rejecting notes for a will though dictated by the dying man, because it did not appear that they had been read over and approved by him.

See generally, monographic note on "Wills."

was not present when said Blackwell began to take said notes, but was present before they were finished, and heard the decedent direct some of them to be taken; but does not recollect their purport." This witness "thought the decedent was of sound mind." William Barnett, a third witness, (having previously, in Court, relinquished and released all benefit which he might be entitled to under the will of John Dunman, deceased, in case the same should be established,) swore, "that he was present at the time the notes were taken, and held the candle for the said Blackwell to take them by, and heard the decedent request said Blackwell to make the said will, and direct each note to be taken;" at which time the decedent "was of sound mind." The witness was certain that the greater part of the notes, as they were taken, were read to

the decedent; and *believed, but was not certain, that he heard the whole of them read. He believed that the notes "above annexed" were the notes then taken by the said Blackwell; and averred that he (the witness) was no way related or connected with the decedent, who, when in health frequently before his illness, expressed his determination to leave half his estate to the children of the said witness. John Williams, a fourth witness, swore that the testator frequently before his death, when in good health, declared that he intended to make the children of his brother Joseph Dunman, and of William Barnett, his heirs. Upon this evidence, the County Court admitted "the said paper" to record as the nuncupative will of John Dunman; and that order was affirmed by the District Court; whereupon Peter Mason (who, with Sally his wife, and others, children of James Dunman, deceased, had been originally summoned to shew cause, if any they could, against the probate) appealed to this Court.

According to former decisions, the Clerk of the District Court was summoned and attended with the original notes and draught of the will made by John Blackwell; from which, as well as the copies inserted in the transcript of the record, a difference appeared between the notes and the draught, in this, that the former contained a clause whereby the testator bequeathed to his mother a yoke of steers during her natural life, and, at her decease, to be sold to pay her debts, and the residue of his own debts, if any; which clause was omitted in the latter.

Wirt, for the appellant. In the present case the paper exhibited for probate was offered as a nuncupative will, and received by the Court as such: but it is evident the testator's intention was to have a written will. The notes were taken only as hints to lead to a will, but not as the will itself. Can a man make a nuncupative will without intending it? If the Court should so decide, they would convert into a will what was never intended to be one, and, in effect, make a will for the decedent.

But, if this was intended as a nuncupative will, the requisitions of the act of Assembly(a) were not complied with: for it is

(a) 1 Rev. Code, p. 161, c. 92, s. 5.

not proved that the testator called on any person present to take notice, or bear testimony, that such was his will, or that he used any words of the like import.

458 *Munford, for the appellee. The requisitions of the act of Assembly are substantially complied with in this nuncupative will. The witness who took notes of the will does not say, totidem verbis, that the testator told him, or others, to take notice that such was his will; but that he sent for him for the purpose of making his will; that, when he came, he asked him whether he would write his will there, or take notes or hints upon paper or slate, and go into another room to write it; that the witness, thereupon, in the presence of the decedent, took notes which he dictated, and which are evidently very particular and accurate, and clearly intended as a will. These circumstances must be equivalent to the "words of like import" required by the act of Assembly.

It is said, that these notes were intended to be reduced into form; and that the testator did not declare them his will, but only that he intended them to be his will, when reduced into form, and approved by him. But a will is only "the legal declaration of a man's intentions which he wills to be performed after his death." (a) A declaration, therefore, that certain words are his will, and, that he intends them to be his will when committed to writing and reduced into form, must be good as a nuncupative will, which is sufficient, (if legal in other respects,) though verbally made, and not in form. Indeed, the words themselves, though not committed to writing at all, would have been sufficient if recollected by the witnesses within six months; and, after six months, if committed to writing within six days. (b) The words themselves were, in truth, the nuncupative will. The writings in question are only evidences to prove (or, rather, to corroborate the parol testimony) that such words were spoken.

No doubt, in all cases of nuncupative wills, the testator intends to have his will reduced to writing, and signed, if he shall live long enough to accomplish it: and it is the very disappointment of this intention, that makes it bad as a written will, but (in case the other requisitions of the law be complied with) good as a nuncupative will. I grant the testator's intention, as to the disposal of his property, must remain unchanged; that is, no declaration of a change of intention must appear. But in this case there was no evidence of any change of intention. In *Cogbill v. Cogbill*, 2 H. & M. 467, the great principle upon which the memorandum was established as a good codicil was that no change of intention appeared. (c) In this case, John Dun-

459 *man's declaration of his intention, concerning the disposal of his property, was not incomplete, or conditional, but positive. There was indeed an implied condition annexed to the directions given Blackwell relative to the formal

draught of the will, that it should conform in substance to the notes dictated by himself. If that condition was broken, that paper might have been objected to, and not signed by him, had it been presented to him. But the validity of that paper is not indispensably now in question. The notes taken in his presence, to which notes no condition or reservation was annexed, expressed the nuncupative will, and ought to be established as such, even if the other paper should be rejected.

Wirt, in reply. The draught in the form of a will is the paper tendered, for probate, as the nuncupative will; and it cannot be received as such, because it does not agree with the notes. The intention of the Legislature in using the expression, "words of the like import," was to dispense with any particular form of words, but not to dispense with a public declaration that the words were spoken with an intent to bequeath. But here the testator only gave hints to write a will, and uttered, in reality, no testamentary words. A flood of frauds, corruptions, and ingenious contrivances may be let in, if a will be established under such circumstances as these.

Wednesday, November 28. The Judges pronounced their opinions.

JUDGE TUCKER, after stating the case. The witnesses not being positive that all the notes taken by the first witness, in the presence of the testator, and by his direction, were read over to him, and approved by him, after they were committed to writing,* I am of opinion that the Court did right in considering those notes as too imperfect to be established as a written will; and the draught, when completed, not being read to him, nor approved by him, must be considered liable to the same objection. But, although those notes were not, for the reasons just mentioned, to be considered as a written will, I think the court judged very properly in admitting them to record, as containing the substance of a nuncupative will, made by the decedent, in extremis, at his own house, and in his proper senses.

460 *JUDGE ROANE. I am clearly of the same opinion. The notes taken by the bed-side of the dying man were a good nuncupative will; but, as it does not appear clearly whether the Court below meant to establish the notes, or the draught of a will, I think it would be proper to express it to be the intention of this Court to establish the notes; especially as there is a slight difference between them and the draught.

JUDGE FLEMING. This is a plain case, that the notes are a good nuncupative will, better authenticated than any I have seen. But the notes ought to be established, instead of the draught; there being a slight difference between the two papers, merely as to the disposal of the money arising from the sale of certain oxen.

Judgment unanimously affirmed; and the Clerk (to prevent misconceptions) directed to enter the notes verbatim in the order-book.

*See 2 Bl. Com. 502.

(a) 2 Bl. Com. 490.

(b) 1 Rev. Code, p. 161, c. 92, s. 6.

(c) See JUDGE ROANE'S and FLEMING'S opinions throughout; particularly p. 511, 513, 514, 522, 524.

Day, Executor of Yates, Who Was Executor of Payne, v. Murdoch, Surviving Partner of Cuningham & Co.

Monday, November 18, 1810.

1. **British Debtor—Payment in Paper Money—Discharge.**—A payment in paper money, by a British debtor to an American creditor, operated a full discharge to its nominal amount, of a current money debt, contracted in specie; notwithstanding the creditor made objections to receiving the paper money, and observed, at the time, that he would keep it safe for the debtor, but did not consider it as a payment, though intended as such by the debtor; and notwithstanding the receipt contained a reservation that, since the creditor had demanded the debt when the rate of exchange was at 15 per cent. he therefore claimed so much as might be allowed him on that account by arbitrators appointed to have been (but who never were) appointed.
2. **Escheat—Trust Estate—Case at Bar.**—A factor and agent for a company of British merchants having, in the year 1771, purchased, on their behalf, a tract of land in Virginia, for a sum of money payable on demand, and then received possession thereof for their use; and a credit for the money having been entered in their books: the equitable title to, and possession of, such land was thereby completely vested in the company; and, under the act of May session, 1779, "concerning escheats and forfeitures from British subjects," the same escheated to the Commonwealth, which, on inquest found, became entitled, in the same manner the company were entitled; but subject to the payment of so much only of the purchase money, remaining due, as did not exceed the net amount for which the land was sold by the escheator, reduced to present current money, according to the 2d section of that act; the said British company being still liable for the residue of the said purchase-money.
3. **Appellate Practice—Error Prejudicial to Appellee.**† —Upon an appeal from a decree in Chancery, an error to the injury of the appellee ought to be corrected, although he did not appeal.‡

*Escheat.—See monographic note on "Escheat" appended to *Sands v. Lynham*, 37 Gratt. 201.

†Appellate Practice—Error Prejudicial to Appellee.—To the point that upon an appeal from a decree in chancery an error to the injury of the appellee ought to be corrected, although he did not appeal, the principal case is cited in *Burton v. Brown*, 22 Gratt. 16; *Morgan v. Ohio R. R. Co.*, 30 W. Va. 25, 19 S. E. Rep. 591; foot-note to *Boulware v. Newton*, 18 Gratt. 708, quoting from *Morgan v. Ohio R. R. Co.*, 30 W. Va. 25, 19 S. E. Rep. 591.

The general rule laid down by the court in the principal case is referred to with approval in *Grantland v. Wight*, 2 Munf. 186; *Quarles v. Quarles*, 2 Munf. 326; *Hopkirk v. Dennis*, 2 Munf. 338; *Wilson v. Burfoot*, 2 Gratt. 134.

See generally, monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268; monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

‡Note. The Court have since, to wit, on the 2d of October, 1811, established the following general rule. "It is the opinion of the law, as on various decisions which have heretofore been had, that, in future, where a judgment or decree is reversed neither in the whole, nor in part, on the ground of error against the appellant, or plaintiff, in any appeal, writ of error, or supersedeas; yet, if error is perceived against the appellee, or defendant, the Court will consider the whole record as before

This was a suit originally brought in the late High Court of Chancery, by Charles Yates, executor of Daniel Payne, 461 against *William Cuningham & Co. British merchants, and Walter Colquhoun, their agent in this country, to attach in his hands so much of the effects of the said company, (the partners being residents in Great Britain,) as would be sufficient to satisfy two claims for debts due from them to the said Daniel Payne in his life-time; the first being a balance of account, on the 1st of September, 1774, of 373l. 11s. 7d. current money, and the other 491l. 19s. 10d. sterling; of which last-mentioned sum, 40l. was the price of certain houses and lots in the town of Dumfries, sold by the said Payne to John Neilson, an agent of the said company, for their use, some time in the year 1771, and the residue was a balance of account.

The material circumstances relative to each claim (as collected from the bill, answer, depositions and exhibits) were the following.

The currency debt was admitted to have been originally due as stated; but the point in dispute related to a subsequent payment of 423l. 19s. in paper money, by a certain James Robinson, (a factor and partner of the company,) to the said Daniel Payne, on the 4th of April, 1777. The question was whether this payment, which, at its nominal amount was equal to the principal and interest of the currency debt, was to be considered as a full satisfaction thereof, or to be credited at its value, according to the scale of depreciation. It appeared that Payne was very unwilling to receive the paper money, but was induced to do so by Robinson's threatening to lodge an information against him with the committee of safety; that, when he received it, he put it in his desk, observing that he would keep it safe for the company, but did not consider it as a payment. He gave a receipt in the following words: "Received, April 4th, 1777, of Mr. James Robinson, 423l. 19s. current money of Virginia, being the amount of the principal and interest due to 462 me in currency by Messrs. *William Cuningham & Co. of Glasgow, at their Dumfries store, and exclusive of the sterling sum owing for the lots that I sold them; nevertheless, I demanded the currency debt when the rate of exchange was at 15 per cent.; if, on arbitration hereafter to be had, it should be determined that I am entitled to an allowance on that account, the said company are hereby subjected to such allowance. Dan. Payne."

It was contended by him that, in consequence of the demand mentioned in that receipt, the debt in question should be considered as turned into sterling at the rate of 15 per cent. difference of exchange; and he alleged that this had been consented to, on the part of William Cuningham & Co. as a consideration for

them, and will reverse the proceedings, either in whole, or in part, in the same manner as they would do, were the appellee or defendant also to bring the same before them, either by appeal, writ of error, or supersedeas; unless such error be waived by the appellee, or defendant; which waiver shall be considered a release of all errors as to him."—Note in Original Edition.

further forbearance of the debt; but of this there was no proof. It was stated in the deposition of Walter Colquhoun, (who, it seems, did not answer the bill as a defendant, but was examined as a witness,) that Payne never made him any offer of leaving the conditional clause in the receipt to the decision of arbitrators; that, subsequent to his death, his executor Yates wrote a letter to the deponent as agent for the company, touching an arbitration; to which he answered that, if it was meant to open the whole transaction, he did not feel himself at liberty to consent; but, if the matter in controversy be considered as restricted to the claim, in Mr. Payne's receipt, respecting the exchange, he might, unless counselled to the contrary, consent to the leaving of that point, as the only disputable one, to the decision of arbitrators; that no written reply was given, but the deponent understood the limitation proposed would not be agreed to.

As to the debt in sterling money; it appeared that a verbal contract was made by John Neilson, factor for the company, in the year 1771, for the purchase of the houses and lots aforesaid of Daniel Payne, at the price of 400l. sterling, payable on demand; that possession was then given to the said factor for the use of the Company, and a credit for the money entered in their books; that no deeds were executed; Payne having refused to make any, since the money was not paid, and choosing to retain the legal title in himself as security for such payment; that the said lots and houses were afterwards confiscated as the property of British subjects, and that he (although requested by Adam Newall, an agent of the Company) did not interfere to prevent it, by

setting up his legal title against the
463 claim of the *Commonwealth. The Company therefore contended, that they ought not to be compelled to pay the said purchase-money. It appeared, moreover, that four bonds belonging to the said Company, and amounting to 1971l. 4s. 6d. 1-2 were put into the said Payne's hands on the 4th day of February, 1786, as security for his claims; of which bonds one for 233l. 10s. 10d. was returned to Walter Colquhoun, their agent, on the 31st of July, 1789, but the other three (with two bills of sale as additional security to two of them) were said to have been retained by the said Payne and his executor.

The Chancellor made a general order of account, March 15, 1800; and, afterwards, on the 18th of May, 1801, "having considered allegations of parties, their proofs, and the arguments of counsel, directed the Commissioner, in stating the accounts between the parties, to debit the plaintiff's testator with the value of the money (which he acknowledged himself to have received) according to the statutory scale of depreciation, and not to debit the defendants with the consideration money which they had agreed to pay for the houses and land in Dumfries." The Commissioner made a report accordingly, finding a balance against the defendants (after charging them with rent for the said houses and lots during the time they were occupied by their agents) to the amount of 465l. 11s. 2d. to bear interest

from the 4th of April, 1777; (the date of the receipt for the money paid as aforesaid on account of the currency debt;) about which time James Robinson, the factor and partner of the Company, with all their clerks, storekeepers and assistant storekeepers were obliged to leave the State under the resolution of the Assembly, dated the 18th day of December, 1776, for enforcing the statute staple of the 27th Edw. III, c. 17.

This report was confirmed by the Chancellor, and (omitting eight years' interest for the time of the war) he decreed to the plaintiff the balance reported, with interest from the 4th of April, 1785: from which decree the plaintiff appealed.

Warden and Botta, for the appellant.

Williams and Wickham, for the appellee.

On the part of the appellant, it was
464 contended that the decree *was erroneous in not allowing the purchase-money for the lots and houses in Dumfries. This bargain was made before the statute of frauds was adopted in this country. A parol agreement, at that time, would have been enforced in equity, even without part performance. But here there was part performance, Cuninghame & Co. were put into actual possession, and made considerable improvements. The land was their property, and the money the property of Payne. He had a right to go against them personally as debtors, though, it is true, he retained a lien on the land. He might waive his lien if he chose, out this could not deprive him of his personal remedy.

The bargain being obligatory on him, he could not have prevented the sale by the escheator: for, if he had filed a montrans de droit, the previous sale to Cuninghame & Co. would have barred his right; and he was not bound to have committed a fraud on the government by representing the land as his own. If, then, he has done no wrong, how has he forfeited his right?

According to the contract, Cuninghame & Co. ought to have paid the money immediately; whereupon, a deed would have been made, conveying to them the legal title; if which had been done, it is admitted on all hands, nothing could have saved the land from the claim of the Commonwealth. Shall they be benefited by their own wrong, and put in a better situation than if they had paid the money. The doctrine laid down in 3 Dall. 225, shews that, as British subjects, they were personally liable for the acts of their government.

On the other side, it was said that the jurisdiction of the Court of Equity in this case could be supported only by taking this as a bill for specific performance. Considering it as such, the Court has a discretionary power to grant or withhold relief. No man shall demand equity without doing equity; so, also, without having done equity. It was Payne's duty to protect our rights, and, not having done it, he is not entitled to a decree. He must be presumed to have had it in his power to assert all his legal rights, the act of Assembly(a) having provided for the protection of such rights. The Commonwealth could only take, subject to the rights of Payne; noth-

ing but the rights of Cuningham & Co. being confiscated.

As a creditor, also, Payne was protected.^(a) There can be "no doubt that he might have secured himself in the mode pointed out by one or other of the laws on this subject. An ample fund, therefore, existing, in the lots and houses themselves, out of which he might have been paid, it was his duty to resort to that fund, and not to Cuningham & Co.; according to the maxim that "no right ought to be exercised in a manner prejudicial to the rights of others."^(b)

In reply it was observed that this was not a bill for specific performance. The plaintiff came into equity on the ground that the defendants were out of the Commonwealth, and he could not sue them at law. This was the only circumstance which ousted the Court of Law of its jurisdiction. Cuningham & Co. were not entitled to a deed, but upon payment of the money; and, now, upon payment of the money, a deed may be made them, conveying all the right remaining in Payne's representatives.

On the part of the appellees, also, the decree was said to be erroneous, in directing the paper money payment to be scaled. The scale applies only to subsisting debts unpaid, but not to payments; for the law is positive that all actual payments in paper money shall be good at their nominal amount. This, being an error to the injury of the appellee, ought to be corrected, though he has not appealed. If there be one error in favour of the appellant, and another in favour of the appellee, the Court will direct both to be corrected. Where a balance of account is to be struck, and the sum of errors on both sides to be calculated, the Court must look into the whole business, and correct all the errors. For this reason, after a decree for an account, the plaintiff cannot dismiss his bill; but a balance of account may be decreed to the defendant; as was done the other day in *Todd v. Bowyer*.^(c)

To this it was objected, that Payne was not obliged to take paper money between 1770 and 1774; when he demanded payment, and Cuningham & Co. failed to pay. The particular wording of the receipt of the 4th April, 1777, proves this, and shews that, in equity, the payment should be scaled.

The counsel for the appellee contended, contra, that the wording *of the receipt proved nothing, but that Payne wished to get over giving a receipt. It was, nevertheless, a plain receipt in full.

Friday, November 30. The following was entered as the opinion of the Court, consisting of JUDGES ROANE and TUCKER.

"The Court, having maturely considered, &c. is of opinion that the said decree is erroneous: therefore, it is decreed and ordered that the same be reversed and annulled, and that the appellees pay to the appellant the costs as well by him as by his testator expended in prosecuting his appeal aforesaid here. And this Court, proceeding

to make such decree as the said Superior Court of Chancery ought to have pronounced, is of opinion, that the payment of 4231. 19s., current money by James Robinson, for and on account of the appellees, to Daniel Payne, on the 4th day of April, 1777, which is acknowledged by said Payne to have been the full amount of the principal and interest then due to him, in current money, was a full payment and extinguishment of that debt, notwithstanding the demand made by the said Payne, that the same should be turned into sterling at the rate of 15 per cent. difference of exchange, and the reservation by him, of a right to claim the same in future; the commutation aforesaid of that debt, being neither agreed to by the debtors, or their agent, (and, if consented to as a consideration for further forbearance of the debt, as alleged by the said Payne, was probably a device to elude the provision of the statute of usury, and therefore void,) nor being established by the award of arbitrators, according to the tenor of the receipt granted by the said Payne at the time of the payment aforesaid; nor, if this bill was intended to procure the decision of the Court of Equity in lieu of that of the arbitrators upon that question, does it appear that the appellant has any just right to claim the addition or commutation aforesaid; and that therefore the bill should, as to the appellant, be dismissed, so far as it relates to that article, with costs; but that, on the other hand, the appellees, although they have not appealed from the decree in question, ought to be allowed the benefit of the nominal amount of the payment aforesaid, which ought not to be subjected to the operation of the scale of depreciation established by law; that sum forming only one item of the account between the

467 *parties, and its allowance in full to the appellees not changing the result of the decree, which will, under the opinion of this Court, as now declared, be still rendered more favourable to the appellant.

"And this Court is further of opinion that, by the contract and agreement between John Neilson, factor and agent for the said William Cuningham & Co., and made in their behalf with Daniel Payne in the year 1771, and not disapproved of, but acquiesced in by them, for the purchase of the said Payne's lots and houses in the town of Dumfries, for the sum of 400l. sterling, payable on demand, possession whereof was then given, and a credit for the money entered in the books of the Company, as appears by their answer, the equitable title and possession was thereby completely vested in the said William Cuningham & Co., who might at any time have coerced a legal title from the said Daniel Payne, by paying or tendering to him the purchase-money, until the said Daniel Payne was absolved from that obligation by the Acts of the Legislature of the Commonwealth of Virginia, and the proceedings had under the same, confiscating the rights of said William Cuningham and Company in and to the same.

"And this Court is further of opinion, that the retention by the said Daniel Payne of the said legal title as a security for the

(a) Ch. Rev. 99, 106, 118.

(b) 3 Fonb. p. 297, b. 3, c. 2, s. 6, note (l): 1 H. Bl. 136. *Wright v. Nutt*; 3 Bro. Ch. 326. S. C.; 3 Bro. Ch. 54. *Peters v. Irvine*.

(c) Ante, p. 447.

payment of the purchase-money for the said lots and houses did not impose it upon him as a duty, by any sinister act or device, to endeavour to protect the property therein of the said William Cunningham & Co. from confiscation; more especially, as it appears, from their own shewing, that they had one or more agents or factors in this country during the whole period of the revolutionary war, who were equally competent to have defended the same; and that the said Daniel Payne is not responsible for the confiscation and sale thereof, which he could not probably have prevented, as the Commonwealth, by the act "concerning escheats and forfeitures," became entitled in the same manner as the said William Cunningham & Co. were entitled, subject, nevertheless, to the payment of the consideration agreed to be paid by the said William Cunningham & Co. for the same.

And this Court is further of opinion, that the appellees are still liable to the representatives of the said Daniel Payne, for any part of the said consideration money 468 which may remain due *beyond the net amount of the consideration for which the lots and houses aforesaid were sold by the escheator of the Commonwealth, after deducting all just and reasonable expenses of the sales of the same, reduced to current money of this present period, according to the directions of the act of the May, 1779, c. 4, s. 2, "concerning escheats and forfeitures from British subjects," according to the rate of exchange between current and sterling money at the time when the final decree shall be made in this cause, with interest thereupon from the time of the institution of this suit; and if the bonds, mentioned in the exhibit No. 6, have been retained by the said Daniel Payne, or his representatives, as is suggested in the answer, that the same, upon the performance of this decree on the part of the appellees, shall be delivered up to them, the appellant accounting with them for any moneys, which may have been received thereupon by himself, or his testator Charles Yates, or the said Daniel, Payne, or any other person to his or their use.

"And the cause was remanded to the said Superior Court of Chancery, with liberty to the appellant to make the Commonwealth, or those claiming under it, parties thereto, if he shall be so advised."

Benjamin Watkins Leigh's Case.

Friday, November 16, 1810.

1. **Practice of Law—Public Office.**—The practice of Law is not an office or place under the Commonwealth.

***Practitioners—Public Officers.**—As holding that practitioners are not public officers, the principal case is cited in *Ex parte Law*, 15 Fed. Cas. 5.

It would be unjust to the profession, the purity and integrity of which it is the duty of all courts to preserve, and a disregard of the public welfare, to permit an attorney who has forfeited his right to public confidence, to continue the practice of his profession. This doctrine is fully sustained by the authorities. *State v. McClagherty*, 33 W. Va. 250,

2. **Attorney at Law—Oath—Duelling.**†—An attorney at law is not bound, as a requisite to his admission to the bar of any Court, to take the oath prescribed by the 3d section of the act to suppress duelling.

Mr. Leigh having on a former day of this term asked permission to qualify as counsel at this bar, it was then resolved by the whole Court, that in addition to the oaths of qualification heretofore usual in such cases, he must take the oath prescribed in the 3d section of the late act to suppress duelling: which he said he would consider of, and for the time declined. And now, by leave of the Court, he again moved to be admitted to the bar, on his taking the usual oaths, without the additional one last mentioned. He flattered himself he should be able to convince the Court that its first impression on this subject, formed and expressed as it was without argument, and on the sudden, was incorrect; in which, if he should have the good fortune to succeed, he should have no doubt or apprehension which would preponderate with that tribunal, the love of justice or the pride of consistency.

469 *The act directs, "that from and after the passing thereof, every person, who shall be appointed to any office or place, civil or military, under this Commonwealth shall, in addition to the oath now prescribed by law, take the oath" therein prescribed. Mr. Leigh insisted, that the practice of law was not an office or place under the Commonwealth, within the meaning of the act; that the act intended public offices only, and not private ones of any kind.

I agree, said he, it is laid down, generally, that attorneys at law in England are in all points officers of the respective Courts in which they are admitted. 3 Bl. Com. 26. But their character of officers of Court in England, is derived from certain restrictions they are under, and privileges they enjoy, in that country, unknown in this. In England, attorneys cannot be bail in civil cases; nor can attorneys at law practise as solicitors in Chancery; nor attorneys in one of the Courts of Westminster in any other; nor can they be called to the bar, till struck off the roll of attorneys; nor, if once admitted barristers, enrolled as attorneys again, till disbarred at their inns of Court; and they must not only be examined and sworn, (as here,) but must be enrolled, and must have served five years' previous apprenticeship as attorney's clerks. Doug. 114, 466, 467; 3 Bl. Com. ubi supra; Stat. 4 Hen. IV, cap. 18, cap. 23; 2 Geo. II, cap. 27; 12 Geo. II, cap. 13; 22 Geo. II, cap. 46; 23 Geo. II, cap. 26; 30 Geo. II, cap. 19. On the other hand, attorneys cannot, regularly, be held to special bail; they must be sued by bill, not by original; they can only be sued in the Courts they belong to; and they are exempt from serving in offices they may be elected to against their inclination. Doug. 312; 1 Bac. Abr. 191; T. Raym. 179; 1 Lev. 265. And to prove that this character of officers of Court attached to attorneys in

10 S. E. Rep. 407, citing the principal case; Baker's Case, 10 Bush. 592; Mills Case, 1 Mich. 894.

†**Anti-Duelling Act—Constitutionality of.**—The principal case is cited in *Ex parte Hunter*, 2 W. Va. 154, as sustaining the validity of the anti-duelling act.

England, springs from these restrictions and privileges, Mr. Leigh remarked that (King's counsel excepted) serjeants and barristers at law, who are subject to such restrictions, and have no such privileges, take no oath of office, and are not deemed officers of Court. 3 Bl. Com. 28. Now, in Virginia, no such restrictions or privileges exist: here attorneys are counsel. In England, too, it was formerly held that attorneys were compellable to act. Co. Litt. 295, b. But it has been since adjudged, that an attorney is not compellable to appear for any one, unless he take his fee, or back the warrant. 1 Salk. 87.

And even if the law, as stated by 470 *Sir Edward Coke, has not been thus exploded; still counsel were never thought compellable to act; (Harg. Co. Litt. ubi supra. n. 1.) and as in Virginia, the characters of attorney and counsel are inseparably blended in the same person, so that one cannot be engaged as attorney, without being engaged as counsel, in which latter capacity he is, on no principle, compellable to act; it results, that no part of the profession is so compellable in this country. Attorneys, therefore, are no more officers of Court here, than counsel are in England. A class of men they are, indeed, in this as well as in that country, concerned in the administration of justice, to whose diligence, integrity, ability and honour much is necessarily confided, while from situation they are exposed to peculiar temptation; and on that account subjected to examination and probation, sworn to do their duty, regulated by rules of policy and practice, and liable to summary punishment and privation for unworthiness or misconduct. But these, their only traits of the officer known to our law, they have in common with jurors: jurors, as well as attorneys, are necessary in our system of jurisprudence, are selected, sworn, regulated, and summarily punishable for misbehaviour. Attorneys, therefore, are no more than jurors officers of Court in Virginia.

But granting that attorneys are on the same footing here as in England; that they are officers of Court; still, Mr. Leigh contended, they are not public officers within this act.

In fixing the legal construction of this our test, said he, I could not, for curiosity, forbear looking into the construction put by English legislators and lawyers, on their corporation, test and abjuration acts; which are known to have been enforced and interpreted in a spirit that the most rigorous expounder of our test, cannot except against. And here every thing confirmed my position.

By the test act, stat. 25 Car. II, c. 2, it was enacted, "that every person that shall bear any office, civil or military, or shall receive any salary, fee or wages, by reason of any grant from his majesty, or shall have command or place of trust under his majesty, or by his authority, or by authority derived from him, within England," &c. shall take the oaths of Supremacy, &c. Now, within this statute, (of which the words are stronger than those of ours,) it seems, attorneys and counsel were not supposed to be included, as

holding offices or places of trust under the king, or under *authority derived

from him; otherwise Parliament would not have thought it necessary to subject them to the test by a special statute, as they did by 7 and 8 Wm. III, c. 24.

By the abjuration act, 13 Wm. III, c. 6, it was enacted, "that every person who shall bear any office, civil or military, or shall receive any pay by reason of any grant from his majesty, or shall have command or place of trust under his majesty, or by authority derived from him, within England, &c. and all ecclesiastical persons, members of colleges, &c. and all persons teaching pupils, &c. and all preachers, &c. and every person that shall act as a serjeant at law, counsellor, barrister, advocate, attorney, solicitor, clerk or notary, by practising as such in any Court, shall, within three months after they enter upon such office, or take upon them such practice," take the oath of abjuration, &c. Upon which Mr. Leigh remarked, that the alternative words (or take upon them such practice) plainly referred to the legal characters before mentioned; and shewed that the parliament did not deem their profession, nor was it generally understood to be, an office or place under government; if they had thought so, those words would not have been inserted.

And by the corporation act, 13 Car. II, stat. 2, c. 1. it was enacted, "that no person shall be placed or chosen in any office of mayor, alderman, recorder, bailiff, town-clerk, common council-man or other office of magistracy, place, trust, or employment, concerning the government of any city, borough, or cinque port, and their members, or other port town, that shall not within one year next before such choice have taken" the oaths of supremacy, &c. and in default thereof, every such placing and choice is declared void. Mr. Leigh thought that if any words would include the attorneys of Corporation Courts, as officers or placemen, those of this statute would. Yet it had been expressly adjudged, that an attorney was not an officer within that act. T. Raym. 56, 94, S. C.; Sid. 94, 152; 1 Keb. 349, 354, 387, 558, 675. Which he took to be a direct decision of the very point now in discussion. In all the notices of this case, the only question ever raised was, whether an attorneyship was such a place as that a mandamus would lay to restore one to it; and it is decided that of an attorneyship in the common bench, to which the profession here is in that respect analogous, no mandamus in any case would lie, because of the

472 Court's summary *power of removal: but no doubt was ever entertained, that the attorney was not within the corporation act. It had been even doubted, whether a censor of the college of physicians (who by the acts of incorporation, stat. 32 Hen. VIII, c. 40, and 1 Mary, stat. 2, c. 9, must be sworn in office, is compellable to officiate, and is vested with large powers of fine and imprisonment) was a public officer within this act. 5 Mod. 431.

The English lawyers, judges, and parliament, therefore, in the utmost fury of religious zeal, gave not to stronger words, so large an interpretation, as had been given to the far weaker words of our act to suppress duelling.

But, said Mr. Leigh, a reference to our own institutions will place the true meaning of this statute in a yet more striking light; and ascertain, beyond doubt, the justness of the construction I contend for.

The act itself furnishes one clear criterion of its meaning. When the legislature ordains that an officer shall take an oath to observe a particular law during his continuance in office, (such are the words of the oath,) surely it alludes to such offices as are wont to be formally resigned and vacated. This act, therefore, could not have alluded to the practice of the law, of which an actual resignation is unheard of. It is true, judicial and some other offices are, from obvious policy, incompatible with such practice; but if the incompatible office be abandoned, professional rights are ipso facto restored. If, for example, a Judge of this Court were to resign his station, surely he might resume his practice in his former courts, without qualifying anew.

It must be agreed, that if the profession of the law be an office or place under the Commonwealth at all, it is a lucrative one. Now the constitution of Virginia expressly provides, that all persons, "holding lucrative offices, shall be incapable of being elected members of either house of assembly, or the privy council." Art. 14. If then the construction I am controverting be right, lawyers are excluded from the assembly and the council. Yet the framers of the constitution, most of whom sat in the first assembly under it, and their successors ever since, never (as we know) had any such idea. The whole practice of the constitution from its origin to this day, the contemporaneous, the present, the constant exposition of it, refutes this inference; and, by consequence, explodes that construction, of which it is the

473 *direct induction; that attorneys are officers under government. I never heard of but one doubt on this point, which was started by one member of the last Assembly. Nay, some of our ablest men have much doubted whether the appointment of State's Attorney in the County Courts, is an office under government. In the Senate, the negative was resolved in Mr. Doddridge's case; in Mr. Campbell's the affirmation: in the other house I remember no precedent, though the case, to my knowledge, has often occurred.

Some may attempt to obviate this last argument, by taking a distinction between offices under the Constitution, and under the Commonwealth; and though it be too subtle for the vision and grasp of my mind, yet, should it occur, it will be put to rest by considering that this principle of the Constitution is not restrained to offices of its own providing; that the clause itself recognises all lucrative offices; and that, though the profession of the law is not mentioned by the Constitution, yet it depends on Courts of constitutional organization.

Again, by the Constitution of the United States, art. 1, s. 6, cl. 2. "No person holding any office under the United States shall be a member of either house during his continuance in office." Is it, or has it ever been, thought that hereby the bar of the Federal Courts are excluded from Congress?

One instance more. By the act of 1788,

New Rev. Code, p. 40, "The members of the Congress of United States, and all persons who shall hold any legislative, executive, or judicial office, or other lucrative office whatsoever, under the authority of the United States, shall be ineligible to, and incapable of holding, any seat in either house of the General Assembly, or any legislative, executive, or judicial office, or other lucrative office whatsoever, under the government of this Commonwealth." And by the act of 1799, ib. p. 392, "No person holding or occupying any office or place, or any commission or appointment whatsoever, civil or military, under the authority of the United States, whether any pay or emolument be attached to such office, place, commission or appointment, or otherwise, or accepting or receiving any emolument whatsoever from the United States, shall be capable of being elected to, or holding any office, legislative, executive, or judicial, or any other office, place, or appointment of trust or profit, under the government of this Commonwealth."

Now, if lawyers in the state Court 474 are officers or placemen *under the Commonwealth, lawyers in the Federal Courts are so under the United States, and are, by the statutes just recited, excluded, not only from all political and military state offices, but from the state bar also. If I am to be excluded from this bar for refusing this test, the gentlemen of the federal bar must be disbarred in the State Courts. Yet it was never imagined; even the keen-sighted jealousy which produced these laws never imagined, that such a conclusion could grow out of them. The objection has eluded the sagacity of all our statesmen, lawyers, judges; of all concerned in devising, making, executing those laws. In fine, it never occurred as a possible opinion, that lawyers of the state or federal bar are officers under the state or federal government; otherwise, doubtless, the exception made by those laws, in favour of county justices and militia officers, would have been extended to them.

We must suppose the legislature acquainted with terms, principles, and spirit of our laws; with the English legal language and doctrine, the basis of our own; much more with our particular institutions, and with the universal practical construction of them; that when it uses particular language, it uses it in the sense affixed to it, by the English jurists, by the state and national constitutions, by former laws, by constant practice under them all, and by the universal understanding of the public in previous cases, all concurring

Mr. Leigh knew of only two objections to his argument, which had been deduced from our own laws and usages. One was, that, under a general provision that all officers of government shall take the oath of allegiance, the members of the bar, state and federal, have been always held bound to take that oath; that is, they have been held to be officers under government. But this objection, Mr. Leigh shewed, was founded on a plain mistake in point of fact: it was not from any such reasoning or inference, but from positive and express provision, that the profession had been required to take the oath of allegiance to the state or to the union. Rev. Code, p. 55, 96; Laws U. S. cong. 1, sess.

1, c. 20, s. 35, p. 74; 2 Dal. 399. Yet he had been well informed, that this was the chief, if not the sole ground of the opinion of those most respectable Judges of the General Court, who, conferring on this subject in June last, hastily concluded that the profession was within the 3d section of the act to suppress duelling. So true it must for ever prove that the laws of nature, as unlike as they are above those of man, tolerate no exceptions; and that the most enlightened minds are not exempt from that liability to error ordained of all that is human. Another objection was, that the act of 1792, c. 71, s. 2, directs that counsel and attorneys "shall take an oath of office," namely, "I do solemnly swear, that I will honestly demean myself in the practice of the law, as counsel or attorney, and will in all respects execute my office according to the best of my knowledge and abilities." This objection, Mr. Leigh thought, hardly needed an answer. It begged the whole question in debate. The lawyer swears he will execute his office: What office? The practice of the law. And this brought it back to the first point; the nature of that office. Office there meant no more than duty. An office had been defined to be a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging; whether public, as that of magistrate; or private, as of bailiff, receiver, or the like. 2 Bl. Com. 36. I admit, said Mr. Leigh, that in a large sense, an attorney at law is an officer; so is an attorney in fact, an administrator, a physician, and who not? In the largest sense, every duty is an office. Thus, the finest treatise of ancient philosophy, that has been saved from the beautiful and admired ruins of antiquity, is called by its author and his countrymen, Cicero de officiis; by us, Tully's offices. The question here is not whether the practice of the law be an office, but whether it be (as the chief justice says, 5 Mod. 432), a public office or not? I know no better criterion of a public office, than that mentioned by counsel in Carth. 478, "that it is a rule, that where one man has to do with another man's affairs against his will, and without his leave, that is an office, and he who is in it an officer:" to which I beg leave to add, that to every public office belong duties to which the officer or his servants only are competent, and to which he is compellable. But an attorney or counsellor in Virginia may or may not be employed, may or may not engage his services, at the public or his own pleasure. Try it by another test: "It may be said once for all," says Sir Edward Coke, "nonuser of itself, without some special damage, is no forfeiture of private offices; but nonuser of public offices which concern the administration of justice, or the Commonwealth, is of itself a cause of forfeiture." Co. Litt. 233, a. Now as, certainly, nonuser is no forfeiture of the office of a lawyer, it is not a public office concerning the administration of justice, or the Commonwealth. And Comyns, in enumerating the officers of the Courts of King's Bench and Common Pleas, pretermits the profession altogether. 3 Com. Dig. 279; 1 Ibid. 598.

But even though the practice of the law were an office or place under the Common-

wealth, within the meaning of this act; Mr. Leigh said, he was not bound to take the oath, which those officers only were to take, who should be appointed after the passing of the act. He could conceive no other appointment of a lawyer in this country (what other was there?) than the license. His license was of eight years' standing. His case, therefore, was not within the words or spirit of the act. And the Legislature would have had good reason to make such a difference. A young man had a fair and free election to take or to forego the profession with its conditions; other and open roads to fame and fortune lay before him: while one whose destiny in life was fixed had no such freedom of choice, and ought not to be thus required, ex post facto, to subscribe new terms, or abandon his only means of earning a livelihood.

Of the doubt as to the constitutionality of this law that had been suggested from the bench, (by Roane, J.) Mr. Leigh said, the more he had pondered it, the deeper impression it had made on his mind. Our Constitution (art. 14), provided that certain "officers (Judges, Attorney-General and Secretary) shall have fixed and adequate salaries; and, together with all others holding lucrative offices, and all members of the gospel of every denomination, be incapable of being elected members of either house of assembly or the privy council." Now these being the only constitutional disqualifications, the strong implication was, that there should be no other. And there would be no doubt of it, but for another provision of the Constitution: "that delegates and senators shall be chosen of such men as actually reside in, and are freeholders of the county or district, or duly qualified according to law." Art. 5, 6. As to which Mr. Leigh remarked, that these very words were plainly meant to fix a qualification; otherwise, the whole passage had as well been omitted, and the subject left entirely to legislative discretion; whence the phrase or duly qualified according to law, must refer to some pre-existent, or coeval, not future laws. Then, as he conceived, that phrase stands opposed merely to freeholders; so as to restrain the power

477 *of change, if any was intended, to that point only. Mr. Leigh had been informed, as matter of history, and he believed, that those alternative words referred to certain sections of the Commonwealth, the citizens of which had, at the time, no freehold titles in their lands, or at least imperfect ones, and yet were duly qualified by law to elect and be elected. (a) But if the words of the Constitution were doubtful, its spirit could not be mistaken. If the Legislature might add one new disqualification, they might add many; multiply disabilities without end; disqualify whole districts or classes of men by personal or local description; make an academical degree, or even previous service in one of its own bodies, a necessary qualification; and thus convert the government into an oligarchy. If this tremendous power existed at all, it was boundless and uncontrollable as the winds; and dissipated at once

(a) See ordinances of convention, 1776, ch. 4, s. 12; Chanc. Rev. p. 81, which seems to put the truth of this fact out of doubt.

all our fond notions of a written constitution, late the glory of American politics. These test laws, particularly, were the first weapons young oppression would learn to handle; weapons the more odious, since, though barbed and poisoned, neither strength nor courage was requisite to wield them. Should we rely on public virtue to keep us from the use and extension of this system of tests? In no age, nor clime, nor nation, had every virtue wholly swayed human bosoms and actions; man was universally liable to be transported with passion, blinded with folly, corrupted with vice, and yet more with power, maddened with faction, and fired with the lust of domination; let us not flatter ourselves we were not exempt from the common lot, and although the wise exposition of the bill of rights, by the act to establish religious freedom, might for a time secure us from a religious test, a political one was certainly a possible, perhaps a probable, and not very remote event. Sir, said Mr. Leigh, I am possessed with a strange delusion, if the very law in question does not appoint a political test. I fear other instances might be recounted. Such are the beginnings. The end of all these things is death. A free constitution cannot co-exist with this dangerous and parricidal power in the hands of the ordinary Legislature. I recur, therefore, to the fundamental principle of the revolution, which I take to be *obsta principiis*, and directly submit the constitutionality of this law to the judgment of the Court.

It had been plausibly suggested, that it cannot be unconstitutional to require one to abjure the commission of a crime. 478 Mr. Leigh pursued this doctrine to its consequences; if true on a small scale, it was so on a large one. If it were a constitutional qualification to require of officers that they shall abjure duelling, so cheap a system of preventive justice might be extended beyond those persons, and that crime, to all persons, and to every crime and vice of the decalogue; not to reckon new ones, which legislative ingenuity might create, or (alluding to the 6th section of the act under discussion) appropriate from our sister states. What then? Would the sin original of man's fall, which the redeemer's blood hath not blotted out, fade and vanish before this poor earth-born scheme of salvation? Or would crimes and vices, spite of this oath, still continue to infest the world? Then, said he, the only effect of this blessed system of abjuration would be, to heap on the head of every sinner the adventitious guilt of perjury; to forge racks for the conscience, and tortures for the soul. Can such horrid refinement of tyranny be constitutional? If not against the word, is it not against the spirit, which declares, "that cruel and unusual punishments ought not to be inflicted?" Surely the pains directly denounced against the duellist, disfranchisement, excommunication and death, (for exile is denied,) are severe enough; and in regard to a professed pious motive of this law, religious men, I think, might have been content with punishing the

body, without impiously preparing the damnation of the soul.

Because I would not lightly run the slightest risk of abjuring the right of self-preservation, under the vague words of this law; because I disapprove its policy; because I think the Court has no rightful power to force me within its pale; because I hold it to be at war, at least, with the spirit of the Constitution; withal, because I abhor rash oaths of all sorts, I do utterly loath the taking of this oath, and feel myself bound by my honour as a gentleman, and my duty as a citizen, to resist the imposition of it to the uttermost of my power. With the light of history before my eyes, I have not the vanity to think that my mind and actions, any more than other men's, are proof against force or temptation; and for that reason only, I forbear to say, positively, that I never will take this oath as a forensic qualification. I am speaking of it more particularly in that view. The application of this test, in principle and in consequence, to offices which are of public gift *and trust, is widely different from such application to professions which are matters of right and modes of livelihood.

Monday, November 26. The Judges pronounced their opinions.

JUDGE TUCKER. On a former day of this term, Mr. Leigh, a gentleman who has practised as an attorney and counsel for several years in the District Courts, County Courts, and Court of Chancery, made a motion to be permitted to practise in this Court; a question was propounded, whether he must take the oath prescribed by the act of the last session for the suppression of duelling. I was of opinion that he could not be permitted to practise in this Court without taking that oath. My opinion was founded upon these principles: that an attorney at law is a public officer; that his license is only an inchoate step to office; that he becomes an officer in that Court only in which he qualifies as the law directs; that his admission to practise in one Court does not authorize him to practise in any other Court, without the permission of such other Court, and taking the same oaths therein as if he had never been permitted to practise in any other; that such an admission was equivalent to an appointment, inasmuch as he thereby becomes an officer of that particular Court: that the policy of the act for suppressing duelling extended as well to such officers, as to any other officer under this Commonwealth.

I have attended to the arguments which have been since offered by Mr. Leigh, in opposition to that opinion, and have examined such of the authorities cited by him as I could get access to. Hurst's case, Raym. 56, 94, which it is the same case as in 1 Lev. 75; 1 Sid. 94; 1 Keb. 349, 354, 387, 558, 675, not to mention the authority of Judge Blackstone, 3 Comm. 26, clearly proves, that in England an attorney at law is considered as a public officer; otherwise a mandamus would not lie to restore him. The whole context of our act concerning counsel and attorneys at law,

between whom there is no distinction in this country, proves the same thing to my apprehension. They are subject to penalties to which no private citizen could possibly be subjected. Let a single example suffice: the lawyers practising in the Inferior Courts may demand for an opinion or advice, where no suit is brought, or prosecuted or defended by the attorney

480 giving such *advice, but not otherwise, one dollar and sixty-seven cents; those in the General Court three dollars and fifty-eight cents, for advice, under the same restrictions. And every lawyer, exacting, taking, receiving or demanding any greater fee, or other reward, is subjected to a heavy penalty. Under what colour or pretext could the Legislature impose a penalty on any other than a public officer, for demanding and receiving a hundred or a thousand dollars, or any other sum whatever, for giving his advice to any person willing to pay for it?

If, then, the office of an attorney or counsel at law be a public office, it must be an office or place under the Commonwealth; which brings it within the words of the act. It matters not by whom the appointment may be conferred, or in what manner the investiture is made: whether the Legislature, the Executive, or the Court appoints or admits to an office, the office or place is held or exercised under the authority of the Commonwealth.

On the point of unconstitutionality, I never have doubted, nor ever shall controvert, the power of this Court to consider and decide whether any act of the Legislature be contrary to the Constitution of the State, or of the United States or otherwise. My reasons and opinions on this subject have long been before the public. I shall not, therefore, repeat them. But on the present occasion, I have not felt, nor do I feel, the smallest doubt of the constitutionality of the act in question; the object of which appears to me the prevention of a great moral and growing evil; and the provisions of it, so far as I have had occasion to consider them, well calculated to advance the benefit of society, and suppress the evil.

I therefore feel no reason to depart from the opinion which I first delivered, that the oath prescribed by that act must be taken by every gentleman who may wish to practise in this Court, previous to his admission.

JUDGE ROANE. I had seen cause to doubt of the correctness of the sudden and off-hand opinion given in this case, long before I had heard Mr. Leigh's argument. That opinion was formed and delivered upon an insulated view of the subject, and under circumstances which precluded a due consideration of the question. I shall ever deem it more honorable, as it is, undoubtedly, more useful, to retract than to adhere to a hasty or incorrect opinion.

481 *An attorney is defined to be one who is set in the place of another, and he is either public, as an attorney at law, or private, as being delegated to act for another, in private contracts or agreements, (1 Bac. 287; Co. Litt. 52.) With respect to

these public attorneys, or attorneys at law, in order to ensure a due degree of probity and knowledge in their profession, so indispensable to persons acting in that character, none are permitted to act as such but those who are allowed by the Judges to be skilled in the law, and certified by the Court of the County of their residence to be persons of honesty, probity and good demeanour. As a further guard against improper practices in their profession, they are required to take the oath prescribed by the act upon this subject. But for the injury arising to the public in general from the want of skill in the profession, and the danger of abuses on the part of persons whose profession peculiarly enables them thereto, no legislative inference would be necessary to distinguish these public attorneys from the private attorneys before mentioned; nor, on any other ground, would it be just to abridge the general right of our citizens to employ any person whatsoever, as their attorney, at their pleasure. Having obtained the sanction of these two tribunals, touching these two particulars, an attorney is licensed or allowed to practise; and the Courts have also a continuing control over them, with power to revoke their licenses for unworthy practices or behaviour. But the licensing Judges cannot be said to "elect" or "appoint" an attorney: He can, perhaps, only be said, to be "appointed" by the particular clients who, after he is licensed, may severally employ him. This result is entirely justified by a view of the act "concerning attorneys at law and counsel," 1 Rev. Code, 96, in which these functionaries are nowhere said to be "elected" or "appointed," either by the government or the licensing Judges, nor are their functions anywhere called or designated as "offices" in the act, except in the form of the oath prescribed to be taken; and even there, that term may well be taken in a general and extended sense, as synonymous with "duty." The act, it is true, prescribes an oath to be taken as aforesaid, previous to being allowed to practise; but that can only be considered, as I have before said, as an additional security for the good conduct of the attorney: It would be too much to say, that this single circumstance of precaution (any more than those of the license and certificate of the County

482 Court *before mentioned) shall exalt that functionary into an "officer," when he is neither said in the law to be "appointed" to any office, nor to hold any office, and when he receives no salary or emolument, except the fees which individual citizens may please to give him. If this single circumstance should be construed to have that effect, it might be equally argued to have a similar effect, in relation to jurors, or others who are obliged to incur the obligation of a similar sanction, before they are permitted to officiate.

It is not necessary, in this case, to consider whether, and in what degree attorneys are considered in this country (as they are in England) officers of their respective Courts; though it is easy to see that an attorney, in this country, not having as many privileges as the English attorneys,

in consideration of which, that character is there holden to attach, a difference may probably exist in this country, in this particular; nor is it necessary to consider the operation of the act, as relative to the Attorney-General and his deputies, and other attorneys for the Commonwealth, who are all "elected" and "appointed" to their several offices, and receive an annual salary for their services. Even admitting, therefore, that attorneys are, in some sense, and in some degree, officers of their several Courts, as they are held to be in England, the question still recurs, are they officers within the meaning of the act to suppress duelling?

However laudable the object of the act to suppress duelling may be, it is still a highly penal law, and must be construed strictly. It is unusually penal, if not tyrannical, in compelling a person to stipulate upon oath, by the 3d section, not only in relation to his past conduct, and present resolution, but also for the future state of his mind, and his future conduct, with respect to the offence in question, under all possible circumstances; a stipulation which many conscientious persons, however prepared to take the oath as it regards the time present, might well hesitate to enter into. Thus premising that this act is highly and unusually penal, I will, under the influence of the rules for construing penal statutes, proceed to apply it to the case before us.

In making a construction upon this act, we must have an eye to every part of it; we must particularly have reference to the 2d section as well as the 3d; they both relate to precisely the same offence, (the giving or accepting a challenge,) and go to the disability *of the same persons only. They differ only in this, that the last clause goes beyond the former, in requiring a pledge that the persons therein contemplated will never, in future, be engaged in duelling.

The 2d section declares that a person accepting a challenge, &c. "shall be incapable of holding or being 'elected' to any post of profit, trust, or emolument, civil or military, under the government of this Commonwealth." It relates as well to persons now in office, as to those to be elected thereto, and we are to construe those of the former class, designated under the term "holding," as standing on a common foundation with the latter, i. e. that the former must have been elected as well as the latter must, of necessity, be elected. This part of the clause, in both its branches, excludes attorneys at law, who, I have endeavoured to shew, are neither "elected" nor "appointed" to office, but are merely permitted to practise, by those who are constituted by law judges of their character and qualifications respectively. Again, this clause only extends to those who hold "a post of profit, of trust or emolument, civil or military, under the government of this Commonwealth." Admitting (which is the most that can be granted) that attorneys are to be considered as "officers," they are only considered, even in England, as I have before said, as officers of their respective Courts. (1 Bac. 287.) They do

not, therefore, come up to the desideratum of this act; they are not officers under the government of the Commonwealth. There is no just ground on which we can erect, by implication or construction, into governmental officers, those who, in England, are not exalted to that character, and who, in the only books and doctrines handed to us on the subject from that country, are held, at most, to be mere subordinate officers of their respective Courts. But, if attorneys could be even considered as officers of the government, they do not hold an office of profit or emolument under the government; (or, in other words, a lucrative office;) otherwise they would have been excluded from a seat in the Legislature by the provisions of the Constitution; which has never been done nor attempted in relation to mere attorneys, however it may be as to those who are "appointed" to prosecute for the Commonwealth, and receive a salary therefor. This section, therefore, relating only to persons "elected" to office, which attorneys are not; to persons who are officers under the government of the Commonwealth, 484 in which *predicament attorneys do not stand; or to persons holding lucrative offices, which has never been considered as being the situation of mere attorneys at law, however gainful their practice may be, does not extend to persons of that character.

The phraseology of the 3d section varies somewhat from that of the 2d; but it is only a variation in words, not in substance. The office or place which it contemplates is one which equally requires an "appointment;" and is to be an office or place "under the Commonwealth," and not under an individual Court of Justice. These criteria exclude attorneys at law, as completely as those contained in the former clause under a varied form of expression. In addition to this, the words of the oath itself prescribed by this clause, "during my continuance in office," seem to indicate those public offices which are held by commission, or appointment, and are wont and proper to be resigned; they do not naturally apply to a function which is never resigned or formally given up, which it is the right of one citizen to exercise at the request and for the benefit of another, and in respect to which the regulating hand of the Legislature has only interposed, for the salutary purposes before mentioned.

This construction of the duelling act, in this particular, is both supported, as aforesaid, by the contemporaneous and continued construction by both houses of Assembly, admitting attorneys to a seat in the Legislature, notwithstanding the provisions of the 14th section of the Constitution excluding therefrom those who hold lucrative offices; and by the construction upon the act of December, 1778, c. 37, (1 Rev. Code, p. 40,) and that of January, 1799, (1 Rev. Code, p. 392,) disabling certain officers of the general government from holding offices under the government of this Commonwealth. By the last of those acts, it is enacted, that all persons holding or accepting "any office or place, or any commission or appointment whatsoever, civil or military, under the authority of the United

States, whether any pay or emolument be attached thereto, or not" shall be "incapable of being elected to, or of holding any office, legislative, executive or judicial, or any other office, place, or appointment of trust or profit, under the government of this Commonwealth." Although these words are undoubtedly as extensive as those occurring in the duelling law now before us, it has never been pretended (although, if

attorneys when they practise in the
485 *State Courts thereby become officers of the Commonwealth, they equally become officers of the general government when they practise in the Federal Courts) that the attorneys practising in the latter Courts cannot also practise in the former. On the contrary, the sanction of this Court, as well as of all the other Courts in the Commonwealth, has been given to this permission; and thus, a construction has been universal, in this country, in cases entirely analogous to the one before us; which, as well as those mentioned by Mr. Leigh, upon analogous cases in England, completely settles the present question. My opinion, therefore, is, that a mere attorney at law, or counsel, is under no obligation to take the oath in question previous to his being admitted to practise in the Courts of this Commonwealth.

As to the question of the constitutionality of the act to suppress duelling, the foregoing view of the case renders it unnecessary for me to say any thing upon it. I do not see, however, at present, that it can be deemed unconstitutional, as it relates to the qualification of attorneys at law, or counsel; unless, indeed, it be on the broad ground of the injustice, if not tyranny, of compelling a man to swear, in advance, that he will not for a given time do or forbear to do any given act; a thing which tender and scrupulous consciences, however resolved at present, might well hesitate to do. With respect to any questions which may arise upon this act in future, in relation to persons elected into the Legislature or the privy council, touching the power of the Legislature to abridge and circumscribe the number of those from whom the people have reserved to themselves the right to make their elections into those important stations; they will remain to be decided by the proper tribunals when they occur, upon full and solemn deliberation; whether the act before us falls within this description, and whether it be censurable, or not, on the ground of abridging the just and constitutional rights of the people, through the medium of an agent, who as yet has committed no offence whatsoever, when, undoubtedly, the Legislature only meant to impose a penalty upon the offender himself; will be then to be considered and decided. At present I am very far from having any conclusive opinion upon it.

JUDGE FLEMING. The act under consideration being a compulsory law, (however salutary it may be), imposing on
486 the officers of government an oath unknown to the former laws of the state, or of the United States, although there be no pecuniary penalty inflicted on those who refuse to take the oath therein

prescribed, I cannot but consider it as a penal statute, and, as such, must give it a strict interpretation. It appears to me, therefore, that practitioners of the law are not comprehended in the act, under these words; "every person who shall be appointed to any office or place, civil or military, under the Commonwealth, shall, in addition to the oath now prescribed by law, take the following oath," &c. The practice of the law is a profession which every citizen of the State, having complied with certain requisites of the act of 1792, c. 71, may take up, engage in, and exercise, according to his own will and pleasure; and which he may lay down, and resume, as often as to him may seem convenient, without any responsibility for his conduct in so doing. The language or wording of the latter sentence in the oath, evinces, to my mind, that the practitioners of the law were not in the contemplation of the Legislature. The officer taking the oath, after swearing "that he hath not been engaged in a duel, by sending or accepting a challenge to fight a duel, or by fighting a duel, or in any other manner in violation of the act, since the passage thereof," is further to swear, that "he will not be so concerned, directly or indirectly, in such duel, during his continuance in office;" which, in my conception, has no allusion to practitioners of the law: but, admitting they are comprehended in the act, it has, or ought to have, a prospective, and not a retrospective, operation; and cannot affect officers of any description, appointed to office prior to the passage of that act; which I construe as if the phraseology of the clause had been thus; "every person, who, after the passing of this act, shall be appointed to any office, civil or military, under this Commonwealth, shall take the oath, &c. as therein prescribed." And I cannot conceive that a practitioner of the law of nine or ten years' standing, qualifying to exercise his profession in a Court where he had been unused to practise, can be an appointment to an "office, civil or military, under the Commonwealth." I am, therefore, of opinion, that Mr. Leigh may be admitted to practise at this bar without taking the oath prescribed by the act to suppress duelling.

Mr. Leigh was therefore admitted without taking the oath.

487 *Austin's Administratrix v. Whitlock's Executors.

Saturday, October 27, 1810.

1. Sealed Instruments—Scroll—Necessity of Recognition in Body of Instrument.*—A scroll annexed to a signature is not sufficient to make a sealed instrument, unless it appear, from some expression in the body of the instrument that it was intended as such.

*Sealed Instruments—Scroll—Necessity of Recognition in Body of Instrument.—This subject has been discussed at length in the Virginia and West Virginia authorities collected in *foot-note* to Clegg v. Lemessurier, 15 Gratt. 108; *foot-note* to Parks v. Hewlett, 9 Leigh 511; monographic note on "Bonds" appended to Ward v. Churn, 18 Gratt. 801; mono-

2. **Covenant—Declarations—Sufficiency of—Case at Bar.**—In covenant, on an agreement to convey the party's interest in a certain suit, and (in case the defendant in that suit was not legally bound by his undertaking) then to convey the right of such party to certain land, a declaration charging a refusal to convey the interest in the suit, or the right to the land, without settling forth a failure to recover in the suit, and a subsequent refusal to convey the land, is substantially defective, and not to be cured by a general verdict, assessing entire damages.

This was an action of covenant, brought in the County Court of Hanover, by Betsy Austin, administratrix of Chapman Austin, deceased, against Martha Whitlock, executrix, and John A. Richardson, executor, of David Whitlock, deceased.

The declaration set forth that the said David, in his life-time, on the 22d day of February, 1791, by his certain writing obligatory sealed with his seal, &c. obliged himself to convey unto the said Chapman Austin, all the interest of him the said David in a certain suit brought by him against one John Smith in consequence of his the said Smith's undertaking to become one Giles Carter's security for the purchase of a tract of land sold by him the said David to the said Carter, lying in the County of Halifax; and in case the said John Smith should not be legally bound by his said undertaking, he the said David in that case obliged himself by his said writing obligatory to convey unto the said Austin, the right which had been conveyed to him the said David, by a certain John Garland of whom he bought the said land, for and in consideration of a sorrel horse delivered to the said David by him the said Austin, the same day and year aforesaid. The breach assigned was, that the said David, in his life-time, had not, nor had the defendants, since his death, although often requested, conveyed to him the said Austin, in his life-time, or to the plaintiff, since his death, all the interest of him the said David in the said suit, nor had he or they conveyed to him the said Austin the right which was conveyed to him the said David by the said John Garland, of whom he the said David bought the said land as aforesaid, "the one or other of which he the said David, in his life-time, and the defendants, since his death, ought to have done, according to the form and effect of his said writing obligatory."

The defendants, without craving oyer, pleaded "conditions performed," and, issue being joined, the plaintiff, at the trial, offered in evidence a writing corresponding with that described in the declaration, except that it concluded, "as witness my hand this 22d day of February, 1791," and was signed, "D. Whitlock," with a written

graphic note on "Deeds" appended to *Flott v. Com.*, 13 Gratt. 564.

On the point, the principal case was cited in *Cromwell v. Tate*, 7 Leigh 806; *Parks v. Hewlett*, 9 Leigh 515, 519; *Clegg v. Lemessurier*, 15 Gratt. 112, 118; *Smith v. Henning*, 10 W. Va. 681; *Keller v. McHuffman*, 15 W. Va. 78.

†**Covenant—Declaration.**—See monographic note on "Covenant, The Action of" appended to *Lee v. Cooke*, 1 Wash. 806.

scroll annexed to the signature: but as it was not expressed on the face of the 488 said writing, that that scroll "was acknowledged by David Whitlock as his seal, and it was not evidenced, as such, by the attesting witness, who was dead, (though his hand-writing was admitted,) the defendants moved the court that the said writing should not go in evidence to the Jury; which motion being overruled, a bill of exceptions was filed. The Jury found a verdict for the plaintiff for 790 dollars damages; and judgment was accordingly entered; but, on an appeal to the District Court holden at Richmond, was reversed; and judgment entered for the defendant; whereupon the plaintiff appealed to this Court.

Peyton Randolph, for the appellant. The County Court decided correctly in receiving the writing in question as a sealed instrument; a scroll being sufficient by virtue of the act of 1789. (a) In the case of *Baird v. Blagrove*, 1 Wash. 170, (which seems against me,) the agreement was dated before the law giving scrolls the same validity as seals, and *Jones & Temple v. Logwood*, 1 Wash. 42, is an authority in my favour; for it does not appear that in that case the words, "in testimony whereof I have affixed my seal," &c. were inserted in the body of the instrument; yet the scroll was decided to be sufficient.

Wickham, contra. I admit that, where a party affixes a scroll by way of seal, it is good as such at common law: for the act of Assembly was only in affirmance of the common law. But here there is no proof that the scroll was intended as a seal.

But, putting this objection out of the question, no action can be maintained at law on this paper. The covenant is void, as being impossible; and, if it were possible, is against law. One man cannot convey to another his interest in a suit. A chose in action, at common law, is not assignable. The suit itself cannot pass by a conveyance. If this be not the construction of the contract, but it is to be understood merely as an agreement that Chapman Austin should have the benefit of the suit, this writing was sufficient of itself, and there was no breach.

The covenant is also against law: for, if not champerty, the first part was certainly maintenance, and the second, or alternative part, was in violation of the act against conveying or taking pretended titles; (b) there being no averment in the declaration that Whitlock, who covenanted to convey, was in possession of the land.

489 *Indeed, the contrary is to be inferred from the agreement; and such an agreement is not binding in law or equity.

2. The declaration is radically defective; containing no averment that Austin lost the benefit of the suit, (in which event only the land was to be conveyed,) and setting forth, in fact, no cause of action. (c)

Randolph, in reply. If a scroll is a seal, per se, it must be so, though not described as such.

As to Mr. Wickham's objections to the

(a) 1 Rev. Code, p. 112, s. 86.

(b) 1 Rev. Code, c. 80, p. 87.

(c) *Chichester v. Vass*, 1 Call, 88.

right of action; I admit that a conveyance of an interest in suit is not binding at law, though it is in equity: but if a party covenants to do an act which is not immoral, he is bound to do it, whether it be effectual in law or not. The most that could be said against the covenant to convey the obligor's interest in the suit is, that it would be unavailing; and this is not a sufficient objection; for parties, if they please, may attach importance to a thing nugatory in itself. But, properly construed, it signifies no more than giving the benefit of the judgment when it should be contained. That part of the agreement was therefore not void: but, if it were, the alternative part was good; and that is enough. (a) The cases relative to maintenance are not applicable, in all respects, to this country. (b) If we take only so much of the doctrine as is reasonable, this agreement does not come within its reason or policy. Neither does the statute relative to pretenced titles apply. In 15 Vin. 154, it is said that a title is pretenced "where it is founded in pretence, and nothing in verity; or where a good title is made pretenced by the act of the party." Under neither of these heads can this case come; for it does not appear that Whitlock's title was unsound; and it cannot be contended that an equity in lands is not assignable. It does not appear from the agreement, or any other circumstance, that he was out of possession.

2. The breach was sufficiently assigned in the declaration; being in the words of the agreement. (c) *Chichester v. Vass* is not like this case; for, there, the gist of the action was altogether omitted. But if there was any error, it was cured by verdict. The defendants pleaded "conditions performed." This was an admission that the conditions were possible, and an averment that they had been performed.

490 **Wickham*. If matter of substance be omitted in a declaration, it is not cured by verdict. There was no option to receive the land in lieu of the suit, in any other event than the failure of the suit. It was essential, therefore, to state that circumstance. The declaration only says that Whitlock failed to convey the benefit of the suit, or to convey the land; thus assigning two breaches; the first of which was impossible, for the agreement itself was all the conveyance he could make of the suit; the second was assigned altogether uncertainly and defectively; and the damages assessed are entire.

Randolph. It is evident that Austin expected, and was entitled to some other conveyance of Whitlock's interest in the suit; the failure to execute which was a sufficient breach of the agreement.

Saturday, Nov. 16. The Judges pronounced their opinions.

JUDGE TUCKER, after stating the case. That a covenant is a deed, and that a seal is one of the essential parts of a deed, is evident from the authorities generally, and especially *Co. Litt.* 6, a. 35, b. 175, b. 225, a. and b. 229, b., and *Litt. s.* 371, 372. From

several of which, and particularly the last two, it is apparent that the clause of *in cuius rei testimonium* ought to recite that the maker of the deed hath thereunto put his seal: for, otherwise, a supposititious seal may be affixed to any instrument of writing, without proof of the acknowledgment thereof by the maker of the instrument, and a mere parol promise or agreement may be converted into a covenant, which is an instrument of a much higher nature; inasmuch, that what might be considered as mere nudum pactum, as in the case of *Hite, Ex'r of Smith, v. Fielding Lewis's Ex'rs*, in this Court, October 29, 1804, (MS.) may, by the subsequent addition of a seal or scroll, be converted into an obligation which should not only bind the maker and his executors, but his heirs also. For such would have been the effect of the writing signed by Fielding Lewis, in that case, "whereby he obliged himself, his heirs, executors and administrators to indemnify Mrs. Smith," as executrix of Charles Smith, for the latter having become security for his son, if there had been a seal, or scroll, added to that instrument, and acknowledged by the maker, in the clause of attestation. But if such mention be unnecessary in the body of the instrument,

491 how easily may any instrument *of the same kind be converted into one very different from it? The omission of the word "seal" in the clause of attestation, according to the maxim of law, "*expressum facit cessare tacitum*," does, in my opinion, preclude all evidence, dehors the instrument, of the execution of it in any other manner than is expressed in the body of the instrument. One of the reasons which are given why a deed must be pleaded with a profert in curia is, that the deed must be brought into Court for the purpose of inspection; and if (as is said in 10 Co. 92, b.) the Judges found that it had been raised or interlined in any material part, they adjudged it to be void. Now, suppose the word seal had been found interlined in such an instrument as this, and no notice taken by the witnesses that such an interlineation had been made before the execution thereof, and nothing farther said about the seal; would not this have avoided the deed? I presume it would. So deeds, in which were erasures, have been held void, because they appeared, on the face of them, to be suspicious. (d) Now what can be more suspicious than the apparent addition of a seal to an instrument, which the maker acknowledges under his hand only? Judge Buller, in the case of *Master v. Miller*, 4 Term Rep. 339, speaking on this subject, says, "when there is a profert of a deed, the deed or the profert must agree with that stated in the declaration, or the plaintiff fails. But the profert of a deed without a seal will not support the allegation of a deed with a seal." Neither, as I conceive, will the profert of an instrument, importing, in the body of it, to be executed under the hand of the party only, support the allegation of a deed sealed with the seal of the party, although a seal be to that instrument in reality affixed; inasmuch as that

(a) 5 Vin. 112.

(b) 15 Vin. 153, (E.) pl. 4.

(c) 6 Vin. 445.

(d) Bro. Abr. tit. Facts, pl. 11, cited 4 Term Rep. 333.

may be done without the party's knowledge or intention.

But here an objection arises upon the pleading. It may be said, the defendants have, by their plea of "covenants performed," admitted the execution of the covenant set forth in the declaration. This is certainly correct: but, inasmuch as oyer was not asked of that covenant, it cannot be alleged that this identical instrument is the deed declared upon, and admitted by the plea. Every objection to the instrument on the ground of variance between the deed alleged in the declaration, and that which was offered in evidence, appears to me to have been still open to the defendant. I am, therefore, of opinion, that the judgment of the District Court was correct, and ought to be affirmed.

492 *JUDGE ROANE. As to the objection made to the reception of the writing in evidence in support of the action, I think the impression of the Court in the case of Baird v. Blagrove, (a) is equally correct, and decisive in support of that objection. In this case, as in that, the paper is nowhere stated, in its body, to have been sealed; in this case, as in that, it is merely attested as simple contracts not under seal are; viz., "witness my hand," &c. and in this case, as in that, a consideration is stated in the writing; which is a circumstance equally unusual, and unnecessary, in relation to specialties. The mere circumstance of scrolls being annexed was not in that case sufficient to exalt the instrument into a specialty; nor ought it in this; especially, as there is only a single scroll in this case, which possibly might have been inserted through inadvertence or accident; whereas there were three scrolls in that case, whence a more solemn and deliberate execution of the instrument may be agreed to be inferible. The County Court, therefore, erred in admitting this paper in evidence, and the judgment of the District Court reversing its judgment is correct. Were this the only error, the District Court ought only to have awarded a new trial, with directions not to admit that paper in evidence in future; whereas it has given final judgment in favour of the defendant: and this brings us to the sufficiency of the declaration.

That declaration states that the testator of the appellees obliged himself to convey all his interest in a certain lawsuit then pending against one John Smith, who was security for Giles Carter, "and in case he should not be legally bound by his said undertaking," then also to convey to said Austin his right to a tract of land; and the declaration assigns breaches in not conveying the interest in the lawsuit, nor the right to the land; without averring, at the same time, that the said John Smith "was not legally bound" by his undertaking, which is a condition precedent to his being bound by the last covenant. The plaintiff has therefore charged, and recovered damages upon, a breach of a covenant, which is not shewn in his declaration to have occurred, but which, as set out, is inchoate and incomplete, for want of this last-mentioned circumstance.

It is clear that a breach should be so set out as that it may clearly appear to be within the covenant; and, also, that, where a covenant is in the alternative, the breach should be assigned as "to both parts thereof." This doctrine is found in 1 Esp. N. P. 363—366, and is decisive against the sufficiency of the present declaration.

On this ground, then, (without entering into the other points stated in the argument,) I am of opinion to affirm the judgment of the District Court.

JUDGE FLEMING was of opinion, for the reasons stated by the other Judges, that the County Court erred in admitting the paper in evidence. He also concurred with Judge Roane in pronouncing the declaration essentially defective.

Judgment of the District Court unanimously affirmed.

Humphreys' Administrator v. M'Clenachan's Administrator and Heirs.

Monday, November 5, 1810.

1. **Land Warrants—Sale of—Deficiency—Deduction of Purchase Money.**—If by a sealed instrument a vendor declare that he has sold to the vendee all his right to certain land warrants, for which the surveyor's receipt has been taken; that, if patents have issued in his name, he will transfer the same by deed; and, if not, desires that they may issue to the vendee; agreeing to pay, or deduct from the purchase-money, all expenses which have accrued; he is bound to make a deduction for a deficiency resulting from a previous contract, by his agent, to allow the locator one third of the land; though such contract was not known to him at the time of his bargain with the vendee, to whom it was equally unknown.

***Sale of Land—Warranty—Eviction—Measure of Damages.**—When there is a sale of land with covenant of general warranty and the purchaser is evicted from part of the land by a third person holding a paramount title, the measure of damages is such a portion of the purchase money as the relative value of the land lost bears to the price of the whole land. *Butcher v. Peterson*, 26 W. Va. 455, citing the principal case.

Where a freehold estate has been conveyed with warranty and the warrantee is afterwards evicted, the proper measure of damages is the value of the land at the time of the warranty, and not at the time of the eviction. *Stout v. Jackson*, 2 Rand. 132. In this case, the question as to the measure of compensation in the case of a warranty of a freehold estate, and the eviction of the warrantee is discussed at some length and the cases decided in Virginia previously touching this point are reviewed; though JUDGE GREEN said that the question had never before been the subject of direct adjudication in Virginia. The principal case was discussed at pp. 137, 139, 165. In *Threlkeld v. Fitzhugh*, 3 Leigh 451, this question was again presented to the Court of Appeals of Virginia. JUDGE CARR said the question was an open one; for though in *Mills v. Bell*, 3 Call 320; *Nelson v. Matthews*, 2 Hen. & M. 164, and *Humphreys v. M'Clenachan*, 1 Munf. 493, the point was incidentally touched, it was not before the court, nor at all involved in the decision of these cases. In regard to *Stout v. Jackson*, 2 Rand. 132, mentioned above, JUDGE CARR said that the question was before the court in that case and elaborately argued by the judges, but that the court consisted

(a) 1 Wash. 170.

3. **Sale of Land—Deficiency—Injunction—Decree.**—On a bill of injunction exhibited by the administrator of the purchaser of a tract of land, against the administrator and heirs of the vendor, (in whom the legal title remains,) claiming compensation for a deficiency, credits for payments and a conveyance; the Court, on allowing the compensation and the credits, may decree that the defendants shall convey their title to certain trustees to be by them conveyed to the heirs of the purchaser, (though not parties to the suit,) if the balance of the purchase-money be paid on or before a certain day; and if not, with power to sell as much of the land as may be sufficient to pay such balance, and to convey the residue, if any, to the said heirs.
3. **Same—Eviction—Rule of Compensation.**—In case of eviction, after a conveyance made with warranty, the value of the lost land, as at the time of the eviction, gives the rule by which the vendee is to be remunerated: but, when the contract is executory, a Court of Equity will adjust it, upon principles of equity according to the circumstances.
4. **Same—Deficiency—Rule of Compensation.**—In case of a deficiency, the value at the time of the contract gives the rule; of which the purchase-money is the standard, where it does not appear that the actual value was different.

Upon an appeal from the Superior Court of Chancery for the Staunton District.

Alexander M'Clenachan, on the 3d day of October, 1795, entered into an agreement with Alexander Humphreys, in the following words, under his hand and seal. "I have this day sold to Alexander Humphreys, his heirs and assigns, for value received, all and every emolument arising from two land warrants, one for 6,666 2-3 acres, issued to me, and in my name, and 4,000 issued to, and in the name of William Long, for services in the late army against Great Britain, as officers in the Continental and Virginia State lines, as per receipt 494 of R. C. *Anderson. All my right, title, interest, claim and demand, in and to the same, I hereby transfer to the said Alexander Humphreys. And if patents have issued in my name therefor, I will transfer the same by deed: if not, I desire that patents or grants may issue to him the said A. H. for it; and all and every expenses that have accrued before this date, I will pay or deduct from the money due me for this land." Neither price, nor the terms, or periods of payment are noticed in this agreement.

On the 21st of the same month, it appears by an exhibit in this cause, that M'Clen-

of three members only, and one dissenting, the judgment did not settle the law. The question was again taken up by the court and discussed and the rule was laid down that the purchaser upon eviction is only entitled to the purchase price paid, with interest from the date of eviction, and costs. This definite fixed rule decided on in *Threlkeld v. Fitzhugh*, 2 Leigh 451, has never since been departed from in Virginia. *Foot-note to Threlkeld v. Fitzhugh*, 2 Leigh 451, collecting authorities in point. See also, *foot-note to Thompson v. Guthrie*, 9 Leigh 101.

The principal case was also cited in *Pate v. M'Clure*, 4 Rand. 176; *Cabell v. Roberts*, 6 Rand. 588.

Injunction.—See monographic note on "Injunctions" appended to *Claytor v. Anthony*, 15 Gratt. 518.

achan executed an instrument under his hand and seal, upon the back of a copy of survey filed in the register's office in Kentucky, in the following words: "I Alexander M'Clenachan, of Staunton, for and in consideration of Henry Rhodes having located the within lands, (the 6,666 2-3 tract,) do transfer unto him the said H. R., and his heirs and assigns, one third part of the land contained in the within plat and certificate of survey, and desire a patent may issue in his name, for that part of the said tract." A patent issued on the 22d of March, 1797, to M'Clenachan and Rhodes, jointly, for the lands in the survey mentioned.

A letter from Robert Breckenridge, of Kentucky, dated November 8, 1795, and directed to Alexander Humphreys, mentions "that the writer had, a few days before, heard of his having purchased all M'Clenachan's land in that State, without regard to his previous engagements, and proceeds to inform him that the larger tract was located under his direction, at the particular request and solicitation of M'Clenachan; that, before the locator would undertake the business, he was obliged to engage, on the part of M'Clenachan, to secure to him one third part of the land: and suggests a wish that Humphreys would mention the matter to M'Clenachan, and that one third part of the tract there alluded to should not be taken into the accounts between them; or, if he received an assignment of the whole, that it might be upon condition of Humphreys' satisfying and paying the locator, according to his and Breckenridge's agreement. This letter appears to have been received by Humphreys, and some mention of it appears to have been made by him, in his life-time, to M'Clenachan. When he died does not appear.

After the death of M'Clenachan, which took place in February, 1798, Humphreys brought a bill in Chancery against his administrator *and heirs, in which he states the price agreed on for the lands to have been three shillings per acre; that he was to pay 100l. in cash, and for the residue bonds were given; and that he paid the money, of which there is no proof in the record. He proceeds to state the assignment of one third of the larger tract to Rhodes; and that he (Rhodes) had obtained a patent for the whole, and is in full possession thereof: that, with respect to the 4,000 acres, M'Clenachan agreed to allow the locator one third part thereof, for locating; but the complainant had compounded with him for 12l. 10s. per thousand acres, which he expressly charges to be the lowest price; the usual allowance being one third of the land itself: that the administrators have brought suit on his bond, without allowing him any credit for the deficiency in quantity, and for money advanced for taxes and expenses thereon: and concludes with praying for a proportionate credit for one third part of the larger tract, to which the locator Rhodes had a title, and also for the sum agreed to be paid for locating the other tract of 4,000, amounting to 50l.; and for his other advances, &c.

Humphreys being dead, a bill of revivor and supplement was filed by his administrator, suggesting, among other things,

that there was a valuable Salt-spring upon the land; praying an injunction to the judgments on Humphreys' bonds to M'Clenachan, and for a specific performance of the original contract, as far as it is in the power of the defendants so to do; with ample compensation for such part as cannot be performed.

The Chancellor, by his decree, allowed a credit pro rata, according to the price, for the one third of the larger tract, to which Rhodes was entitled for locating the same; and 12l. 10s. per thousand acres for the smaller tract; together with such other claims, for payments, as the complainant could make appear; and directed an account: and further that the defendants should convey all their title to the lands (and procure Rhodes to join therein, for whatever title he may have to more than one third part of the larger tract) to trustees for the following uses, to wit, that if the plaintiff, or the heirs of Humphreys, (who are not parties in this suit,) or some other person for them, should, on or before a certain day, pay to the administrator of M'Clenachan the balance of the purchase-money, (to be ascertained by the Commissioner's report,) with legal interest thereon, then the trustees to convey the legal estate to the heirs of Humphreys; otherwise, they were to sell as much of the lands as would be sufficient to pay the debt, and to convey the residue, if any, to the heirs of Humphreys.

From this decree the administrator of Humphreys appealed.

Wickham, for the appellant, contended, 1. That Humphreys was entitled to a deduction for the deficiency, in proportion to the value of the land, and not the price he was to give. He bought the whole land; and was not informed that the locator was to have part. It was a frequent practice for the locators to have compensation in money: there was no reason then for him to think that Rhodes, the locator in this instance, was to have part of the land. M'Clenachan's assignment to Rhodes was after the agreement with Humphreys, and could not deprive him of his right to the benefit of his bargain. Rhodes's equity was against M'Clenachan only, not against Humphreys, who was a purchaser without notice. Humphreys therefore is unquestionably entitled to compensation; the only question being about the rate of compensation. The case of Nelson v. Matthews, 2 H. & M. 164, furnishes the rule so far as the circumstances of that case are applicable to this, and shews that actual value, and not the purchase-money, is the standard.

2. The value at the time of the contract is not the proper standard. At that time M'Clenachan had not disabled himself to comply with the contract. The land was never lost by Humphreys until March, 1797, when the patent issued to M'Clenachan and Rhodes jointly. The value, therefore, at the date of the patent is what we contend for.

3. The decree was wrong in directing a conveyance to trustees, and a sale of the land, if the purchase-money should not be

paid. Instead of this, it should have directed a conveyance to the heirs of Humphreys. However equitable the decree now in question might have been, if M'Clenachan's representative had sued in equity for the purchase-money, the case is different here. The bill was filed by the administrator of Humphreys for an injunction and specific performance. The heirs of Humphreys, indeed, were not before the Court, and it may be said that we ought to have made them parties. This seems to have been an oversight on both sides; but it was irregular to enter a final decree until the heirs were parties.

497 *The Attorney-General and Wirt, for the appellee, endeavoured to get the contract itself rescinded, on the grounds that it did not appear in evidence that any money had been paid by Humphreys towards complying with the bargain; that M'Clenachan was in habits of intoxication, and was said by some of the witnesses to have been drunk at the time the contract was made. At any rate, the contract, if not to be rescinded, ought not to be specifically enforced in a Court of Equity, being unreasonable and oppressive; (a) and Humphreys, the party now praying specific execution having shewn a backwardness on his part. (b)

2. If the contract is to be enforced, it is improper to make any deduction on account of the land conveyed to Rhodes the locator. M'Clenachan bargained to sell Humphreys only his right to the land, such as it was; not knowing whether it stood on a survey, or patent; and subject, of course, to the ordinary deduction for compensation to the locator; which, it is proved, was commonly one third of the tract. The word "expenses" in the agreement related to office-fees only; not to part of the land. Can it be believed that he would, if in his senses, have sold the land for three shillings per acre, (which soon afterwards rose to nine and twelve shillings,) and yet have bound himself to make good any deficiency that might arise from the locator's claim. The great inadequacy of price strengthens the conclusion that such could not have been his intention. And, if Mr. Wickham be right in his construction of the contract, the impossibility of M'Clenachan's complying with it, in opposition to Rhodes' prior equity, furnishes an additional reason why it should not be specifically enforced.

3. But, if there ought to be a deduction, the Chancellor has resorted to the most equitable criterion. The original bill itself claimed no more than a "proportionate" deduction, which must be understood according to the value at the time of the contract; which value the parties themselves have fixed at three shillings per acre.

4. The decree was right in holding the land liable to be sold, in case the administrator of Humphreys should fail to pay the purchase-money. (c) There was no neces-

(a) 1 Vern. 227, Phillips v. Duke of Bucks; 1 Fonb. 30, note (o); 2 Eq. Cas. Abr. p. 56, c. 4, Tristram v. Melhuish; Ibid. p. 19, c. 14, Klen v. Stukeley; 3 Bro. Parl. Cases, 306, S. C. 5 Viner. 549, pl. 12, Squire v. Baker. Prec. Ch. 538.

(b) 1 Bro. Parl. Cases, Hayes v. Caryl; 2 Bro. Parl. Cases, 447, Wingfield v. Whaley, Sugden, 248. (c) Cole v. Scott, 2 Wash. 142.

sity to make his heirs parties; their title being merely equitable. Besides, this was not a bill to subject the land, but an application to the discretion of a Court of

Equity, which had a right to annex
498 a condition to its *decree, (by which the injunction was continued in force,) that, if the administrator, or the heirs of Humphreys, should fail to pay the money by a certain day, the land should be conveyed to trustees, &c. within the principle of the rule that he who asks equity must do equity. This was a favour granted the administrator on certain terms. However, if the heirs ought to have been parties, the plaintiff was to blame in not having made them so: and this Court might now modify the decree so as to direct that if he do not pay the money, by a day appointed, the injunction be dissolved; that the heirs be made parties, and the land ultimately liable. If such a decree as this should be entered, the appellant ought nevertheless to pay the costs; the appellee being the party substantially prevailing. (a)

Wickham, in reply. If the bargain is void, we are surely entitled to an injunction to the judgments at law. M'Clenachan's administrator enforces the contract by suing on the bonds; yet attempts, in equity, to set aside the contract! If it be binding on one party, it surely is so on the other.

We admit that M'Clenachan sold only his own right. But, having previously parted with one third of the land, he ought to make good the deficiency; for his assignment to Rhodes was a fraud upon us. Humphreys was not guilty of any backwardness in fulfilling the contract on his part; since, until a title was made, he was not bound to pay a farthing. The rule in equity is always to grant an injunction to relieve against the demand of the money, where the vendor is unable to make a complete title. *Jolliffe v. Hite*, 1 Call, 301; *Quesnel v. Woodlief*, 2 H. & M. 173, and *Nelson v. Matthews*, *Ibid.* 164, were all cases of injunctions to protect the purchaser from being compelled to pay the money. If it had been paid, M'Clenachan's administrator might have disposed of it in the way of administration; and the administrator of Humphreys might not be permitted to recover it back, in case the land should be lost; because he ought to have stopped it in the first instance.

The only question in the cause is the rate of compensation. This must be the value of the land at the time of the contract at least; but, in my opinion, it ought to be the value at the date of Rhodes' patent, which may be denominated the time
499 of our *eviction.* We were not bound to prove the precise value at the last-mentioned period: it sufficiently appears that it was more than the rate at which Humphreys purchased. The exact amount can be ascertained by reference to a Commissioner or a Jury.

Saturday, November 16. The Judges pronounced their opinions.

(a) *Ellzey v. Lane's Executrix*, 2 H. & M. 589.

*Note.—It did not appear that Humphreys was ever in possession of the land.—Note in Original Edition.

JUDGE TUCKER stated the case as above, and proceeded as follows:

The point most strongly contested in this Court was, whether Humphreys was entitled to a compensation for the deficiency of the larger tract, (the equitable title to which was, at the time of the contract, in Rhodes,) according to the average price of the whole, or according to the specific value of the land when Rhodes acquired his legal title thereto, by the patent from the Governor of Kentucky. Mr. Wickham contended for the latter.

The price of lands must, in all cases between the seller and the purchaser, be considered as the just value thereof at the time of the contract, regard being had to the terms and mode of payment agreed on between them: in other words, the price is the value, as agreed on by the parties themselves: if the contract be executory on both sides, the party who hath not yet fulfilled his own engagements, comes with an ill grace before a Court of Equity to demand ample compensation, or, more properly speaking, vindictive damages against the other party for any deficiency or failure on his part. Although M'Clenachan, either from want of information of Breckenridge's contract with Rhodes, on his behalf, or from some other cause, is alleged to have sold Humphreys the whole of the larger tract, instead of that part only to which he was justly entitled, that circumstance does not so clearly appear from the words of the contract itself, which only imports to convey all his title, interest, claim and demand, and every emolument arising from two land-warrants therein mentioned. It must not be forgotten that these warrants are assignable by law. It does not appear he then knew they were even located; he could not then be supposed to intend specifically to warrant the quality of the lands upon which they might be located: and, without some reference to quality and quantity, as connected with each other, no calculation of value, independent
500 *of the price, can possibly be formed.

I therefore think the Chancellor's decree correct in making the price per acre the standard by which the abatement from the price is to be made, in regard to the larger tract. (b) With respect to the lesser tract, the only inconvenience or expense which Humphreys has been exposed to, as far as appears by this record, was the compensation of 12l. 10s. per thousand acres paid to the locator. This, according to the very terms of the contract, M'Clenachan had agreed to deduct from the amount of Humphreys' bonds. More, the latter could on no principle be entitled to, as was decided, I believe, in the case of *Hull v. Cunningham's executors*, last term. (c) I approve also of the remainder of the decree, though some objections, not appearing upon the record, might, perhaps, have been taken to it.

JUDGE ROANE. In the case of *Mills v. Bell*, 3 Call, 326, it was resolved by this Court that, in the case of an eviction after a conveyance made with warranty, the

(b) See *Nelson v. Matthews*, 2 H. & M. 164.

(c) *Ante*, p. 589.

value of the lost land, as at the time of eviction, should give the rule by which the vendee is to be remunerated; for that "the purchaser is entitled, on the covenant, to the increased value of the estate, as well as for any improvements he may have made on it, but that when the contract is executory, a Court of Equity will adjust it upon principles of equity according to the circumstances."

Under the last branch of this position the said case of *Mills v. Bell* was adjusted. In the case of *Nelson v. Matthews*, 2 H. & M. 164, it was held that the actual value at the time of the contract should give the rule. This case, however, is supposed not to be in opposition to the principle laid down in *Mills v. Bell*, (ut supra,) as it was the case of a deficiency in the quantity of land sold, and not an eviction of any part of that actually conveyed by the deed. There was no subject, therefore, quoad the matter in controversy, the value of which could have increased, or on which improvements could have been placed: the giving the purchaser, therefore, the value of his purchase at the time, with interest, would do him ample justice. This last case is analogous to the one before us; and the value of the deficient land, as at the time of the purchase, should give the rule in this case as in that: but, as it is not objected that the price contracted for is greater or less than the real value at the date of the contract, I

501 *see no reason to depart from that in the present instance; and am for affirming the decree.

The case of *Farley v. Shippen*, Wythe's Rep. p. 135, is conclusive as to the power of the Court over lands lying in another state, where the persons decreed against are within its jurisdiction. It is true that the commissioners or agents who are to carry the decree into execution ought to be within the jurisdiction, so as to be amenable to the process of the Court. In point of fact, I believe that the commissioners in this case do reside out of the limits of the Commonwealth; but, as this does not appear of record, it is not for us to take the objection.

JUDGE FLEMING. It is the unanimous opinion of the Court that the decree be affirmed.

HOOE v. Tebbs and Wife.

Wednesday, October 31, 1810.

1. **Prison-Bonds Bond—Suit on—Judgment—Effect on Sheriff.**—If, in a suit upon a prison-bonds bond, a Court possessing competent jurisdiction adjudge the bond void: the plaintiff may sue the Sheriff without appealing from the judgment though erroneous.
2. **Same—Same—Same—Same.**—In such case the Sheriff, though not a party to the suit on the bond, is bound by the judgment: unless he can prove it was obtained by collusion.
3. **Escape of Prisoner—Action against Sheriff—Verdict—Sufficiency.**—In an action against the Sheriff for

***Escape of Prisoner—Action against Sheriff—Verdict—Sufficiency.**—In *Vanmeter v. Giles*, 1 Rob. 345, it is said: "The judgment rendered for the plaintiff was moreover wrong, because the verdict did not expressly find that the prisoner escaped with the consent or through the negligence of the sheriff.

an escape, a verdict in general terms, for the plaintiff, is not sufficient to authorize a judgment; notwithstanding the charge in the declaration be, that the Sheriff took a defective prison-bonds bond, and thereupon voluntarily permitted the prisoner to escape; and issue be joined on the plea of not guilty. An express finding by the Jury according to the act of 1793 concerning escapes, is absolutely necessary.

4. **Prison-Bonds Bond—Sufficiency of.**—It seems, that a prison-bonds bond, taken payable to the plaintiff, is good at common law, and an action may be maintained upon it.

5. **Same—Same.**—Quære, whether it be not also good under the act of Assembly?

This was a special action on the case in the Dumfries District Court, by William Tebbs, and Victoria his wife, against Bernard Hooe, sen. late Sheriff of Prince William County. The declaration charged that the plaintiffs had, in a certain action of trespass, assault and battery, obtained a judgment, and sued out a writ of *capias ad satisfaciendum*, against one Daniel Tebbs, which was delivered to George Lane, one of the defendants' deputies, to execute, who thereupon took the body of the said Daniel Tebbs in execution; and that the said George Lane, "contriving, and unjustly intending, contrary to the duties of his office, to hurt, injure, and deprive the plaintiffs of the means and remedy of obtaining their damages and costs aforesaid, afterwards, (the said Daniel Tebbs being still in custody, &c.) did receive and take of the said Daniel Tebbs, together with Wil-

502 loughby Tebbs *as his security, a prison-bonds bond payable to the plaintiffs, (and not to the Sheriff,") which was set forth in hæc verba: "and thereupon the said Lane, without the license of the plaintiffs, and against their will, contrary to the duties of his office, freely and voluntarily permitted and suffered the said Daniel Tebbs to escape, and go at large, out of the custody of the said Lane, so being Deputy Sheriff as aforesaid, whereso-

Our statute concerning escapes is clear and explicit, that no judgment shall be entered against any sheriff in any suit brought upon the escape of any debtor in his custody, unless the jury who shall try the issue shall expressly find that the prisoner did escape with the consent or through the negligence of the sheriff, or that he might have been retaken, and that the sheriff neglected to make immediate pursuit. This peremptory mandate applies to all actions against the sheriff, and of course his sureties, of whatever nature or form, founded upon an escape; and if not strictly complied with, the defect cannot be supplied by any intendment or conclusion, in favor of a general verdict, from the pleadings or issue: as was held by this court in *Hooe v. Tebbs*, 1 *Munf.* 501." To the point that, where the declaration charges the sheriff with a voluntary escape, who pleads not guilty, a general verdict for the plaintiff does not warrant a judgment against the defendant, the principal case was cited in *Stone v. Wilson*, 10 *Gratt.* 586.

The principal case was cited with approval on this point, but distinguished from the case at bar, in *Burley v. Griffith*, 8 *Leigh* 448.

†**Prison-Bonds Bond—Sufficiency of.**—See the principal case cited in *Porter v. Daniels*, 11 *W. Va.* 254, 257.

ever he would, the plaintiffs being wholly unsatisfied for their damages," &c.

The declaration charged, moreover, that the plaintiffs thereafter brought an action in the said District Court on the said bond; and that, by the judgment of the Court, the said bond was declared to be illegal, and that an action was not sustainable thereon; by reason of which premises the plaintiffs had never received and recovered their damages and costs first mentioned, but had been run to great trouble and expense in prosecuting, and discharging the costs accruing on the action sued out by them on said bond," &c.

The defendant pleaded not guilty; and, issue being joined, a verdict was found in the following words: "We of the Jury find for the plaintiffs, and do assess their damage to one hundred and eight pounds, five shillings." A motion was made in arrest of judgment; 1. "Because the Jury who tried the issue had not expressly found that Daniel Tebbs the prisoner did escape with the consent, or through the negligence of the defendant, or his officer; or that he might have been retaken, and that the defendant and his officer neglected to make immediate pursuit;" and, 2. "Because the whole proceedings were erroneous and irregular." The Court overruled the motion, and gave judgment for the plaintiffs: the defendant appealed.

Botts, for the appellant, made three points; 1. That the prison-bonds bond set out in the declaration was a valid one. The 21st section of the act of 1748, c. 8, (a) repealed in 1793, (b) (under which this bond was taken,) does not expressly say to whom it should be payable; but the strong implication is, to the plaintiff; the act not requiring it to be payable to the Sheriff. In like manner, the law relating to forthcoming bonds, (c) though it uses the expression, "if the owner of such goods and chattels shall give sufficient security to such Sheriff," &c. has always been construed as requiring such bonds to be made
503 "payable to the plaintiffs." It is true that, by the act of 1764, c. 6, s. 1, (d) the Sheriff is directed to assign over and deliver the prison-bonds bond to the plaintiff: but this only shews that the Legislature supposed the bond might be taken payable to the Sheriff; not that the law required it. Indeed, it answers every beneficial purpose to take it to the plaintiff, or to the Sheriff for his benefit. The 7th section of the act of 1748, c. 6, (e) does not vitiate this bond; first, because it was taken under the authority of the before-mentioned act of Assembly; and, secondly, because the clause now in question relates only to bail-bonds or bonds for "appearance." The same construction, viz. that it related only to persons arrested on meane process, was given in England to the statute 23 Hen. VI. c. 9; from which ours is copied. (f)

But in many cases where a bond is not

sufficient, under the act of Assembly, to authorize a motion in a summary way, it has been decided that an action may be maintained upon it at common law: (g) particularly, where a statute requires a bond to be taken payable to the plaintiff, it is valid as a common law bond, though taken to the Sheriff: the converse of which rule ought equally to hold good.

2. The judgment in the suit on the bond, to which the present appellant was no party, ought not to bind him; especially as that judgment was illegal. (h)

3. The verdict of the Jury in this suit is imperfect, in not expressly finding that the debtor escaped with the consent or through the negligence of the Sheriff. (i) The Clerk's entry that the Jury found the defendant "guilty in manner and form as charged in the declaration," is merely the clerical form of recording the verdict, but does not satisfy the act of Assembly. At common law, it would be otherwise. On a general verdict of "guilty," the Court would adjudge that the Sheriff had been guilty of voluntarily permitting the escape of the prisoner. But this act goes farther; and for wise reasons. A Jury might shrink from finding a voluntary escape, when through hurry or inadvertency, they might find a general verdict for the plaintiff. But, however this may be, the words of the act are plain, and positive, and must be obeyed.

Williams, contra. The action in this case may be considered, either, as on the case for a voluntary escape, or, (more
504 properly,) *as against the Sheriff for misfeasance in office, in taking a bond which was not such as the law required.

This being an action on the case, the verdict substantially complied with the law: for the point put in issue by the plea of "not guilty" was, whether the defendant was guilty in manner and form as charged in the declaration; and the verdict of the Jury, by finding the issue in favour of the plaintiff, expressly found that the defendant was guilty in the same manner and form. How far, indeed, the act of Assembly is applicable to actions on the case for escapes, might be questioned; since, in such actions, the Jury inquire into all the circumstances, and give such damages as they may deem proper; (k) whereas, in debt, for an escape they must give the whole debt. In the last-mentioned action a special finding by the Jury, that the escape was voluntary, may be requisite because the plea of nil debet does not expressly put that point in issue. But, in the action on the case, it is otherwise; a finding to the same purport being sufficient; for the Legislature have not pretended to prescribe the form, but the substance of the verdict. The case of Johnson v. Macon, 1 Wash. 4, is not like this; having been decided on the ground of there being no proof of an actual escape.

(g) Johnsons v. Meriwether, 3 Call, 538; Hewlett v. Chamberlayne, 1 Wash. 367; Beale v. Downman, 1 Call, 249.

(h) 1 Call, 51, Drew v. Anderson; Runn. on Eject. 364, 367.

(i) 1 Rev. Code, c. 79, s. 3, p. 119; Johnson v. Macon, 1 Wash. 4.

(k) Bonafous v. Walker, 2 Term Rep. 126, 1 Vent. 211, 217.

(a) Edit. of 1769, p. 196.

(b) 1 Rev. Code, c. 151, s. 37, p. 393.

(c) Edit. of 1769, p. 194, s. 12, 1 Rev. Code, p. 296, s. 13.

(d) Edit. of 1769, p. 446, 1 Rev. Code, c. 79, s. 3, p. 119.

(e) Edit. of 1769, p. 184, 1 Rev. Code, c. 80, s. 17, p. 122.

(f) 6 Bac. Abr. (Gwill. edit.) 179, 1 Term Rep. 422. Rogers v. Reeves.

In that case, too, it is said that "the consent or negligence of the Sheriff, though made necessary by the act of Assembly, ought to be presumed, unless on the Sheriff's part, a tortious escape be shewn, and that fresh pursuit was made."

But, secondly, this is an action against the Sheriff, for misfeasance in office, in taking a bond, contrary to law, to the injury of the plaintiffs. The fair inference from the 21st section of the act of 1748, c. 8, is, that the Legislature intended the bond (which the Sheriff was to take) to be payable to the Sheriff; because the law did not direct it to be taken to any other person. The law concerning escapes(a) puts this beyond a doubt, by directing the prison-bonds bond to be assigned to the creditor; whereas forthcoming and replevin bonds are only to be delivered (not assigned) to the creditor, or to be returned to the Clerk's office. The bond being payable to the plaintiff, was therefore certainly not good as a statutory bond; and, if it were good as a common law bond, the Sheriff is not thereby cleared from responsibility; for it was his duty to take such a bond as the statute required. The plaintiff had his election to sue either the obligor, or the Sheriff. But the case of Syme v. Griffin(b) is a plain authority to shew that this bond was utterly void.

Botts, in reply. I admit that the verdict, finding the defendant guilty, did find the declaration in substance. Nevertheless, the Legislature, intending to reform the common law in this particular, demands an express declaration from the mouths of the Jury, that it was a voluntary or negligent escape, or that there was not fresh pursuit. Where the words of a statute are plain, consequences are not to be regarded; for this would be to usurp legislative authority;(c) and this act is penned in terms precluding all possible ambiguity. In Johnson v. Macon, 1 Wash. 6, the President of this Court, in reference to the same act, says, the finding that the escape was voluntary, or negligent, must be express.

The two arguments offered by Mr. Williams and myself shew strongly that it makes no difference whether the bond was given to the Sheriff or plaintiff; the law not having directed which. Why should the Sheriff be more naturally designated as the obligee than the plaintiff? The plaintiff in this case accepted the bond, and made his election by suing the obligor. The bond, being good at common law, was as beneficial to the plaintiff, as if taken according to the act of Assembly; the mode of proceeding and recovery being the same.

JUDGE TUCKER stated the case, and proceeded. The motion in arrest of judgment in this case seems to have been founded upon the third section of the act concerning the escape of debtors,(d) which declares that no judgment shall be entered against any Sheriff, or other officer, in any suit brought upon the escape of any debtor

in his or their custody, unless the Jury, who shall try the issue, shall expressly find that such debtor did escape with the consent, or through the negligence of such Sheriff; or that such prisoner might have been retaken, and that the Sheriff and his officers neglected to make immediate pursuit.

I conceive that there is no principle of the common law more generally acknowledged, or more demonstrably true, than that, whenever the defendant in any action whatsoever pleads the general issue, and relies on that plea only, if the Jury find a general verdict for the plaintiff, every material fact, allegation and averment, which is sufficiently charged in the 506 declaration *to support an action thereupon, is by such verdict as substantially and expressly found to be true, as if the Jury had repeated the declaration, clause by clause, verbatim, in their verdict. And this is proved by the manner and form of pleading, which, we are told by Sir Edward Coke, 1 Inst. 115, b. affords one of the best arguments, or proofs in law, when drawn from right entries, or course of pleading; for that the law itself speaketh by good pleading. Now the right entry, or course of pleading in this case is, that the defendant, by his attorney, comes and defends the wrong and injury, and saith that he is not guilty in manner and form as the plaintiff hath complained against him; and of this he putteth himself upon the country; and the plaintiff likewise. Thus, the issue for the Jury to try, is whether the defendant be guilty, in manner and form as the plaintiff hath complained against him: they have answered that he is guilty, and assess the plaintiff's damages. The Court, whose duty it was to mould this verdict into proper form, have done so, and it is accordingly entered that he is guilty in manner and form as the plaintiff by replying hath alleged. But the replication is not special, but merely joins the issue tendered by the defendant in his plea: it denies the truth of the plea, as the plea had before denied the truth of the charge in the declaration, in manner and form as the same was therein set forth. And the verdict, by affirming the truth of the issue thus joined between the parties, has, in my opinion, not only substantially, but expressly, found that the debtor did escape with the consent of the Deputy Sheriff; it being expressly charged in the declaration, that the Deputy Sheriff, contrary to the duties of his office, freely and voluntarily permitted and suffered the said Daniel Tebbs to escape and go at large.(e)

Thus far I have spoken upon the general principles of the common law, and the right course of pleading. I will now notice the preamble to the clause of the act before recited, and upon which the defendant has relied for his indemnification; premising that the County Court law requires the Court of every County (under a penalty on the Justices, if they fail to do so) to build, and keep in repair, a common gaol and county prison, well secured with iron

(a) 1764. c. 6, s. 1, Edit. of 1769, p. 446.

(b) 4 H. & M. 277.

(c) 6 Bac. 301, (Gwill. edit.) 1 Term Rep. 728, The King v. Hogg

(d) 1 Rev. Code, c. 79.

(e) 1 Wash. 6, Johnson v. Macon.

bars, bolts and locks. The frequent neglect of this injunction is thus noticed by the Legislature in the act concerning escapes, s. 3. "And whereas the situation of most prisons in *this

507 Commonwealth hath given opportunities to evil disposed persons to break open the same, and turn out debtors and others in custody, to the hindrance of justice, prejudice of creditors, and ruin of sheriffs, who have been compelled to pay the debts, with which such prisoners stood charged; for remedy thereof, Be it enacted that no judgment," &c. We are told by the same eminent Judge before referred to (a) that the preamble of a statute is the key to the mind of the Legislature. What, then, was it in the mind of the Legislature to remedy in this case? The insufficiency of the county gaols: for to that object alone, and the means it afforded disorderly persons to violate the laws, was their attention turned, and not to any voluntary act of misfeasance on the part of the Sheriff, whether the same were committed through wilfulness or mistake. Here the Sheriff is charged with an unlawful, and therefore unjustifiable act, proceeding from one or the other of those causes; it is immaterial which; for, if a Sheriff mistakes his authority, he is civilly answerable, equally as if he had wilfully offended. I am therefore of opinion that the judgment be affirmed.

JUDGE ROANE. The judgment of the District Court in the action upon the prison-bonds bond having been in favour of the defendants, upon the ground that the bond was illegal and void; and that judgment being still in full force and un-reversed, we must now take it to be correct, and the bond sued upon to be void, whatever opinion the Court may entertain upon the question, as occurring in the present action. It was not incumbent on the appellee to have appealed from that judgment to the Court of the last resort; but it was competent for him to proceed upon the judgment of the District Court, in the present action against the appellant; reserving to the appellant, however, the right to shew that that judgment was obtained by the connivance or collusion of the appellee. These conclusions seem entirely warranted by analogy to the decision of this Court in the case of Lee, Executor of Daniel, v. Cooke, 1 Wash. 306. That was an action against a warrantor of a slave recovered from the warrantee by the judgment of the District Court, and it was adjudged not to be necessary to aver in the declaration, or to prove, that notice was given to the warrantor of the pendency of the action against the warrantee; for

508 *Justice is presumed to be fair till the contrary appear; and, if there was any collusion between the parties in that action, it should have been pleaded and proved on the part of the defendant. In that case, as in this, a man was affected by the judgment in a suit to which he was no party: and in that case, as in this, the decision of a subordinate Court was held

sufficient to support the second action, as being conclusive upon the point decided, only reserving power to the defendant to shew that the parties to the former action had colluded to his injury.

I shall therefore proceed upon the idea that the bond in question is void; though my opinion is, that it is not so at common law, however it may be under the statute, as to which I have formed no conclusive opinion. The case of Johnson and Meriwether, and the other cases cited by Mr. Botts, prove this, in my judgment, incontrovertibly: and, however this bond may stand justified in other respects by our statute, I am inclined to think that the 17th section of the act concerning Sheriffs (b) does not extend to bonds given by parties in execution, but to such only as are given by persons arrested on meane process. This has been decided in relation to the English statute, (to which our's substantially corresponds,) in the case of Rogers v. Reeves, 1 Term Rep. 421. And, although a contrary opinion seems to have been hinted at by this Court in the case of Syme v. Griffin, yet this point was not made in that case; and, besides, that decision may stand justified by another ground taken by the Judges, namely, that a part of the condition of the bond was adjudged to be void by the principles of the common law.

Taking this, then, to be a void bond, as by the decision aforesaid it is declared to be, the release of the prisoner from gaol was "an escape with the consent, and through the negligence of the Sheriff," and such escape is the very gist of this action. There can be no real difference between a release of a prisoner without taking any, or taking only a void and ineffectual obligation. The Sheriff is bound to retain the prisoner in gaol, unless he gives a bond in all respects such as is required by the law allowing the liberty of the prison rules. Unless that bond be perfect, the party injured is not bound to proceed upon it against the obligors therein; but is at liberty to pursue the Sheriff on the ground of an illegal discharge of the prisoner.

Such being the nature of this action; 509 it being, in effect, an *action against the Sheriff for the escape of the prisoner; the law (as well as the case of Johnson v. Macon, 1 Wash. 4,) is imperative that the Jury should expressly find the escape to have been with the consent, or through the negligence, of the defendant. This requisite cannot be supplied by any intentment or reference whatsoever; not even by the very strong circumstance, denoting such consent, that a bond was in fact taken by the Sheriff at the time, which was afterwards, however, adjudged to be void.

On these grounds, I am of opinion, that the District Court erred in rendering judgment on the verdict in question, and that its judgment ought to be reversed.

JUDGE FLEMING, after stating the case. With respect to the charge, that the bond for keeping the prison bounds was made payable to the plaintiffs instead of he Sheriff, I consider that as no good

(a) Co. Litt. 79, a.

(b) 1 Rev. Code, p. 122.

ground of action; for, though it was not taken in strict conformity to the act of Assembly, respecting the persons to whom payable, yet it was a good bond at common law, according to the decisions of this Court in the cases of Meriwether v. Johnson, and others; and, had the appellees appealed from the decision of the District Court, I have no doubt that judgment would have been reversed by this Court, and the action brought upon the bond sustained. In the case of Syme v. Griffin the condition of the bond was illegal in itself; and therefore no action could have been maintained upon it.

With respect to the escape, no judgment, in my conception, ought to have been entered on the verdict; for, by the act of 1792, c. 79, sect. 3, it is enacted, "that no judgment shall be entered against any Sheriff, or other officer, in any suit brought upon the escape of any debtor in his or their custody, unless the Jury who shall try the issue shall expressly find that such debtor or prisoner did escape, with the consent, or through the negligence, of such Sheriff, or Serjeant, or his officer or officers; or that such prisoner might have been retaken, and that the Sheriff, or Serjeant, and his officers, neglected to make immediate pursuit." In the verdict before us there is no such finding, nor any thing similar, or tantamount; and it seems to me that the rule of the common law that has been mentioned does not apply in this case; it being taken away by a special clause in the act of Assembly above mentioned.

510 *As to the rule, "that the preamble of a statute furnishes a guide to its construction," where the enacting words are ambiguous, or doubtful, it may be well to resort to the preamble as a key to discover the will and intention of the Legislature; but where an enacting clause is clear and explicit, as in the present case, it seems to me improper to resort to the preamble, to discover the meaning of the statute, in order to give it an operation, or to destroy its effect, contrary to the will of the Legislature.

I am of opinion, upon the whole, that the judgment is erroneous, and ought to be reversed; and the cause remanded to the Superior Court of Prince William, for a new trial to be had therein.

Judgment reversed, and new trial directed.

Henderson v. Hudson.

Monday, October 15, 1810.

Statute of Frauds—Application—Reality*—Case at Bar.

—The statute to prevent frauds and perjuries applies to an agreement between a purchaser of

*Statute of Frauds—Application—Reality.—The statute of frauds and perjuries applies to a contract between a purchaser of real estate and a third person for an interest in the property. Walker v. Herring, 21 Gratt. 678, 680, citing the principal case.

The principal case was also cited in Jarrett v. Johnson, 11 Gratt. 335, 337; Miller v. Lorenz, 39 W. Va. 172, 19 S. E. Rep. 306; foot-note to Parrill v. McKinley, 9 Gratt. 1, containing an extract from Miller v. Lorenz, 39 W. Va. 172, 19 S. E. Rep. 306.

land, and a third person, that such third person should be admitted as a partner in the purchase; the proof of such agreement being only parol evidence of subsequent declarations and acknowledgments by the parties.

This was a suit in the late High Court of Chancery, brought by Christopher Hudson against John Henderson, for the purpose of obtaining a conveyance of a moiety of a tract of land purchased by the defendant of a certain Thomas Booth, and of Robert Andrews, who, as executor of Samuel Beall, deceased, had a mortgage upon it. The plaintiff relied on a verbal agreement between himself and the defendant, that he should be let in as a partner in the purchase. The defendant in his answer denied the agreement, and claimed the benefit of the statute to prevent frauds and perjuries. The testimony related altogether to parol declarations and acknowledgments by the parties at sundry times subsequent to the alleged agreement. The late Chancellor, Mr. Wythe, was of opinion, "that the defendant was by the testimony proved to have agreed to associate the plaintiff in the purchase of the land; that the statute applied only to contracts and actions upon them, (quæ frequentius accidunt,) between the buyers and sellers of lands," but not to such a contract as the one now in question; "that the defendant, (when he transacted with the sellers the business about which they treated,) observing good faith, would have joined the plaintiff's name 511 in the conveyances; *that, if the statute were capable of an exposition comprehending such an example as the present subject of litigation, it ought rather to be called an act to permit fraud and perfidy."

He therefore decreed "that the defendant convey with warranty against himself, and claimants under him, one moiety of the land purchased by him of Thomas Booth, and deliver possession thereof to the plaintiff, upon payment by him of the like proportion of the purchase-money, with interest, to the defendant; which moiety the County Surveyor was ordered to distinguish and describe on a map, in presence, and by direction, of Commissioners appointed to superintend the partition, and to allot and assign the purporties. And the said Commissioners were required to report the said plan, allotment and assignment, with an account stated between the parties, debiting one with his proportion of the purchase-money and interest, and the other with one half of the profits of the said land, whilst he had withholden the possession thereof." From which decree the defendant appealed.

Wickham, for the appellant, took a view of the evidence, by which he contended the contract alleged in the bill was not proved. Some conversation between the plaintiff and defendant on the subject of a proposed partnership in the purchase was admitted in the answer: but the defendant says that the contract was not closed, because an advance of money on the part of the plaintiff was necessary; and every circumstance in the case proves this. Especially, if Hudson

was a partner, is it not unaccountable that he should never have been called upon to advance his share of the purchase-money?

But the statute of frauds puts an end to all question. This is the very kind of case intended to be prevented, by the statute, from coming before a Court of Justice. The contract, as alleged, was not to be performed within one year; and, even if not for land, could not be enforced.

Peyton Randolph, for the appellee. The statute of frauds does not relate to a contract between joint purchasers of land; but only to contracts between vendor and vendee. Hudson (the appellee) originally contracted for the land: Henderson (the appellant) applied to be admitted as a

512 partner. At that time the "land had not been purchased. According to the bargain made by Hudson on his application, he was a mere agent and trustee. As between Hudson and Henderson, it was only a contract that Henderson, as agent for both, should buy the land; not a contract of Hudson to buy the land of Henderson. Why should he employ Henderson to purchase, if not for their mutual benefit? The testimony proves his great anxiety to purchase; and that he understood the bargain was joint: yet, according to the answer, you lose sight of him altogether.

Wirt, on the same side, quoted Moseley's Rep. 39, *Atkins v. Rowe*, as shewing that where a man sends an agent to buy land with his money, and the agent takes the deed in his own name, the principal, on proving this by parol evidence might claim the land in equity; and he was inclined to think that, even if the agent paid his own money, the Court would give the principal relief. The case of *Waller v. Hendon*, 5 Viner, 424, proves that an authority to treat, or buy, may be good without writing, and binds the principal to pay the money, for which his agent may agree. In the present case, what was Henderson but an agent for Hudson, as to one half of this land? The contract should bind him to Hudson, as it would bind Hudson to the seller. A contrary doctrine would destroy all agency by parol: and, though declarations of trust are required by the statute to be in writing; yet such as arise by operation or construction of law are excepted; as, where the conveyance has been made to one, but the purchase-money was paid by another; this is a resulting trust for him who paid the money; (a) and the existence of such trust may be established by parol evidence, shewing the mean circumstances of the pretended purchaser; (b) or by the party's own confession: (c) or other circumstances. (d) The objection that this will open the door to perjuries applies in all these cases; but it shuts the door to frauds. The cases of contracts partly performed are of the same sort: yet the law is well settled that part-performance takes a parol agreement out of the statute. *Lamas v. Bayly*, 2 Vern. 627, which seems against me, was not a case of a joint purchase,

but of an agreement that, after the purchase, Lamas should have part as purchaser from Bayly, who, in the first instance, bought singly. But the authority of that case, as reported in Vernon, has been questioned. (e)

513 *Wickham, in reply. The case of *Lamas v. Bayly* is conclusive upon the present question; applying directly in my favour. Vernon, by whom it is reported, was an able lawyer; and his authority is better than that of Viner, who was a mere compiler. But even as reported in Viner, and 2 Eq. Cas. Abr. it is not against me; for it is there said that the very agreement charged in the bill was admitted in the answer, and yet, on the ground of its being ambiguous and uncertain, the contract was not enforced; "the statute being intended to oust as well all such ambiguous agreements, as to prevent perjuries," &c. The case therefore was stronger than ours, in which the pretended contract is denied in the answer. *Atkins v. Rowe*, (f) quoted by Mr. Wirt, contains nothing decisive. The Chancellor there "let the plea stand for an answer," with liberty to except; but did not overrule the plea, or give any positive opinion; and the reporter concludes with a quære. *Waller v. Hendon*, 5 Viner, 424, is not law; for a power of attorney to buy or sell land must be in writing, to be binding on the principal.

I admit that, where by fraud a contract is prevented from being in writing, the statute does not apply. *Sellack v. Harris*, 5 Viner, 421, is not like this case. In 2 Atk. 150, *Lane v. Dighton*, Amb. 409, is referred to; and that was not a case where parol evidence of the party's confession was admitted; the rule is, that such confession must either be in writing, or appear judicially, by the answer. (g)

Wednesday, October 31. The Judges pronounced their opinions.

JUDGE TUCKER. The bill charges that the complainant having begun a treaty with Mr. Andrews, and one Booth, for the purchase of a tract of land mortgaged by the latter to Samuel Beall, deceased, whose executor Mr. Andrews was, a conversation took place between the complainant and the defendant, from which the former discovered that the latter was desirous of purchasing the same land, and consulted the complainant on the means of effecting the purchase; that the defendant proposed to the complainant during that conversation to admit him as a partner in the purchase, which he refused; that, shortly after, meeting with the defendant again, the latter repeated his former proposition of 514 "a partnership, which he again refused; that the defendant "then promised that if the complainant would give him an interest in the purchase, he would be at all the trouble and expense of waiting on Messrs. Andrews and Booth, and, at the expiration of four or five years,

(e) 1 Pow. on Cont. 310, referring to 5 Vin. 521, pl. 32, and to 2 Eq. Cases Abr. 45, pl. 10, as reports of the same case.

(f) Moseley. 30.

(g) Ryall v. Ryall, 1 Atk. 59; *Ambrose v. Ambrose*, 1 P. Wms. 322.

(a) *Willis v. Willis*, 2 Atk. 71.

(b) *Ibid.*

(c) 2 Atk. 150, note. Noland's edit.

(d) 5 Viner, 521, pl. 81, *Sellack v. Harris*.

would let the complainant have his part again; that, upon the complainant's objecting to that condition that the defendant would, then, probably demand too high a price for his part, he said, he would agree to leave the price to be settled by referees; as he only wished to be paid for his improvements, and whatever rise might take place in the price of lands after the purchase: that the complainant then acceded to the defendant's proposition, solely upon the conditions last mentioned; and it was agreed between them that the defendant might offer as far as 400l. or 500l., with as long a credit as possible; the complainant assigning as a reason that he did not know at that time what price he might get for his wheat and tobacco;" that the defendant accordingly went down, and made the purchase, and, on his return, informed the complainant thereof, and of the terms, viz. 100l. cash to Booth, and 300l. to Mr. Andrews, in two annual payments; that the defendant has since refused to let him have his stipulated proportion, although he has always been ready to pay his proportion of the price, and has actually tendered to the defendant 60l. as a compensation for the 50l. which he had advanced on the first purchase.

The defendant answered, setting forth several conversations, between the complainant and himself, on the subject, "and denying that those conversations ever terminated in a contract, or ever approached nearer to one than he had before stated." In an amended answer which he was permitted to file, he insists upon the benefit of the statute of frauds and perjuries.

I shall briefly observe upon this answer, that the conversations which it states differ very materially from those set forth in the bill; that no witnesses (of whom a great number were examined) were present at the time of making the contract; their testimony going only to conversations between the parties in their presence subsequent to the purchase; or to communications made to them at different times by the plaintiff, or defendant. And, although one witness, Mr. Carter, swears positively, "that the defendant informed him that he and the complainant were in partnership in that purchase, and that he had made a very advantageous bargain,"

515 *yet even he does not mention the terms of the partnership, nor any particulars whatsoever relating thereto. Another witness, James Lucas, says the defendant told him that the complainant was to join him in the purchase of the land, or wished to do so; but he cannot recollect which of those expressions he used. Two other witnesses, William Clarkson and David Anderson, whose depositions were much relied on by the complainant's counsel, and are, in fact, in great measure literal transcripts of each other, (a circumstance, which in my mind does not strengthen, their testimony,) state a conversation between the parties in their presence respectively, in which they both say, in the same words, that each of them "heard the complainant demand of the defendant a compliance with a contract which the complainant stated to have existed be-

tween the defendant and himself respecting a partnership in the purchase of the aforesaid tract of land, the particulars of which contract the deponent does not recollect to have heard, except so far as relates to a conversation which the complainant stated to have taken place between them to the following effect;" which they set forth, nearly, or entirely, in the same words; and in which the complainant and defendant contradicted each other in several particulars. Neither does any thing stated by them in their depositions shew the terms of the agreement (if any can be collected, or presumed, from what they say) to be such as the complainant has set forth in his bill.

I deem it unnecessary to enter into a more minute examination of the evidence, the statute of frauds and perjuries being relied on by the defendant in his amended answer.

In giving my opinion in the case of *Argenbright v. Campbell*, (a) I said, that the true intent and meaning of our statute of frauds and perjuries was, according to my apprehension, to reduce all such parol agreements as are mentioned in the purview of the act to the level of a mere *nudum pactum*, or of a mere colloquium, or the inception of a contract, instead of the completion of it; that although it was very clear that the statute intended to prevent fraud as well as perjury, yet, from the purview of it, declaring that no action shall be brought in the cases therein enumerated, the true intent of the statute was to prevent the fraudulent imputation of a contract, rather than the fraudulent denial of one; and, therefore, that all promises, agreements, and contracts within the purview of the statute, if not reduced

516 *to writing and signed pursuant to the statute, and if nothing were done, in performance thereof, whereby the actual state of the parties, or one of them, is materially affected, ought to be considered as imperfect and incomplete, so as to be incapable of supporting a suit either at law, or in equity. For the reasons and authorities in support of this opinion, I beg leave to refer to that case, p. 160—169. An opinion not very dissimilar to some parts of the preceding may be found in the case of *Rowton v. Rowton*, (b) delivered by another member of the Court. And, though, in that case, I was of opinion that the contract was not only fully proved, but fully executed on the part of the son, and his situation thereby materially altered, the difference of opinion between myself and a majority of the Court did not arise from a different construction of the true policy of that statute, but from the difference of opinion which was entertained respecting its application to the peculiar circumstance of that case. In the case of *Cooth v. Jackson*, (c) Lord Chancellor Eldon declared that, if a defendant denies that any parol agreement ever took place, a Court of Equity will not inquire into the truth of that denial. The same Judge says, in the same page, that all the doctrine of a Court of Equity attributes great weight to the

(a) 3 H. & M. 100.

(b) 1 H. & M. 92.

(c) 6 Ves. jun. 30.

oath of the defendant; and that the moment the defendant, in the form in which issue is joined in that Court, in his answer says that there was no agreement, the witness cannot be heard; or, if he was heard, unless supported by special circumstances, giving his testimony greater weight than the denial by the answer, the Court could not make a decree. In the case now before us, the agreement charged in the bill is denied by the answer, and the whole mass of evidence taken together does not prove it as alleged in the bill. The statute appears to me emphatically to apply to such a case.

But it is objected, this is not a contract for the sale of lands, but for a purchase thereof in partnership. Whoever looks at it, as charged in the bill, must, I think, be sensible it was for both: the terms on which the complainant alleged he was to have the defendant's part back again, appear to me incapable of being understood in any other sense. The contract also must, I conceive, be taken as one entire contract, and not as different bargains. The latter part being, for the reasons just mentioned, within the statute, the cases of *Cooke v. Tombs*, (a) and *Lea v. Barber*, (b) are, in my apprehension, conclusive against the Chancellor's decree. *The case of *Chater v. Beckett* (c) is an affirmation of the same principle. So was that of *Lord Lexington v. Clarke*, (d) if the note of it in the report of *Chater v. Beckett* be correct. I have not the book to refer to. I will here say, with Lord Kenyon, in the last-mentioned case, "that I lament extremely that exceptions were ever introduced in construing the statute of frauds: it is a very beneficial statute; and if the Courts had, at first, abided by the strict letter of the act, it would have prevented a multitude of suits that have since been brought."

I am of opinion that the decree be reversed, and the bill dismissed.

JUDGE FLEMING.* It is agreed by the counsel on both sides that the only two points in the cause are, 1st. Whether the case be within the statute of frauds and perjuries; and, 2dly. Whether the contract, as stated in the bill, has been proved; both of which appear to me in favour of the appellant: but I shall reverse the order, and first consider whether the contract, as stated in the bill, be proved? And I have no hesitation in saying that it is not proved to my satisfaction. It is, in the first place, expressly denied by the answer, which is corroborated in some of its material parts by oral testimony: and, in the whole cloud of witnesses examined on the part of the appellee, not one was present at the time of the pretended contract or agreement between the parties; but the whole of their testimony relates to loose confessions of the appellant, and assertions of the appellee when the matter in controversy happened to be the subject of conversation: and not a single witness pretends to have heard the appellant state or confess the substance or

conditions of any agreement whatever between the parties, relative to the subject in dispute. Such evidence as this (were the statute of frauds and perjuries out of the way) is, in my mind, too slight and feeble to deprive any one of his freehold and inheritance, or any part thereof.

2dly. But, were the oral testimony of the appellee more particular and pointed in support of the contract, it appears to me, (notwithstanding the opinion of the Chancellor to the contrary,) that the case is within the statute of frauds and perjuries, which I consider as a very beneficial and salutary law, that has been too much disregarded in some of our Superior Courts of Chancery. And, although, in the case before us, it is not immediately between a buyer and seller of land, yet it is within the mischief intended to be guarded against by the statute, which being a remedial one, and intended to prevent a growing evil, ought to be liberally construed: and the admission of oral testimony to prove the agreement, denied by the appellant, tended by imputation to deprive him of a considerable part of his freehold and inheritance. But the first point being, in my apprehension, clearly against the appellee, I have considered the latter with less attention than I otherwise should have done. And, upon the whole, I concur in the opinion that the decree be reversed, and the bill dismissed with costs.

Decree reversed, and bill dismissed.

Harvey and Wife v. Pecks.

Monday, November 11, 1810.

1. **Husband and Wife—Deed—No Privy Examination***—Effect.—A deed from a husband and wife without her privy examination and relinquishment, is utterly void as to her, and furnishes no consideration to support a subsequent conveyance.
2. **Deeds—Fraud.**†—What are badges of fraud in obtaining a deed.

Benjamin Borden, the elder, by his last will, dated the 3d of April, 1742, and admitted to record the 9th of December, 1743, gave to five of his daughters (of whom

***Husband and Wife—Deed—Necessity of Privy Examination.**—To the point that in order for a wife to convey real estate there must be a privy examination of the wife, else the deed is void, the principal case is cited in *Laughlin v. Fream*, 14 W. Va. 334; *McMullen v. Eagan*, 21 W. Va. 244; *Watson v. Michael*, 21 W. Va. 572; *Cooley v. Porter*, 23 W. Va. 126.

In *Bartlett v. Fleming*, 3 W. Va. 164, it was held, on the authority of the principal case, *Countz v. Geiger*, 1 Call 190, and *Hairston v. Randolphs*, 12 Leigh 445, that the certificate of justices of the execution of a deed by a married woman, which omits to state that she had the deed fully explained to her, or had willingly executed the same and wished not to retract her execution of it, is radically defective, and the deed inoperative as to the wife.

See further, monographic note on "Acknowledgments" appended to *Tallaferro v. Pryor*, 12 Gratt. 377; monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

†**Deeds—Fraud.**—See generally, monographic note on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 554; monographic note on "Fraud" appended to *Montgomery v. Rose*, 1 Pat. & H. 5.

(a) 2 Anstr. 420.

(b) Ibid. 426, in a note.

(c) 7 Term Rep. 201.

(d) 2 Vent. 228.

*JUDGE ROANE did not sit in this case.

Lydia, who afterwards married Jacob Peck, was one) five thousand acres of land, "all of good quality;" (being part of his lands on James River, without specifying the situation or boundaries;) "that is, one thousand acres of good land, a piece, to every one of the said five daughters, to them and their heirs and assigns for ever;" and all the rest of his said lands to be sold, &c.

By a deed of bargain and sale, dated the 17th of September, 1745, Jacob Peck, and Lydia his wife, for and in consideration of the sum of 30l. current money, conveyed to Benjamin Borden, the younger, who was the testator's executor, "all the said Jacob's part of the land which he had by virtue of his intermarriage with the said Lydia, containing one thousand acres, situate, lying and being on one of the branches of James River, and in that part of Orange called Augusta;" without any farther description; the land, as it seems, having never been allotted according to the will.

This deed had the name of Lydia Peck as well as that of *Jacob subscribed, without a mark; and her privy examination and relinquishment were not taken.

On the 19th of May, 1747, a bond in the penalty of 70l. was executed by Jacob Peck to Benjamin Borden, conditioned, that if the said deed was not good, having been executed before the said Jacob Peck (who was a native of Germany) had been naturalized, he was to make a good and lawful deed when demanded; and, on the 19th of January, 1748, a receipt "in full satisfaction for one thousand acres of land, upon the waters of James River, which was left to Lydia Borden, by her deceased father," (without mentioning any sum of money as paid,) was also given.

Benjamin Borden, the younger, having departed this life; and Martha Borden, his only daughter and heiress, having married Robert Harvey; a deed was obtained by the said Harvey, on the 25th of May, 1797, from Jacob Peck and Lydia his wife, (who then were very old,) conveying to himself and his heirs the same one thousand acres of land, described as aforesaid; for and in consideration of the sum of 400l. of which he paid 18l. in cash; giving his bonds for the balance, payable in four equal instalments. On the same day, by virtue of a dedimus previously issued from the Clerk's office of Botetourt County, and brought with him by Harvey to the place where the deed was executed, Henry Walker and William Anderson, two Justices of that County certified "that they had examined Lydia Peck, privily and apart from her husband, touching the said conveyance; and that she acknowledged the same to Robert Harvey, and was willing such her acknowledgment might be recorded in the County Court aforesaid." By a subsequent certificate, dated the 10th of April, 1798, the same magistrates stated, that she the said Lydia Peck, at the time of such examination, did declare "that she willingly signed and sealed the said indenture, which was then shewn and explained to her." This deed, with the two certificates annexed, was duly recorded. By a writing under seal, bearing

date the 27th of May, 1797, but appearing in fact to have been executed on the same 25th of May, the terms of the contract with Harvey were mentioned, and it was agreed that, "if a certain instrument of writing, executed by the said Lydia to her son Jacob, be of sufficient authority to vest the said one thousand acres of land in the said Jacob, then the above contract was to be void, the said deed to be cancelled, Harvey's bonds given up, and the eighteen 520 pounds "in cash repaid him." This writing was attested by the said William Anderson and Henry Walker. The written instrument referred to, as having been executed by Lydia Peck, to her son Jacob Peck, was dated May 11th, 1796, and signed

her
Elizabeth \times Peck, (Seal.)
mark,

conveying "all and singular her hereditary interest and lawful partition part of and in the personal and real estate of her father Benjamin Borden, to her sons Jacob, John, and Joseph Peck, and their heirs and assigns for ever;" the name (Elizabeth) appearing to have been inserted in the body of the instrument, and also in the signature, by a mistake of the person who drew it.

In September, 1799, Jacob Peck, sen. and Lydia his wife, filed their bill in the late High Court of Chancery, against Robert Harvey and Martha his wife, suggesting that both the deeds (to Benjamin Borden, the younger, in 1745, and to Robert Harvey in 1797) were obtained by fraud and imposition; setting forth a variety of circumstances in support of this allegation, against each deed, particularly, that Harvey contrived to make the plaintiffs drunk, and obtained the last deeds from them when in a state of intoxication; praying the Court to decree the said deeds to be void and of no effect; that the said Robert and Martha convey the said lands to the plaintiffs; that Commissioners be appointed to allot to them one thousand acres of land lying on the waters of James River, according to the will of the said Benjamin Borden, the elder, and to put them in possession thereof; that the said Commissioners liquidate and settle the annual profits or issues, and that the said Robert Harvey and Martha pay the same to the plaintiffs, after deducting the sum of 18l. paid as aforesaid by Harvey;" concluding with a prayer for general relief.

The defendants by their answer denied the fraudulent practices charged in the bill, and insisted that the first deed, in 1745, had been fairly obtained for a price equal to the value of the land continually exposed to Indian depredations. They farther set forth, (among other allegations,) "that the defendant Robert, living at a considerable distance from the complainants, and being desirous of avoiding more applications than should be necessary, and, especially after frequent conversations with the complainants on the subject, did, by the 521 advice of his attorney, carry a deed drawn, and requested two Justices to attend, because he had every reason to expect that the bargain would be concluded, from what had already passed; that he

offered, at first, 200l. which he conceived was a liberal offer, considering that the land had been fairly purchased of the complainants in the year 1745; that he believes that Jacob and Lydia Peck were both sober at the time of executing the last deed, and thinks he may well make this conclusion from the caution used in obtaining the writing, which he the said defendant signed, containing the reservation aforesaid: that another fact would shew a perfect knowledge in the complainants of what they were doing, and had done; viz. that after the last deed was executed, they came to the town of Fincastle, and in the presence of their son John Peck, gave up to the defendant Robert the bonds taken at the time of the purchase, and took fresh bonds with other security; and that neither they nor their son then uttered any complaint about the said purchase; nor did the latter pretend any claim to the land. The answer concluded with an averment that, if the decree of the Court should be adverse to the defendants, they had not land enough, belonging to the reservation made by Benjamin Borden, the elder, out of which to make the allotment required by the complainants.

The testimony taken in the cause was very voluminous. The depositions of Peter Holm, and Haunah, his wife, (who was a daughter of the plaintiffs,) were positive in proving the fraud charged in the bill to have been committed by Harvey, and the intoxication of the plaintiffs by his procurement. The magistrates, Walker and Anderson, did not think the plaintiffs were intoxicated at the time of the contract, but mentioned that liquor had been procured. Walker swore that, before the business was closed, Mrs. Holm was told to make some toddy; and the cup was passed twice, as well as he remembered. Anderson recollected seeing Peck and his wife drink some liquor at the time the deed was executed; but did not remember whether it was or was not, mixed with water; (though he thought it was;) nor whether Mrs. Peck drank or not before the bargain was concluded: during his stay there, he thought she drank lightly. They both conceived her to have been in her senses when they took her relinquishment. The characters of these two gentlemen were proved to be highly respectable. Sundry depositions were also taken with the view of discrediting Peter Holm and 522 wife; *from which (as well as from her own deposition) it appeared that she was induced by a promise of reward from Harvey to assist him in making the old people drunk, and persuading them to make the bargain; but nothing was proved against Peter Holm's credibility, except that he was occasionally subject to habits of intoxication. The value of the land was proved to be 2,500l. or 3,000l. in the year 1797; the age of Jacob Peck was about one hundred years, and that of Lydia upwards of eighty; and both were very illiterate as well as poor. The witnesses differed in opinion concerning their capacity to make contracts; but the evidence was strong as to the mental imbecility and dotage of Jacob Peck.

No evidence appeared to impugn the deed, dated in 1745, except the circumstances

herein before expressed. The allegation in the answer, relative to the subsequent exchange of other bonds for those at first given by Harvey, was in substance proved.

The suit, having abated by the deaths of the plaintiffs, was revived on behalf of their children; and, on the 26th of November, 1804, came on to be heard by the Judge of the Superior Court of Chancery for the Staunton District, who decreed "that the plaintiffs repay to the defendant, Robert Harvey, the sum of 18l. with legal interest thereon from the 27th of May, 1797, and restore to him the bonds given for the balance of the purchase-money; that the said defendant deliver up both the deeds in question to be cancelled, and moreover reconvey to the plaintiffs any title which he and the other defendant had acquired, by either of the said deeds, to the lands in the bill mentioned, and pay the plaintiffs the costs of this suit; that certain Commissioners, appointed for that purpose, do ascertain and report to the Court the situation of such lands of Benjamin Borden, the elder, as will best answer the description of those devised by him to his five daughters, and whether sufficient of such remain undisposed of to satisfy the claim of the plaintiffs, as representatives of Lydia Peck; if not, who are in possession of said lands, and by what title they hold them.

From this decree the defendants appealed.

Payton Randolph and Call, for the appellants.

523 *Wickham and Wirt, for the appellees.

So much of the argument in this cause as related to the evidence need not be inserted. The points in law made on either side were the following:

1. With respect to the deed in 1745, it was contended on the part of the appellants, that no objection on the ground of fraud being established; and the price given by Benjamin Borden, the younger, not being inadequate, if estimated at that time when the land was in possession of the Indians; the attempt of the appellees to set aside the last deed was not founded in morality and justice. The Court of Equity, therefore, having a discretionary power to give or withhold its aid in such cases, ought not to interfere in their favour; especially considering the acquiescence of the plaintiffs during the great length of time which had elapsed since the date of the first deed.

In answer to this, the circumstances, under which that deed was given, the authority and command which Benjamin Borden derived from his seniority, executorial office and resources, over the ignorance, confidence, poverty, and dependence of the original plaintiffs, the great advantage which his superior knowledge of the language, the country, its manners and laws, gave him in a bargain with an illiterate foreigner, were relied upon as powerful objections. The price too was *prima facie* inadequate; being only thirty pounds for one thousand acres of good land! for it does not appear in evidence, that the country was in the hands of the Indians. The defendant himself does not affirm it positively, but only (by recitation) speaks of his impressions and convictions. Another suspicious

circumstance is, that the names of Jacob and Lydia Peck are signed to the first deed; but their marks to the last.* If the deed to Borden, therefore, had any effect at all; it comes in such a shape, as not to be permitted to stand before a Court of Equity and good conscience. But, in fact, it is a mere nullity as to Lydia Peck; she being a married woman; and her privy examination and relinquishment not having been taken. There is not a circumstance to shew any equitable or moral obligation upon 524 her to execute that deed; and *it must be presumed to have been under the coercion of her husband, without direct evidence to the contrary. Indeed, it may be denied that she ever signed it at all; for the probate of a deed said to have been executed by a married woman, without privy examination, is entirely extrajudicial, and proves nothing against her; since, at common law, (independent of our act of Assembly directing the mode of taking her relinquishment,) every deed from a married woman is void.

From Jacob Peck himself, the deed passed nothing, because he was then an alien, as is proved by his subsequent bond to make a farther conveyance. An alien can purchase land, but cannot hold; and can require nothing by act of law.

The length of time is no objection to the claim of the appellees; being repelled by the coverture of Lydia Peck, under whom the present plaintiffs claim ab initio. Besides, the limitation is not pleaded; nor is staleness of the demand insisted on either by plea, or answer; which is indispensable, that the other party may have an opportunity of accounting for it by a replication; for this reason, it will not do to make the objection by demurrer; (a) much less by argument.

In reply, it was contended that, as to Jacob Peck, (though an alien,) the deed was not void, (even if the land did not pass by it,) but was binding, on his heirs, by his covenant to warrant the title; and this whether they received real assets, or not. (b) The act of 1785, c. 67, (c) does not affect this case; being altogether prospective in its operation.

But the act of 1766, c. 20, (d) confirmed the deed, and gave it full effect as a conveyance. The charge of fraud is repelled by Peck's deliberately, on the 19th of May, 1747, confirming the contract made in 1745, by giving a title-bond; and the penalty of that bond, being only seventy pounds, evinces that the price of the land, at thirty pounds, was not considered inadequate by either party.

2. As to the last deed, the evidence was contradictory with respect to the imbecility of the plaintiffs, and other circumstances. The Chancellor should therefore have directed an issue to ascertain the disputed facts.

The Counsel for the appellees objected, served, contra, that this was *not

necessary, where the weight of evidence clearly preponderated on one side, as it did here. The deed to Harvey was plainly obtained by fraud; 1st. From the gross inadequacy of price; the right of Jacob Peck to the land being at that time no more than equal to one year's purchase, in consequence of his extreme old age; and Mrs. Peck's title being almost a fee-simple in possession of a tract of land worth 2,500l. or 3,000l.; which Harvey well knew; for the Court of Appeals in the case of Harvey and Wife v. Borden, 2 Wash. 156, had, in the fall term of the year 1795, decided the great question; and he was apprized that, when Jacob Peck died, he must give up the land. To this circumstance must be ascribed his sudden transition to pretended affection and kindness, after neglecting the old people, in the depth and bitterness of poverty, for so many years, his great anxiety, and urgent persuasions, and contrivances to induce them to conclude the bargain.

In support of this point, as to the effect of gross inadequacy of price, they cited Grotius, b. 2, c. 12; Puffendorf, b. 5, c. 3, s. 9; Codex Juris Civilis, lib. 4, tit. 1; Pothier on Obl. p. 34, s. 25; 2 Bro. Ch. Cases, 177, note, Horne v. Meers; 7 Bro. Parl. Cases, 70, Filmer v. Gott; 2 Vesey, 549, Chesterfield v. Janssen; 1 Bro. Ch. Cases, 6-9, Gwynne v. Heaton; 2 Bro. Ch. Cases, 167, Heathcote v. Paignton; 10 Vesey, jun. 209, Underhill v. Harwood; 3 P. Wms. 315, Pusey v. Desbouvrie.

2dly. The weakness of intellect of Peck and wife, if not in itself, yet coupled with the inadequacy of consideration, was clearly sufficient to vitiate the deed. (e)

3dly. The previous preparation of the deed and commission to take Mrs. Peck's relinquishment was another badge of fraud. (f) It is not the usual course, where people deal upon equal terms, to prepare the deed before the contract. This is therefore a strong circumstance shewing Harvey's settled determination to get it signed at all events; and a pregnant proof of his own impressions as to the condition of the persons with whom he had to deal.

4thly. Scrupulous concealment of the negotiation from the only habitual counsellors of the old people, their sons; and,

5thly. The false recital in the preamble of the deed that Jacob and Lydia Peck had conveyed the land by the deed of 1745, and that the new contract proceeded from their discontent, (occasioned by the rise in the value of the land,) and from Harvey's generosity; *were additional evidences of fraud. This recital was a deception upon them, and shewed that through ignorance of law they were influenced by erroneous impressions concerning their rights; which circumstance, added to inadequacy of consideration, was enough to set aside the contract. (g)

6thly. The fraudulent artifices used by Harvey to make the plaintiffs drunk, and

*Note. It was proved that Jacob Peck could write; but not that Lydia could.—Note in Original Edition.

(a) Aggas v. Pickerell, 8 Atk. 225.

(b) 2 Bl. 302.

(c) 1 Rev. Code, c. 18.

(d) Edit. of 1760, p. 479.

(e) 2 Ch. Cases, 103, White v. Small; 2 P. Wms. 208, Clarkson v. Hanway; 2 Atk. 324, Bennett v. Wade; 1 Bro. Ch. Cas. 560, Gartside v. Isherwood.

(f) 2 Ch. Cases, 103, White v. Small.

(g) 1 P. Wms. 315, Broderick v. Broderick; 4 Vesey, jun. 348; Griffin v. Nanson; Moseley, 864, Lansdown v. Lansdown; 2 Atk. 38, Simpson v. Vaughan, and the cases there cited.

take advantage of their intoxication, were forcibly urged.

In reply, it was contended, that Harvey, having married a lady, whose ancestor and herself had been in possession of the land more than half a century, by virtue of a deed, and a subsequent bond confirming that deed, was not to blame for wishing to save his wife's inheritance.* The first deed not having been fraudulent, the consideration for the second was not inadequate; for Mrs. Peck having executed the first deed, and knowing that her husband had received the money, was bound in honour and honesty to sign the second. Concerning the pretended imbecility of intellect, the testimony is contradictory. The previous preparation of the deed and commission is a very common circumstance, and well accounted for by the answer.

A conclusive circumstance, against the charge of fraud and intoxication, is, that the Pecks afterwards ratified the contract, by giving up the bonds to Harvey, and taking new ones.

Thursday, November 29. The JUDGES ROANE and FLEMING (JUDGE TUCKER not sitting in the cause) pronounced their opinions.

JUDGE ROANE, upon the whole case, was for affirming the Chancellor's decree.

JUDGE FLEMING. The only material question in this case is, whether the deed from Jacob Peck and wife to the appellant Robert Harvey was, or was not, fraudulently obtained? In proof of which there are several strong badges and circumstances spread upon the record.

1. The appellant's going to the 527 house of Peter Holm, where *Peck and his wife were on a visit to their daughter, with a deed ready prepared, with a commission to take the relinquishment of her right to the land in question; and two magistrates to take her privy examination, before any contract was made, or perhaps treated for.

2. The manifest inadequacy of the price of 400l. for the land, stated by the depositions to be worth from 2,500 to 3,000 pounds.

3. The extreme old age, weakness and imbecility of Peck and his wife; of whom the land was purchased for the above-mentioned trifling sum of 400l.; and,

4. The plying the old people (accustomed to intoxication) with ardent spirits, procured from the neighbourhood, by Harvey himself; before the business was completed; or, perhaps, before the negotiation had commenced.

An attempt has been made, however, to invalidate the testimony of Peter Holm and his wife, by whom the latter circumstance was proved: but their testimony respecting that matter is corroborated by two of the appellant's most respectable witnesses, the magistrates who took the acknowledgment of Lydia Peck. Mr. Walker, in answer to a question put by the appellant, whether he saw one, or both of them drink freely, said, "I think they drank twice, but I did not discover that they drank deeply;" but they might have drank twice more, or oftener,

without his observing them; as I do not suppose he was a spy upon their actions, nor on particular as to notice whether they drank deeply or not; nor do I think it material, as the crime and mischief lay in Harvey's having procured the liquor, from the free use of which, it may be fairly presumed, they were under no restraint: and the circumstance of the liquor being sweetened would naturally produce a double effect; first, in disguising its strength; and, secondly, would induce a more free and liberal use of it: and it is in evidence that they were put to bed, on account of intoxication, soon after the business was finished. The evidence of Peter Holm and his wife is strongly supported by that of Walker and Anderson, in another important part of it, which is, that Lydia Peck refused her assent to the contract, "or to sign the deed, unless Harvey would enter into an article to cancel the bargain, in case an instrument of writing she had executed to her son Jacob Peck some time ago was sufficient authority to vest the 528 title of *said land in him; which the said Harvey did, and then she signed the deed." Those are the express words in Walker's deposition; and that of Anderson is much to the same effect.

I see nothing to lessen the credit of Peter Holm's evidence. His deposition consists chiefly in answers to a variety of interrogatories, put to him by the parties, which he seems to have answered with frankness and candour: several of them (had they been answered in the affirmative, would have been much in favour of the appellees) he professed to know nothing about. And when the question following was asked him, "do you remember of hearing the defendant insisting on your mother-in-law, Lydia Peck, to drink, and how often?" he answered, "I heard him ask her once."

These circumstances in the testimony of Peter Holm and his wife, corroborated, in some of its material parts, by that of Walker and Anderson, two of the appellants' principal witnesses, perfectly establishes its credibility with me. And I have no hesitation in saying that I think the decree a very just one, and therefore concur in the opinion that it be affirmed.

With respect to the decree of September, 1745, from Jacob Peck and wife to Benjamin Borden, it may be observed,

1. That the wife of Peck, in right of whom he claimed an interest in the said land, never relinquished her right to the same.

2. Neither Peck nor his wife (the latter of whom claimed a right to the 1,000 acres of land, on the waters of James River, under the will of Benjamin Borden, her father, the locality or identity of which had never been ascertained) were ever seised, or in possession thereof, and therefore could not convey the same to Benjamin Borden.

Decree affirmed.

529 *Dangerfield v. Rootes, Administrator of Baylor.

Tuesday, November 27, 1810.

Set-Off—Unliquidated Claims.—A debtor ought not to be allowed a set-off (even in equity) for unliqui-

*Note. The second deed was to Harvey himself, and his heirs: not to his wife.—Note in Original Edition.

dated and disputed claims against his creditor, purchased by him after suit brought by the creditor against him.

This was an appeal granted by a Judge of this Court, under the act passed January 27, 1810, (a) from an order of the Superior Court of Chancery for the Richmond District, dissolving an injunction, which John Dangerfield had obtained to stay proceedings on a judgment confessed by him, at the suit of Thomas R. Rootes, administrator of John Baylor, jun. deceased, on a bond to the said Baylor, in his life-time. Pending the suit on that bond, the appellant, (as alleged in his bill,) for a valuable consideration, purchased of John Nicholson several claims which the latter had (in right of his wife) against the said Baylor, as executor and devisee of his father, John Baylor, sen., as administrator of his mother, and as executor of his brother, George Baylor; but which were much disputed by him in his life-time. Suits in Chancery to recover them had been brought, and by his death had abated.

The object of Dangerfield in making the purchase was to set off those claims against his own debt then in suit: and, in his bill, he alleged that the claims of Mrs. Nicholson were debts of the first dignity against the estate of the said John Baylor, jun. a part thereof, viz. a legacy of 300l., being charged on the estate real and personal devised to him by John Baylor, sen.; and the residue (as was alleged) due from him as administrator of his mother, and executor of his brother George.

Rootes, the administrator with the will annexed of John Baylor, jun. having filed his answer, denying the plaintiff's equity, and insisting that the money due on the bond from Dangerfield ought not to be thus intercepted, since he might thereby be compelled to commit a devastavit; the Chancellor dissolved the injunction; being of opinion that "it was settled in the case of *Alexander v. Morris* and others, 3 Call, 105, to be improper for a debtor, after suit brought, to trump up claims against his creditors, in order to discount them; especially, when purchased at an under rate; and that, if the principle was correct in that case, as between those parties, it should be applied with increased force in this case; since it might have the effect of subjecting the administrator to acts, which, but for that, he might avoid."

Upon a petition for an appeal, it was granted by Judge Roane, *for the following reasons assigned by him in his written mandate, addressed to the Clerk of the Court of Chancery: "I am far from being prepared to say that the ground taken by the Chancellor, in dissolving this injunction, is erroneous: yet I think the case deserves deliberate consideration; and, on that ground, I am of opinion to allow the appeal; especially, as the act of Assembly has provided for a prompt decision in such cases. The case of *Alexander v. Morris*, 3 Call, 105, has indeed a general dictum, seeming reprobate discounts, 'trumped up,' after the suit has been brought; but that case may have turned upon the extreme (not

to say fraudulent) circumstances, under which the discounts in question were acquired; and it is the best and safest rule of interpretation to test a case by the actual circumstances of it. On the other hand, it is held in the case of *Hudson v. Johnson*, 1 Wash. 10, 'that it has been always the practice, and very properly, to allow discounts up to the time of trial, but so as not to destroy the plaintiff's action, and entitle the defendant to costs.' There can be no substantial difference between acquiring the bond of an obligor (after a suit has been brought by him) by a fair assignment for valuable consideration, (our act having legalized such acquisitions,) and acquiring his bond, subsequently, for money lent him, which would undoubtedly be received as a discount, I presume, under this last decision, with the aforesaid restriction, that the whole sum in suit is not to be thereby extinguished, and the plaintiff subjected to costs. The decision in this case does not even allow the complainant the benefit of the proffered discount, (if substantiated,) and within the limits of the restriction aforesaid: and any construction upon this point, as at law, would seem to hold a fortiori in equity; keeping, nevertheless, a steady eye upon the real justice of the case. If, under the English statutes upon this subject, it was once held that debts subsequently acquired might be set off; (See *Douglas's Reports*, 112, *Reynolds v. Beerling*, in a note;) and it has only been recently decided otherwise in the case of *Evans v. Prosser*, (*Douglas's Additions*, p. 10,) whereby it appears to have been a vexed question in that country; it at least deserves consideration whether the former principle is not the law in Virginia, under the more latitudinous words of our act on the subject. Those words are, 'that the defendant shall have liberty on the trial to make all the discount he can against the debt, and, on proof, the same shall be allowed him in Court.'

531 "On the ground of the doubts entertained in this case, I am of opinion to allow the appeal; the complainant first giving bond and security in the amount of double the debt and interest recovered against him by the judgment which was enjoined.

"Spencer Roane."

In this Court, a number of points were made in argument, by Botts, for the appellant, and Call and Wickham, for the appellee; but, as the decision here turned on a single point, and the doctrine upon it (with the principal authorities relating to it) is sufficiently expressed in the following opinions of the Judges, the arguments of counsel may with propriety be pretermitted.

Saturday, December 1. The Judges pronounced their opinions.

JUDGE TUCKER, after stating the case, proceeded as follows:

In the case of *White, Whittle & Co. v. Bannister's Ex'rs*, (b) this Court appears to me to have laid down the same doctrine with that expressed in *Alexander v. Morris*, and to have gone the full length of the Chancellor's reasons for the dissolution of

(a) Sessions Acts of 1809, c. 11, s. 2.

(b) 1 Wash. 166.

this injunction. The case of *Brown's Adm'x v. Garland*, (a) (though an action at law), contains, I apprehend, a direct application of the same principles. These authorities, I conceive, fully support the opinion of the Chancellor; and I will add the strong and pertinent observation of Mr. Wickham in his argument, that if set-offs of this kind were encouraged by the countenance and sanction of this Court, a debtor by bond, or other liquidated demand, who was unable or unwilling to pay his debt, when judgment was recovered against him, would be sure to look out for the most complicated and perplexed claim that he could hear of against his creditor, as that would ensure him a respite of ten or twenty years before the claim could be properly liquidated. The only question before the Court being upon the propriety of dissolving the injunction, I am of opinion the Chancellor's decree ought to be affirmed.

I desire to be understood as giving no opinion whatever upon any other point in the cause.

JUDGE ROANE concurred in dissolving the injunction.

532 *JUDGE FLEMING. This case seems to rest upon the single point, whether the appellant has a right to produce the unestablished claim (however just) of Nicholson, purchased up, for what consideration does not appear, as a set-off against his own bond, long after a suit had been instituted on it?

There are several decisions of this Court which seem expressly against the principle. As *White, Whittle & Co. v. Bannister's Ex'rs* and others. In that case the Court would not allow a judgment against the executors, assigned to the appellants as a set-off against rent due to the estate of their testator; because, said the Court, "if creditors, purchasing from the executors, or as in that case, renting an estate from them, should be permitted to bring forth their claims against the testator, in discount, they might thereby not only gain an advantage over other creditors, but the executors might be involved in the trouble of accounting for the assets on every purchase; and in case of mistakes, might subject themselves to a devastavit. The objection has additional weight where the plaintiffs purchased up the debt for the purpose of a discount." If, in that case, then, a judgment against the executors was not admitted as a set-off, a fortiori, shall an unestablished claim (however just it may ultimately prove to be) be disallowed. The cases of *Brown's Adm'x v. Garland* and others, (1 Wash. 221,) and *Alexander v. Morris*, (3 Call, 105,) go to establish the same principle.

The only case I have been able to find which seems to have a contrary tendency, is that of *Hudson v. Johnson*; (1 Wash. 10,) but, when examined, it appears very different from the case before us. There the defendant, on the trial of the issue of payment, produced a receipt from the attorney who prosecuted the suit, dated after its commencement, which receipt was allowed as a discount; the defendant having proved, that on application to the plaintiff

to know where his bond was, he replied that it was in possession of Lewis, his attorney: but the receipt having been given subsequent to the suit, the Court adjudged to the plaintiff his costs.

I am of opinion that there is no error in the decree before us, dissolving the injunction.

Decree unanimously affirmed.

533 *(April Term, 1810, continued from p. 338.)*

Mayo v. Giles's Administrator.

Thursday, March 29, 1810.

1. Bonds—Assignment—Assignee Takes Subject to What Equities.—Although the assignee of a bond, with, or without notice, takes it subject to all the equity of the obligor, yet such equity must be clearly and manifestly established by proof, before it shall affect an assignee without notice: especially, if the obligor, after the assignment, promises payment of the full amount of the bond to the assignee. *See also, on the subject of assignments, *Buckner v. Smith, &c.*, 1 Wash. 299, and *Hoomes v. Smock*, *Ibid.* 389.

In the month of May, 1793, John Mayo obtained an injunction from the County Court of Henrico, to stay proceedings on a judgment rendered against him in favour of Knowles Giles, assignee of Fortunatus Sydnor; setting forth in his bill, that in the year — a certain Francis Gaddy, then of the city of Richmond, had an account against the complainant for blacksmith's work; that he the complainant was told at several times by Fortunatus Sydnor that Gaddy was indebted to him, and had instructed him to apply to the complainant for payment; that, not suspecting any fraud, he gave his bond to him the said Sydnor for 84l. 7s. 11d., being the sum then supposed due from the complainant to the said Gaddy, without making any deduction on account of an engagement of his to a certain John Swann for the payment of a sum of money due from Gaddy to Swann, the amount of which was then uncertain, and also the value of eleven muskets which had been delivered by the complainant to the said Gaddy to clean, and had never been returned; the aggregate amount of which said two articles was to be deducted from the said bond, when the precise sum could be ascertained. In support of this allegation, a written agreement by the said Sydnor, bearing even date with the bond, was exhibited.

The bill further stated that Sydnor, soon after, assigned the bond to Giles; that, "at the time of making the said assignment, the said Giles knew the circumstances under which the said bond was granted;" that Gaddy refused to grant the

*The succeeding nine cases of April Term, by a mistake of the printer, were not inserted in their proper place: but as the reader will find them by the index as easily as if this accident had not happened, it is hoped that no inconvenience will result. —Note in Original Edition.

†Bonds—Assignment.—See foot-note to *Norton v. Rose*, 2 Wash. 333; monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; monographic note on "Assignments" appended to *Ragsdale v. Hary*, 9 Gratt. 409.

(a) 1 Wash. 221.

complainant an acquittance, (alleging that he had never authorized Sydnor to receive the debt,) and forbade him to pay any part of the said bond; that, nevertheless, Giles the assignee had brought suit, and recovered a judgment at law.

To this bill Sydnor and Giles were both made defendants, but no process appears to have issued against the former, and no answer by him was filed. The latter by
534 his answer declared himself "a bona fide purchaser of the bond, for a valuable consideration, 'expressly denying that, at the time the said bond was assigned to him, or at any time before, he knew of any dispute or fraud being practised by which the complainant was induced or drawn in to execute the said bond.'" He contended, therefore, that, having the legal right to the debt, and equal equity with the complainant, a court of equity ought not to deprive him of the benefit of his judgment at law.

The testimony in support of the bill consisted, 1. Of Sydnor's written agreement dated the 8th of October, 1790, in the following words: "Having this day received Colonel John Mayo's bond, on account of Francis Gaddy, for 84l. 7s. 11d. and there being some doubts with Mr. Mayo whether he owes Mr. Gaddy that sum or not, I therefore hereby oblige myself, provided Mr. Mayo, in one month after this date, should produce proper vouchers to satisfy me that he has and is obliged to pay John Swann 13l. 15s. on account of Mr. Gaddy, independent to an order drawn in favour of John Swann on Mr. Mayo by Mr. Gaddy, and provided Mr. Gaddy should not within one month after date produce to Mr. Mayo eleven muskets which were delivered him to clean, that the price of the said muskets and the 13l. 15s. shall be fixed to the credit of this bond executed by Mr. Mayo agreeable to the award of Mr. John Hicks, William Booker, William Foushee, and Joseph Higbee. Witness, my hand, F. Sydnor."

2. A letter from Sydnor, dated the 9th of March, 1791, mentioning that necessity had compelled him to pass the bond to Giles; which he hoped the complainant would not be displeased at; that Giles had promised, "if the complainant would fix him upon a certainty of receiving one half the money in a short time, he would wait nine, or perhaps twelve months for the balance;" that should the complainant, on making particular inquiry, find the bond was given for rather too large a sum, the strictest honour should guide him (Sydnor) to fix the overplus in his hands to discharge it, as he conceived it not worth while to alter the bond for so small a sum, as perhaps the complainant could rely on his punctuality; and that he "hoped he would accommodate the matter as above proposed." 3. A deposition of a certain Samuel Jones, proving a verbal declaration by Sydnor, "that he had long been at a loss what to do respecting a bond he had obtained of Colonel Mayo, and passed to Knowles Giles, who had then sued on said bond, which would probably
535 be carried to a Court of Chancery, where he the said Sydnor might be placed in a disagreeable predicament, as Gaddy had cancelled the bargain by which

he obtained the bond;" that he had previously contracted with Gaddy for the sale of part of a lot in the City of Richmond, and that by selling the same ground to the said Jones, he should "destroy the foundation of his claim against Gaddy, which had been his justification in the receipt of said bond; but, as he should never be able to get any thing out of Gaddy, he had determined to sell, and execute a deed for, the ground, to Jones; which he proceeded to do."

On the other side, the deposition of Alexander King proved a promise by Mayo, (when applied to, by the deponent, on behalf of Giles, for payment of the bond,) that he would pay "the amount of the bond to Giles." The judgment at law was by confession; and, "by consent of the parties, fourteen days" were allowed the complainant to file his bill of injunction in the Clerk's office."

In August, 1793, a motion to dissolve the injunction was overruled; and in November, 1796, Giles having died, the suit was revived against his administrator. May 8th, 1800, the cause came on, by consent of parties, to be heard in chief, when the injunction was dissolved, and the bill dismissed with costs. On an appeal to the Superior Court of Chancery, this decree was affirmed by the late Chancellor, Wythe; and thereupon Mayo appealed to this Court.

April 21st, 1810. The Judges delivered their opinions.

JUDGE TUCKER, (after stating the case.) The original agreement between Mayo and Sydnor, referred to in the bill, whereby it was stipulated that, if Gaddy did not within one month produce the eleven muskets delivered him to clean, that Mayo should have credit for their value, is an admission on the part of Sydnor that Mayo should not be driven to his action to obtain compensation for them, if not delivered, but that the value thereof should be admitted as an equitable discount, or set-off against the bond. I call it an equitable discount, because I do not know in what manner he could have had the benefit of it at law; the value of the muskets not being ascertained in the agreement. And indeed, the parties seem to have ad-
536 mitted this, the one "by confessing a judgment on the bond, and the other by consenting that the former should be allowed fourteen days to file his bill of injunction in the Clerk's office. But, were it not so, the circumstances of fraud and imposition, charged in the bill, in my opinion, are amply sufficient to give jurisdiction to the Court of Chancery, in this case: nor could a demurrer, for want of equity, hold.

As to the merits. In the case of Norton v. Rose, (1 Wash. 233,) it was the unanimous opinion of the Court, (in the absence of Judge Pendleton and Judge Fleming,) that an assignee of a bond or obligation takes the same subject to all the equity of the obligor; and this, as I understand the Judges, whether the assignee at the time of the assignment have notice of such equity, or not. The question appears to have been fully discussed both by the bar, and by the bench, and therefore ought not now to be disturbed. But I am so far from feeling a

disposition to do so, that I accord entirely with the opinions thus delivered. The only question, then, is, has the appellant brought his case within the rule there laid down? From the agreement, as before stated, and a letter of March 9, 1791, from Sydnor to Mayo, and the deposition of Samuel Jones, I am very much disposed to believe that Mr. Mayo was probably entitled to the relief he seeks.

But the whole, taken together, does not in my opinion support the allegations of his bill. Why no process was ever issued against Sydnor, to compel him to answer the charges against him; or why Gaddy was neither made a party, nor a witness in the causes, it is impossible for this Court to discover. While I feel from the evidence before me a strong suspicion that other and better evidence might have been adduced, in support of the bill, I am constrained to say that the appellant has not proved his case, as alleged in the bill, or as it appears probable from some parts of Samuel Jones's deposition. I therefore think the decree must be affirmed. But I conceive it ought to be, without prejudice to any future bill against Sydnor which he may be advised to bring for relief on this subject. It would indeed be my wish only to affirm so much of the decree as dissolves the injunction, and allows the appellee to take the benefit of his judgment at law, and remand the cause for further proceedings, if the plaintiff should be so advised. But I doubt the power of this Court to make such a decree where the cause, with all its imperfections, *on the part of the plaintiff, 537 upon its head, after being in Court full seven years, was brought on by consent of parties, to be heard in chief upon the bill, answer, exhibits and depositions, in this record.

In the opinion I have given I mean not, in the most distant manner, to disturb or weaken the principles established in the case of Norton v. Rose, in which I most heartily concur.

JUDGE ROANE concurred in affirming the decree.

JUDGE FLEMING was of the same opinion; observing, that, whatever equity Mayo might have against Sydnor, he had none against Giles, who was a fair purchaser of the bond, and to whom Mayo had made a promise of payment.

Decree unanimously affirmed.

Wyatt v. Sadler's Heirs.

Friday, April 27, 1810.

1. **Wills—Rule of Construction—Intention.**—In construing wills, the cardinal rule is to collect the intention of the testator from the whole will taken together, without regard to any thing technical, or any particular form of words; and if

***Wills—Rule of Construction—Intention.**—The cardinal rule for the interpretation of wills is, to collect the intention of the testator from the whole will, taken together as a consistent whole formed of all its parts: and, if such intention be lawful, full effect must be given to it. Intention is the life and soul of a will, and the great point to be ascertained; when it is clear, and violates no rule of law, it

such intention be lawful, (as not creating perpetuities, or the like,) full effect ought to be given to it by the Courts.

2. **Same—Same—Case at Bar.**—A testator (who died in the year 1768) expressed himself, in the introductory part of his will thus: "and as to what worldly goods it hath pleased God to give me, I leave and bequeath as followeth." In the next clause, he "wills and desires that his wife should enjoy all his land during her life, and after her decease gives and bequeaths to his two sons, all his land, to be equally divided between them; his still, likewise, to be between them, to distil for their own use, and after, to his eldest son." A fee simple estate in his share of the land passed to the younger son.

On the trial of an action of ejectment, in the District Court of King and Queen, (on behalf of John Den, lessee of Richard Wyatt, against the widow and heirs of John Sadler, deceased,) the lessor of the plaintiff proved that he was the eldest son of Richard Wyatt, who died in the year 1768, seized in fee of the land in the declaration mentioned; that, being so seized, the said Richard Wyatt, the elder, had made and published his last will; in which were the following clauses, after the usual preamble; viz. "and, as to what worldly goods it hath pleased God to give me, I leave and bequeath as followeth: Item, my will and desire is, that my beloved wife Elizabeth Wyatt shall have and enjoy all my land during her natural life. Item, after the decease of my wife, I give and be-

538 queath to my sons Richard *and William Wyatt, all my land, to be equally divided between them, Dragon Swamp and all, my still, likewise, to be between them, to distil for them for their own use, and after, to my son Richard. Item, my will and desire is, that my lot at West Point shall be sold, and Mr. Stephen Bingham to have the refusal of it." There were other bequests of personal estate, &c. The lessor of the plaintiff farther proved that William Wyatt, the younger son of said testator, departed this life a year or two before the institution of this ejectment; that the widow was also dead at the time of bringing the said ejectment; and the defendants, claiming under the said William Wyatt the land in the declaration mentioned, which had been allotted to him on partition made between Richard and him, moved the Court to instruct the Jury that, under the said will, a fee passed to William, on the death of the widow, in that part of the land devised to him; which the Court accordingly did; to which opinion of the Court the

must govern with absolute sway. *McCamant v. Nuckolls*, 85 Va. 337, 12 S. E. Rep. 160, citing *Wootton v. Redd*, 12 Gratt. 196; *Boisseaux v. Aldridges*, 5 Leigh 233, 248; *Lucas v. Duffield*, 6 Gratt. 456; *Parker v. Wasley*, 9 Gratt. 477; *Cheshire v. Purcell*, 11 Gratt. 771; *Wyatt v. Sadler*, 1 Munf. 537; *Rushton v. Rushton*, 2 Dall. 244; *Finley v. King*, 3 Peters 377; *Smith v. Bell*, 6 Peters 68, 75; *Land v. Otley*, 4 Rand. 213; *Reno v. Davis*, 4 Hen. & M. 283; *Boothe v. Blundell*, Vesey. Jr. 521. See principal case also cited in *Johnson v. Johnson*, 1 Munf. 552, 553, 554; *Goodrich v. Harding*, 3 Rand. 233; *foot-note* to *Wootton v. Redd*, 12 Gratt. 196; *foot-note* to *Kennon v. McRoberts*, 1 Wash. 96; *foot-note* to *Davies v. Miller*, 1 Call 127.

See generally, monographic note on "Wills."

plaintiff filed a bill of exceptions. Verdict and judgment for the appellants; and appeal.

Wickham, for the appellant. The abstract question submitted by this record is, whether a fee passed to William Wyatt under a will, in which there are no words of perpetuity, and no residuary clause. This depends upon authority; and certainly, according to the old adjudications, the remainder to Richard and William was for life only; the reversion in fee vesting in Richard, as heir at law. None of the modern precedents have gone so far as to make a devise like this carry a fee. In *Davies v. Miller*, (a) the word estate was transposed from different parts of the will, and coupled with the devise, so as to give a fee: but here the word "estate" is not used; but "goods" only.

Warden, contra, relied on *Davies v. Miller* as an authority in point. The words "as to what worldly goods," &c. coupled with the clause immediately ensuing, in which lands are devised, evidently shew that the testator meant the same thing as if he had said "all my estate." From the whole will, it is clear, that he did not intend to die intestate as to any part of his property.

Wirt, on the same side, quoted 8 539 Viner, 208, pl. 23; 1 Swinburne, *368, Powell's note. Judge Pendleton, in delivering the opinion of the Court, in *Kennon v. M'Robert*, (b) says, "that the intention of the testator is to give the rule of construction, is declared by all the Judges both ancient and modern. He afterwards quotes Lord Mansfield's observation in the case of *Mudge v. Blight*, (Cowp. Rep. 352,) "that he verily believed that every case determined upon the rule of law, directing an estate for life, if there be no limitation, defeats the intention of the testator." It is surprising that, impressed with this conviction, his Lordship did not at once change the last-mentioned rule, as "rigid and unjust," and conflicting with the "true rule built upon intention;" instead of which he caught hold of little words, such as "estate" and the like, which word "estate" is said by Judge Pendleton to have been "pressed" into the service. In 1 Roll. Abr. 834, l. 30, the words "my whole estate," in 3 P. Wms. 295, (*Tanner v. Wise*,) and 3 Call, 306, (*Watson v. Powell*,) "all my temporal estate," in 2 Vern. 690, (*Beachcroft v. Beachcroft*,) Lutw. 36, 136; Cas. temp. Talb. 160, "all my worldly estate," and in 1 Call, 127, (*Davies v. Miller*,) "my estate," were deemed sufficient for the purpose.

It is contended by Mr. Wickham, that the cabalistic word "estate" is all-important and indispensable: but in 7 Bro. Parl. Cas. 467, (*Jackson v. Hogan*,) the words "as to my worldly substance," in the preamble, and "all the remainder and residue of all the effects, both real and personal, which I shall die possessed of," in the residuary clause, and, in 1 Bro. Ch. Cas. 437, (*Huxlop v. Brooman*,) "all I am worth," were severally determined to pass a fee. In the present case, the testator was unlearned in

law, as appears from his using the terms "give" and "bequeath" (which are appropriate to personal estate) in disposing of his lands. His will should, therefore, be the more liberally expounded.

It has been decided that when personal estate and real are given in the same clause, the real shall pass as absolutely as the personal. (c) The relation, too, in which the testator stood to the parties, and the existing circumstances of the case, ought to affect the construction. (d) The wife in this case may have been young; and a remainder for life only, could have been of little value to the sons.

540 *Wickham, in reply, admitted the testator meant to give a fee. Indeed, he would go farther, and admit that, since the first settlement of Virginia to this day, whenever a man gave land, he meant to pass the whole estate. There is, in reason, no distinction between a gift of land and a gift of a horse. Yet the law requires a different mode of transfer, and the testator's intention must give way to the law: this is a subject of positive institution. Thus, if a man make a nuncupative will, and give personal estate and land, the land will not pass. We are only to inquire, then, whether it had become a rule of property, before the act of 1785, (e) that, if a testator did not use words of perpetuity, a fee would not pass. If so, the rule ought to be abided by; however unreasonable it may appear; for to depart from it would be as contrary to policy as to law; since the titles to many estates in this country would be shaken by such a decision as is now contended for.

The later authorities have gone so far as to determine that the word "estate," or words equivalent thereto, such as "all I am worth," and the like, may carry a fee. The word "estate" has a very extensive meaning, as conveying the whole interest of the testator; and words of the same import have been permitted to have the same effect.

Thus far the decisions have gone, and no farther. The words "worldly goods" are only descriptive of the kind of property, not of the quantity of interest; and such words have never been allowed to carry a fee. In *Jackson v. Hogan*, 7 Bro. Parl. Cas. 467, the word "effects," being in a residuary clause, and coupled with other strong expressions, such as "all the remainder and residue," and "real and personal," were supposed to relate to the totality of estate. But this will not warrant the position that "effects," or "goods," in an introductory clause, can be connected with a devising clause so as to enlarge a life-estate, in lands into a fee-simple.

Mr. Wirt's observation that, when personal and real estate are given in the same clause, the real shall pass as absolutely as the personal, does not apply in his favour; for the only bequest of personal property which has any connection with this devise of the lands in this case, is that relative to the still; a share in which is given to William for life only.

(c) 8 Burr. 1861, *Rose v. Hill*.

(d) 2 P. Wms. 194, *Newland v. Shephard*; Amb. 887, *Peat v. Powell*.

(e) 1 Rev. Code, p. 160, s. 12, 1785, c. 62.

(a) 1 Call, 127.

(b) 1 Wash. 102, 108.

541 *Wirt. The testator's disposal of the still certainly furnishes a strong argument to prove that he supposed that he had used words sufficiently strong to give an absolute estate in his lands; for recollecting that favourite object (the still) was incapable of partition, he gives it to his eldest son, after the death of William; which shews that had he intended his lands to go to the same son, he would have said so.

May 9, 1810. The Judges delivered their opinions.

JUDGE TUCKER, (after stating the case.) Mr. Wickham for the appellant, admitted that it was the probable, and even apparent intention of the testator to give his two sons an equality of estate as well as an equal quantity in his lands: but contended that no estate in fee-simple could pass, even by a will, without words of inheritance, or of perpetuity, or such expressions as were descriptive of the testator's whole estate in the lands. Mr. Wirt, on the other hand, insisted, that, where no particular estate is limited by the words of the will, the testator's intention shall prevail. The case was very ably argued on both sides, and I felt myself much obliged to the counsel for their assistance.

The subject of testamentary dispositions of land received in this Court, in the celebrated case of Kennon v. M'Robert and Wife, as full and elaborate a discussion from the bar (as I have been informed) as ever any cause had in any Court. The clear, lucid, and comprehensive view, of the subject generally, taken by the justly celebrated President Pendleton, in the opinion which he delivered as the resolution of the Court, points out, in my opinion, the polar star by which Courts in future ought, in all cases, to be guided and directed. He has clearly and demonstratively shewn that there are no precise words, no precise arrangement of them, nor any thing in any degree technical, necessary to the discovery of the testator's real and legal intention. He has convicted those, who have contended for such precision and technicality, of inconsistency and contradiction, and has demonstrated (to my satisfaction at least) that, whenever from the whole face and context of the will, we can collect the testator's intention, we are bound to give it effect. (a)

542 *In the present case, I am fully satisfied that the testator meant to dispose of the whole estate. And that under the words worldly goods, he meant to include his lands, and his estate therein. The next sentence, after that in which these words occur, contains the disposition of all his lands to his wife, for life: she might (as was suggested in the argument) have been young, and a remainder for life only of very little value to his sons. The emphatical words that after her death all his lands should be equally divided between his heir and his second son, Dragon Swamp and all, impress me with the idea, that he thought these words sufficient to shew

they were to have equal estates, as well as equal quantities in the land. The clause respecting the still (as was very pertinently and forcibly observed by the counsel) shews he recollected that favorite object was incapable of partition: he therefore gives it to the eldest son whenever their joint interest in it should cease. Had he intended the lands also to go to the same son, he would have said so.

There is one reason, which does not exist in England, why the intention of the testator in the distribution of his lands among his children ought to be referred to an estate of inheritance, unless the contrary intention manifestly appear. It is, that lands were the property most easily acquired in this country, as well as most necessary to the support of a family. A father, often, had nothing else to give. In distributing it, he must be presumed to do a father's part among his children by giving an estate of inheritance.

I therefore think the judgment ought to be affirmed.

JUDGE ROANE. In the case of Kennon v. M'Robert, (b) the Court, after discussing much at large the question whether the word "estate" could be transposed from the introductory part of a will, to the devising part, so as to enlarge the interest devised from a life estate into a fee, left that question, expressly, undecided. It did so, although it expressed a strong affirmative opinion upon the question; because the case could well go off upon another point, and in deference to the cases of Mitchell v. Sidebotham, (c) Den v. Gaskin, (d) and Wright v. Wright, (e) in which contrary decisions had been rendered. To these last cases might have been added (inter alia) those of Shaw v. Russel, (cited in Den v. Gaskin,) Loveacres v. Blight, (f) and Hogan v. Jackson. (g) All of these cases

543 seem to have established *the position beyond a doubt, that such introductory words, alone, are not sufficient; though the last-mentioned case very properly admits, that they may be resorted to as a help to guide the judgment of the Court, in relation to the words contained in the devise itself. The opinion of the Court on this point, as expressed in the case of Kennon v. M'Robert, seems to have been grounded upon the three cases of Tanner v. Wise, (h) Ibbetson v. Beckwith, (i) and Grayson v. Atkinson. (k) A reference to the two former cases will shew that there were words also in the body of the respective devises, in aid of which the introductory words were used; and thus the decisions on them are perhaps to be reconciled to the distinction taken as above, in the case of Hogan v. Jackson: and, with respect to the last case, if the words in the body of the will "all the rest of my goods, lands," &c. do not shew it to be of the same character, the intro-

(b) 1 Wash. 100.

(c) Doug. 760.

(d) Cowp. 670.

(e) 1 Wilson. 414.

(f) Doug. 854.

(g) Cowp. 804.

(h) 3 P. Wms. 295.

(i) Cases temp. Talb. 157.

(k) 1 Wils. 133.

(a) 7 Brown's Parl. Cases. 407. Jackson v. Hogan: Cowp. 290. S. C.: 1 Bro. Ch. Rep. 437: 3 Burr. 1381: 3 P. Wms. 295: 2 P. Wms. 194: Forr. 160: Amb. 397: 1 Call. 127: 3 Call. 308: 2 Vern. 690.

ductory words are unusually strong to import an intention to dispose of all the testator's temporal estates; in which respect the preamble before us (it will presently be remarked) is different. That case of *Grayson v. Atkinson* is, therefore, perhaps, the only case that can be found (or was relied on by the Court) to justify the construction of a fee, from the words of the preamble of a will, without words of similar import, in the body thereof, to aid which the introductory words are to be used. The weight of the English cases, therefore, undoubtedly is against the position that introductory words, alone, are competent to operate an enlargement into a fee. The opinion in the case of *Kennon v. M'Robert* has, however, been since admitted, and acted upon by this Court; and it has now grown into a rule of property, (not to be departed from,) that the word "estate," alone, in the preamble of a will, is sufficient. The cases of *Davies v. Miller*, (a) and *Watson v. Powell*, (b) have been decided conformably thereto; though, in the former, the word "estate" is also found in the conclusion of the will, and was relied on by the Court as aiding the preamble. In all those cases, however, the word "estate" was found in the introduction: there was no opinion given in relation to words of an inferior character. That was the ultimatum of those cases; and, if we go beyond it, and are satisfied with terms short of that, we do not stand upon the authority of that decision. The most that can be contended for, in favour of that decision, is, that it has exalted the introductory words of a will to the level of the devising part: that case, how-

544 ever, "cannot be construed to have decided, that words contained in the preamble of a will shall carry a fee, which words in the devising part thereof would be insufficient to produce that effect. That is going a grade farther than was necessary in that case; for the word "estate," if found in the devising clause, would have been sufficient. Whenever such a position shall be established, it will not only prostrate one of the best settled rules for the construction of wills, but also lead to the absurdity of supposing that the intention of the testator is to be better collected from the preamble of the will (which, in general, contains nothing more than the formula expressions of the scrivener) than from the text of the will itself; and that slighter expressions would do in the former than in the latter.

Taking the preamble of the will, therefore, to be of equal dignity with the body of the will itself, and not of greater; while it is admitted that any words, however irregular, importing a devise of an inheritance, will carry a fee, it is also true that, if such words are wholly wanting, nothing but a life estate passes. There is no position of the law better established than this; and this rule is not in the smallest degree impugned by any of the decisions of this Court. This position results from the nature of a will, which is only

considered as a species of conveyance; (c) and as words of inheritance are indispensable in conveyances at the common law, so they are necessary, by analogy, in the case of wills, although in favour of the intention of the testator (and because he is supposed to be *inops consilii*) any equipollent words, however irregular, are received. Thus it is held that "all my estate," or "all my interest," will do; but that "all my lands at A." will not. (d) The former will suffice, because they import the quantity of interest conveyed; for an "estate" is defined to mean "such interest in lands as the tenant hath therein;" (e) whereas the term "land" only imports the thing, or the specific property devised. In making this construction, it is also held that we must have resort to the words of the will itself, however irregular; and there must be no doubt, upon those words, taken in a general view, that a fee was intended; or else the rule of law must prevail. (f) It must prevail, (and has been so decided in numberless cases,) although it is at the same time admitted by the Judges, that that rule, in many cases, thwarts the intention of the testator, as ordinary men do not 545 distinguish between "the gift of a tract of land and that of a horse;" (g) it must also prevail in cases where the descent of the land to the heir seems even reprobated by leaving him a disinheritance legacy of a shilling, or the like. (h) The general intention inferrible from the consideration just mentioned is not competent to operate the enlargement: we must look for it in the words of the will; and if the intention of the testator shall chance (in any case) to be thwarted, it is (to use the language of Lord Mansfield) because "quod voluit non dixit."

In the case before us, the words of the introduction are, "as to what worldly goods it has pleased God to give me, I leave and bequeath as follows." There are no words here descriptive of the testator's interest in the lands in question; nor does he say that he means to dispose of all his worldly goods, and much less all his interest therein. He only says that, with respect to his worldly goods, he means to devise so and so: and these words would have been still proper, had the testator only disposed of half his estate, or of his lands only. These are the settlements of Lord Mansfield, in relation to the introductory words in the will, in *Den v. Gaskin*; words which are similar to, but stronger, at the same time, than those before us. I will not say, however, but that this criticism upon the introductory words which is entirely proper under the point of view in which such words are held in England, may be less proper under the decisions of this Court, as aforesaid, by which the character of such words seems changed and exalted, and they are placed, as it were, upon a level with the devising words themselves: on this point, however, I give no

(c) Cowp. 90. 804.

(d) Doug. 670.

(e) Bl. Com. 108; Doug. 354.

(f) Doug. 354; Cowp. 340.

(g) Doug. 670; Cowp. 304. 657.

(h) Cowp. 670.

(a) 1 Call. 127.

(b) 3 Call. 306.

opinion, because the words in the preamble now in question stop short of the desideratum required and do not import the quantity of interest the testator professed to devise.

The case before us is, then, a naked one. The introductory part of the will is short of the standard required by the decisions of the Court, and receives no aid from the body of the will itself. Neither can such aid be found in the general consideration before stated. This is admitted by the Court in the said case of *Kenyon v. M'Robert*. In that case the Court disclaimed the power to change the law, whatever its opinion might have been touching the rule in question, considered as a new case; admitted, that it was to be governed by precedents; agreed, that cases prior to

January, 1787, (when the common law rule concerning conveyances *was changed by an act of the legislature,) must be settled by the decisions of that time; and admitted, that the intention of the testator (which it also decides is to be collected from the will itself) must not prevail against the settled rules of construction.

As well, therefore, on the ground of the principles declared by the Court in the said case of *Kenyon v. M'Robert*, as of those precedents by which the Court professed in that case to be governed, I have no hesitation in saying that only an estate for life passed in the estate before us, and that the judgment of the District Court is erroneous, and ought to be reversed. A contrary decision in this case (considering that almost all wills have the formulary words of introduction in them) would go the length of repealing the rule aforesaid altogether, in relation to these testamentary conveyances; and that by the mere power of the Court, when the power of the Legislature only was deemed competent to make the change in relation to their prototype, (common law conveyances,) and was exercised prospectively only, (from the 1st of January, 1787,) leaving all prior conveyances to stand by the rules antecedently established; as the Court, (in the case of *Kenyon v. M'Robert*,) has also expressly held, as aforesaid, should be the case in relation to wills prior to the period aforesaid. That case itself, therefore, seems to me a conclusive authority in favour of a reversal in the present instance.

JUDGE FLEMING stated the case, and proceeded as follows. The only question is, whether William Wyatt (the younger son) took an estate in fee, or for life only, in the lands bequeathed to him?

Under the feudal system in England an arrangement was made of the various tenures by which lands were to be holden. It was natural to suppose that technical forms would not always be attended to; and hence it became necessary to provide a rule for cases where the duration of the estate was not described. The rule under the feudal system was, that conveyances of an estate in land, without words of inheritance or limitation, passed only an estate for life.

After the statutes of the 32d and 34th of Henry VIII, a more liberal construction,

and extensive latitude has been allowed, in the construction of wills respecting lands, than in conveyances *by deed; on account of the former being often made in extremity, where counsel, skilled in the technical terms of the law, were not to be had: and, therefore, the intention of the testator is to prevail in every case where it does not contravene some known and established rule of law.

Lord Holt, and other Judges in more modern times, emphatically call that intention the polar star by which our decision is to be guided. And Justice Buller, in delivering his opinion in the case of *Hodgson v. Ambrose*, Douglas, 341, noticed what Lord Hardwicke truly said, in *Bagshaw v. Spencer*, 1 Vez. 142; 2 Atk. 577, "there can be no magic or particular force in certain words, more than others; their operation must arise from the sense they carry." And, he added, "I say, that sense can only be found by considering the whole will together. That is the first and great rule in the exposition of all wills; and it is a rule to which all others must bend. It says, 'if not inconsistent with the rules of law:' but it must be remembered that those words are applicable only to the nature and operation of the estate or interest devised, and not to the construction of the words. A man cannot, by will, create a perpetuity, put the freehold in abeyance, nor limit a fee upon a fee, &c. But the question whether the intention be consistent with the rules of law, or not, can never arise till it is settled what the intention was; and, if it be apparent, I know of no case that says a strict legal construction, or a technical sense of any words whatever, shall prevail against it." Nor, in my apprehension, shall the want of a technical word frustrate the intention of a testator, where it is apparent upon the face of the whole will taken together.

Lord Mansfield, in the case of *Mudge v. Blight*, Cowper, 355, after noticing that, at common law, a deed, without words of limitation, conveys to the donee only an estate for life, adds, "but I really believe that almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the testator. Notwithstanding this, where there are no words of limitation, the Court must determine in the case of a devise affecting real estate, that the devisee has only an estate for life. But, as this rule of law has the effect I have just mentioned, in defeating the intention of the testator, in almost every case that occurs, the Court has laid hold of the generality of other expressions in a will, where any such can be found, to take the devise *out of this rule. Therefore, if a man says 'I give all my estate,' that has been construed to pass a fee: or even if words of locality are added as 'all my estate at A.' it has been held that the whole of the testator's interest in such particular lands will pass, though no words of limitation are added. 2 P. Wms. 524. So in the case of *Hogan v. Jackson*, from Ireland, the Court had no difficulty in saying that the words 'all my worldly substance,' in the introductory part of the will, meant every thing the

testator had, and that the words all his real effects, in the subsequent residuary devise, were equivalent to worldly substance, and carried every thing to the residuary devise. In general," (adds Lord Mansfield,) "wherever there are words and expressions, either general or particular, or clauses in a will, which the Court can lay hold of, to enlarge the state of a devisee, they will do so, to effectuate the intention. But, if the intention of the testator is doubtful, the rule of law must take place."

In the case before us, I have no doubt but the intention of the testator was to pass a fee to both his sons. First, because in the introductory part of the will he uses this expression; "and as to what worldly goods it hath pleased God to give me, I leave and bequeath as followeth;" and immediately proceeds to dispose of his lands, in the first clause of his will; manifesting thereby his idea that the words worldly goods, comprehended all his worldly possessions, and were tantamount to the words all his worldly estate; and it seems agreed on all hands, that, had he used the word estate, instead of goods, a fee would have passed to his son William; (see *Davies v. Miller*, 1 Call, 127, and *Watson v. Powell*, 3 Call, 306,) and, to my mind, the latter was as expressive of his intention as the former would have been. We frequently find men, who are unacquainted with the technical terms of the law, using the word goods, to signify estate; a recent instance has occurred, during the present term of this Court, in the will of William Murray, in the preamble of which he expressed his intention of disposing of all his worldly goods, and immediately proceeded to bequeath (not devise) his lands. In the case before us, the testator, after giving his wife a life in his lands, adds, "Item, after the decease of my wife, I give and bequeath to my sons Richard and William Wyatt all my land, to be equally divided between them, Dragon Swamp and all," manifesting thereby, in my apprehension, his intention that his sons should

549 *be equal, not only respecting the quantity, but also the interest they were to enjoy in his lands; which was an absolute fee. He then directs his still, likewise, to be between them, for their own use, and after, to his son Richard; that being an article, which, if divided, would be rendered useless to both sons.

On this view of the case, even from the English authorities, it appears to me that William Wyatt took a fee in the lands bequeathed to him by his father's will; but, if not, the case of *Kennon v. M'Robert*, in this Court, and the subsequent cases of *Davies v. Miller*, and *Watson v. Powell*, seem to have put it beyond a doubt. I am therefore of opinion, that the judgment of the District Court ought to be affirmed.

By a majority of the Court, the judgment was affirmed.

Johnson and Others v. Johnson's Widow and Heirs.

Wednesday, May 9, 1810.

s. Will—Conveyance of Fee-Simple Thereby.*—A fee-

***Will—Conveyance of Fee-Simple Thereby.—As de-**

simple estate in lands might pass by a will (even before the act of 1786, c. 62.) without words of perpetuity, or any words equivalent; provided it appeared, from the whole will taken together, that such was the intention of the testator.

2. Same—Construction—Use of Same Words for Disposition of Realty as Personalty.—Where an illiterate testator uses the same words in disposing of his real, as in disposing of his personal property, and in the same clause of the will, it is fair to infer that he intended to give them the same effect as to both kinds of property.

This was a suit in Chancery in the County Court of Southampton, by the widow and children of Robert Johnson the younger, against Edmund Johnson, grandson, and heir at law of Robert Johnson the elder, and Joseph and Lemuel Jones, purchasers from the said Edmund, to recover of them a tract of land devised to Robert Johnson the younger, by the will of the said Robert the elder, bearing date September 4, 1772, and admitted to record the 12th of the same month.

The clauses on which the controversy turned were, "I gave and because to my son Robert Johnson, 120 acres of land that I bought of James Kitchen, and 1 cow and 1 calf," &c. proceeding to mention several other articles of personal property. "I give and because to my grandson Edmund Johnson, 5s. I give and because all the rest of my worldly estate to my well beloved wife Martha Johnson, to be at her disposal ingurin of her life or widowhood, and afterwards to my son Britain Johnson, to him for ever."

The bill set forth that, although there are no words of perpetuity in the devise of the land to Robert the younger, the plaintiffs could prove that the testator, at the time of making the will, told Joseph Bradshaw, the writer thereof, to give the 550 said 120 *acres of land to his son Robert, and his heirs; and this, they contended, was strongly corroborated by every devise and bequest contained in the will. They prayed a decree for the land, (as being entitled under Robert the younger, he having died intestate,) and for general relief.

The defendants relied on their construction of the will, as giving to Robert the younger, an estate for life only, and, immediately upon the death of the testator, the reversion in fee to Edmund Johnson, his heir at law. They denied any knowledge of the testimony of Joseph Bradshaw, but believed that, even if it were as stated by the plaintiff, the Court should disregard it.

The only depositions taken were those of Council Johnson and Sarah Johnson, proving declarations by the testator some time previous to his death, that he intended to

ciding that, before the statute of 1786, a fee would pass by a will, without words of perpetuity, or any words equivalent, if it appeared from the whole will taken together that such was the intention of the testator, the principal case was cited in *Goodrich v. Harding*, 8 Rand. 288.

Chancery Practice—Prayer for General Relief.—The principal case was cited in *James v. Bird*, 8 Leigh 514, in a discussion of how far relief may be given in equity under a prayer for general relief.

have his will altered, and give the plantation that he bought of James Kitchen, to his son Robert Johnson, jun.

The County Court decreed the land to the plaintiffs, and, on an appeal to the Superior Court of Chancery for the Williamsburg District, Chancellor Tyler was of opinion, "that, upon a fair construction of the will of Robert Johnson the elder, it was his intention that Robert Johnson the younger, his eldest son then living, should have an absolute interest in the tract of land devised to him, in the same manner as he intended the said Robert should enjoy the personal property devised to him in the same clause wherein the land is devised;" and that there was no error in the said decree, except that the County Court should have decreed the dower of the appellee Mary, in the said land, to be assigned to her; partition of the said land (subject to the said dower) to be made among the children of the said Robert Johnson the younger; and an account to be taken of the rents and profits of the said land whilst in the possession of the appellants. He therefore affirmed the decree as far as it went, and remanded the cause for farther proceedings; from which decree an appeal was taken to this Court.

Call, for the appellant, made two points; 1. A life-estate only passed to Robert Johnson the younger. This is a mere naked case of a devise of land to a son, (not being heir at law,) without any words of perpetuity, and without any words in the preamble to supply their place. None of the cases come up to this. It 551 *may, perhaps, be said the residuary clause makes a difference; but that would not benefit the plaintiffs, because they are not entitled under it.

2. The Court of Chancery had no jurisdiction; (unless as to the dower of the widow,) because the remedy was complete at law.

Wickham, contra. The case of Wyatt v. Sadler, (a) is decisive of this, on the merits; establishing the great rule that the testator's intention ought to prevail. Here the testator was a very illiterate man altogether unacquainted with law or with technical terms. His giving real and personal property in the same clause, and by the same words, clearly proves that he knew no difference between them, but intended an equally absolute estate in both; and his bequeathing five shillings to his heir at law shews that was all he meant to give him. But the residuary clause is decisive to shew that he thought he had given all his estate in the land in the foregoing part of the will. It is not probable that he contemplated giving his wife a remainder for life after an estate for life to his son.

As to the jurisdiction. The widow and infant children join in the suit. She is clearly entitled to dower. There being, then, no exception to the jurisdiction, the Court, having it for part, will entertain it for the whole.

Call, in reply. The circumstance of real and personal estate being joined in the same clause makes no difference; for in the

case of Forth v. Chapman, (b), recognised in Hill v. Burrow, (c) it was decided that the same words, as to the two different kinds of property, should be taken in different senses, though occurring in the same clause.

The testator's giving his heir at law five shillings, does not prove that he meant to give the more to the other devisee.

But the residuary clause is said to be decisive. Be it so. Then the appellees are not entitled; but the testator's widow, in whom the reversion in fee vested by that clause. It is contended to be improbable that he intended this. The same argument was used and overruled in *Selden v. King*. (d) But in *Kennon v. M'Robert*, this

Court expressly decided that, where 552 there *is any other estate for the residuary clause to operate upon, it will not carry the estate from the heir at law.

Monday, May 14. The Judges pronounced their opinions.

JUDGE TUCKER. The principal question in this cause depends upon the construction of the will of Robert Johnson, a most illiterate man, if we may trust the evidence arising out of the will itself, dated September 4, 1772, and proved and admitted to record eight days after; whence it may be inferred, that it was made in extremis, and when the testator was perfectly inopos consilii. The testator, having bequeathed his soul to Almighty God, and desired to be buried in a christian-like manner, without further preamble proceeds thus: "It is my desire I gave and because (give and bequeath) to my son Robert Johnson 120 acres of land I bought of James Kitchen, and one cow, and one calf, and one heifer, and one feather-bed, and furniture, two ewes and two lambs, and two sows, and one mare, saddle and bridle." He then gives similar legacies of personals, to three of his daughters. Then 1l. 5s. to his grandson Kitchen Johnson, to be paid to him at 20 years old; and then to his grandson Edmund Johnson (his heir at law) 5 shillings; then 5 shillings to another daughter; and concludes thus: "I give and because (bequeath) all the rest of my worldly estate to my well beloved wife M. J. to be at her disposal (disposal) ingurin (during) her life, or widowhood, and afterwards to my son Britain Johnson to him for ever." The question is, what estate did Robert Johnson take in the 120 acres above first devised?

I had occasion to remark the other day, that the late President Pendleton had, in the case of *Kennon v. M'Robert*, clearly demonstrated (to my satisfaction at least) "that there are no precise words, nor any precise arrangement of them, nor any thing in any degree technical, necessary to the discovery of the testator's real and legal intention;" and, that "whenever, from the whole face and context of the will, we can collect the testator's real intention, we are bound to give it legal effect." (e) In the case of *Rose v. Hill*, (f)

(b) 1 P. Wms. 668.

(c) 8 Call. 342.

(d) 3 Call. 72.

(e) Ante, p. 541. *Wyatt v. Sadler*.

(f) 3 Burr. 1884.

(a) Ante, p. 537.

Lord Mansfield speaking of the testator's meaning, said, "the testator uses the same words in disposing of the real estate, as he does in disposing of the personal; and they explain each other." Here the testator has done the same thing,
 553 *in the same sentence. So far, then, we may consider it as explaining his intention to give an absolute property in the one as well as in the other.

There are other circumstances, apparent upon the face of the will, to corroborate this construction. He gives to his grandson (his heir at law) five shillings. Probably because he had given his father, in his life time, whatever he had intended to give him. Be this as it may, it creates a very strong presumption he had no intention that he should ever inherit this 120 acres. Ignorant as he was, he seems to have known that one person might enjoy property by a gift for life, and another for ever afterwards. This appears from the gift of all the rest of his worldly estate to his wife for her life, or during widowhood, and afterwards to his son Britain Johnson. Why then did he not express himself in like manner as to this land, if, indeed, he intended only to give a life-estate in it? These circumstances are so many evidences of intention, that I think we ought not to reject them, although they may come within none of the technical rules heretofore laid down by the courts of Westminster Hall.

Objection. The residuary clause to the wife, with remainder to his son Britain, will carry the fee, in this case, both from the heir at law and Robert. I think not. For the rule that you cannot infer a particular intention from a sweeping residuary clause was recognised in the case of Kennon v. M'Robert; and, according to my conception of that case, the residuary clause in that was equally as strong as in the present. It cannot be thought that the testator meant to give a life-estate to his wife in this land, or a remainder (after two life-estates) to his son Britain, by these general words, which may well be satisfied otherwise: for, from the affectionate terms in which he speaks of his wife, there can be no doubt that there was other estate upon which this residuary clause might operate. (a) I am therefore of opinion in favour of affirming the decree, not only of the Chancellor, but of the County Court, so far as it goes to this point.

JUDGE ROANE. My opinion is, that Robert Johnson the younger took an estate for life only, in the premises in question. My reasons for this opinion were stated in the case of Wyatt v. Sadler, the other day; and I shall not repeat them. I am free,

however, to admit, that, under the
 554 opinion of the other Judges *in that case, a fee passed to Robert Johnson. There is no difference between the cases, so far as we are to be guided by precedents. My own opinion, therefore, is, that the decree ought to be reversed; but, in deference to the decision of this Court in the case of Wyatt v. Sadler, it must be affirmed.

JUDGE FLEMING. In the construc-

tion of this, as of other wills; to discover the intention of the testator, we must take the whole together, and judge accordingly. The writer of this will was very illiterate, and totally unacquainted with the technical terms of the law; and the testator having given the land in the same clause, and in the same words used in disposing of personal property, (the absolute right in which passed to the legatee,) it appears to me that the testator did not intend a remainder, on the death of his son Robert, to his heir at law, to whom he gave a small pecuniary legacy, and says no more of him. And, in the last clause of the will, he gives all the rest of his worldly estate to his well beloved wife Martha Johnson, to be at her "disposal ingurin" of her life or widowhood; (meaning, I suppose, at her disposal during her life, &c.) If Robert took only an estate for life in the land, his widow, by the residuary clause, would have taken a remainder during her life, or widowhood, as such remainder was not otherwise disposed of by the will; and it could never, I conceive, have been in the contemplation of the testator to make such remote provision for his wife, on a supposition that she would survive his son Robert. But, on a presumption that Robert took an estate in fee, the whole of the will (though written in very untechnical language) seems perfectly consistent. I am therefore of opinion, that Robert took a fee in the land in controversy; and, if I had doubted on the subject, it having been already so decided by two different Courts, I should not now disturb the decree.

Decree affirmed.*

555 *Newell v. Wood, Governor of the Commonwealth.

Wednesday, May 9. 1810.

1. *Supersedeas—Service—On Whom.*—A writ of supersedeas, to a judgment obtained in the name of the governor, for the benefit of a relator, ought to be served on such relator, and not on the governor.

*Note. It seems, from this case, that a joint suit in Chancery may be maintained in behalf of a widow and heirs or devisees, to recover land in which the widow has a right to dower, on a bill stating a case in other respects proper for a Court of Law, (or alleging another circumstance, apparently with a view to give the Court of Equity jurisdiction, without proof of such circumstances,) and merely praying a decree for the land, and for general relief, without specially claiming dower, or praying that it may be assigned; that, having jurisdiction as to the right of dower, the Court will entertain it for the whole subject in controversy, and, after decreeing the land to the plaintiffs, will go on to decree assignment of dower to the widow, partition among the other plaintiffs, and rents and profits against the defendant.

See 3 Atk. 8. Cooke v. Martyn. In which it is said that "praying general relief is sufficient, though the plaintiff should not be more explicit in the prayer of his bill;" and *ibid.* 141. Grimes v. French: "though you pray general relief by your bill, you may at the bar, pray a particular relief that is agreeable to the case you make by your bill: but you cannot pray a particular relief which is entirely different from the case;" or "Inconsistent with it." Cooper's Eq. Pleading, 14, and the cases there cited. For example, the plaintiff may have an account for rents and profits under the prayer for general relief, if the case made by the bill entitle him to it; but not otherwise. 3 Atk. 182.—Note in Original Edition.

(a) 1 Wash. 111, Kennon v. M'Robert.

2. **Court of Appeals—Jurisdiction.***—The court of appeals had jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law.
3. **Bonds—Joint and Several—How Suit Must Be Brought Thereon.**†—The point decided in *Leftwich v. Berkeley*, 1 H. & M. 61, was in like manner decided in this case.
4. **Judgment.**—If a court give a right judgment for a wrong reason, it ought, nevertheless, to be affirmed.

In an action of debt in the County Court of Wythe, on a Sheriff's bond, in the name of James Wood, (who sued for the benefit of William Ingledove,) the declaration, in the beginning thereof, complained of James Newell, Stephen Saunders and Henry Hamilton, in custody, &c. of a plea that they render unto the plaintiff thirty thousand dollars, which they owe and unjustly detain; for that, whereas the said defendants, and a certain Andrew Thompson, William Drope and John Hay, by their certain writing obligatory, sealed with their seals," &c. "acknowledged themselves to be held and firmly bound, yet the said defendants, or the said William Drope, Andrew Thompson, and John Hay, have not paid," &c. After a common order confirmed against the defendants, leave was given to amend the declaration by making Thompson and Drope and William Hay, administrator of John Hay, defendants. But no amendment appears to have been made. A verdict having been found for the plaintiff, the defendants filed errors in arrest of judgment; alleging that "they, as sureties of Andrew Thompson, were not liable to the plaintiff, until the said plaintiff had established his claim in a suit against Andrew Thompson, their principal." The County Court arrested the judgment. But on an appeal to the Washington District Court, that judgment was reversed, and judgment entered for thirty thousand dollars, (the penalty of the bond,) to be discharged by the payment of 23 dollars and 40 cents, (the damages assessed by the Jury,) and such other damages as may be hereafter assessed upon suing out a scire facias thereon, and assigning new breaches."‡

A writ of supersedeas to this judgment was awarded by a Judge of the Court of Appeals; which writ was executed on William Ingledove, the relator, and not on James Wood, the nominal plaintiff. This was afterwards determined by the Court to have been sufficient and proper service of the writ.

Wickham, for the plaintiffs in error, assigned the following reasons for reversing the judgment:

1st. Because the suit was not commenced against all the obligors jointly, nor any one of them severally; but against three out of six obligors. (a)

*Court of Appeals—Jurisdiction.—See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., Turnpike Co., 1 Rob. 268.

The principal case was cited in note to *Lewis v. Long*, 3 Munf. 155.

†Bonds—Joint and Several—How Suit Must Be Brought Thereon.—See foot-note to *Leftwich v. Berkeley*, 1 Hen. & M. 61; *Cook v. Berkeley*, 3 Call 378.

‡Note. See 1 Wash. 91, 92, *Bibb v. Cauthorne*.

(a) *Leftwich v. Berkeley*, 1 H. & M. 61.

2d. Because if, in consequence of the order, made in the County Court, authorizing the plaintiff to make Andrew Thompson, William Drope, and William Hay, administrator of John Hay, deceased, defendants, these persons should be deemed parties to the suit and judgment, the said judgment is erroneous in this, that William Hay, as administrator, is joined in the same suit with others who are sued in their own right; which is contrary to law.

He contended, also, that this case was within the jurisdiction of the Court; although the damages recovered amounted only to 23 dollars and 40 cents; because the matter in controversy was more than 100 dollars; and because, by the judgment of the District Court the plaintiffs in error were liable for the sum of 30,000 dollars, which might be recovered on the assignment of new breaches.

The Court (consisting of all the Judges) agreed in opinion, that the first error assigned was fatal, upon the authority of *Leftwich v. Berkeley*, and that this Court has jurisdiction in all cases where the penalty of the bond is sufficient; the judgment being always for the penalty, to be discharged by the damages, &c.‡

557 *JUDGE ROANE observed, that the County Court had rendered a right judgment, though for a wrong reason.

Judgment of the District Court reversed, and that of the County Court affirmed.

Whitehorn and Wife and Others, Heirs and Executors of John Clanton, v. Hines and Others, Administrators and Heirs of William Howell.

Wednesday, May 16, 1810.

1. **Deed—Setting Aside—Grantor of Weak Understanding.**—Under what circumstances, a deed obtained from a man of weak understanding (though not an idiot or lunatic) may be set aside in equity.
2. **Chancery Practice—Fraud Presumed from What.**—Fraud it seems, may be presumed in equity from strong circumstances; such as gross inadequacy of consideration, breach of trust and confidence, undue influence exerted (especially over a young and weak person by a near relation), over diligence and assiduity in guarding against objections, and the like.
3. **Hire of Slaves—Interest.**—Interest on the hire of slaves disallowed as in *Dillard v. Tomlinson*, &c. ante, p. 183.
4. **Fraud—Effect on Bona Fide Purchaser.**—It seems, that a bona fide purchaser, without notice of fraud, having received a deed from two persons, (one of whom fraudulently induced the other to join therein,) is not responsible in equity; but the

§No appeal now lies to the Court of Appeals from any judgment on a forthcoming bond; but only a writ of error or supersedeas; 3 Rev. Code, p. 128, s. 2.—Note in Original Edition.

‡Deed—Setting Aside—Grantor of Weak Understanding.—See principal case cited in *Samuel v. Marshall*, 3 Leigh 576. See also, foot-note to this case; monographic note on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564; monographic note on "Contracts" appended to *Enders v. Board*, 1 Gratt. 364.

¶Fraud—Effect on Bona Fide Purchaser.—See monographic note on "Fraud" appended to *Montgomery v. Rose*, 1 Pat. & H. 5.

loss ought to fall on the fraudulent vendor. (1) But quære, if the estate of the fraudulent vendor be not sufficient to make good the loss?

g. Same—Same.—In such case, the circumstance that the person defrauded was of weak understanding, but not an idiot or lunatic, is not sufficient to affect the right of the bona fide purchaser.

William Hines and John Millison, administrators of William Howell, deceased, and the said John Millison, and Mary his wife, (which Mary is heir at law of the said William Howell,) brought a suit in Chancery, in the County Court of Sussex, for the purpose of setting aside a deed which the said decedent in his life-time had executed to his cousin John Clanton.

The bill (which was filed in July, 1800) set forth "that, from the time of his birth to the day of his death, the said William Howell laboured under a lamentable and invincible weakness of understanding and intellect, which rendered himself absolutely incompetent to regulate his own affairs, and classed him with propriety among those who are called idiots; that this was universally known and assented to by all who knew him;" that he inherited from his father a tract of land, containing 264 acres, and ten slaves, whose names are mentioned; that, soon after he arrived at the age of twenty-one years, his cousin John Clanton, to whom his situation had been long and perfectly known, induced him (although the plaintiff Mary, his sister, was then living) to execute a deed to the said John for the land and slaves aforesaid, as his absolute property and estate, for the incompetent consideration of the said John's finding

and providing for the said William 558 "sufficient and plentiful meat, drink, washing, lodging and clothing, in a comfortable and plentiful manner during his the said William Howell's life, or his remaining a bachelor; that, after this deed had been thus fraudulently obtained, from an unfortunate and wretched being who was ignorant of its operation, the said John Clanton, having had the same (after several ineffectual attempts) proved and recorded, treated the said William Howell, during the remainder of his life, not like a kinsman, and a man from whom he had obtained a handsome estate, but as a vagabond, an outcast, and a slave; his food was of the coarsest kind; his garments were mean, tattered, and filthy; his person was miserably neglected; and himself consigned to the society and conversation of the negroes on the land. In order to manifest more plainly the palpable and infamous fraud practised on this occasion by the said John Clanton, the plaintiffs aver that the deed abovementioned, when offered, at first, and several times afterwards, to the Court for probate, was rejected by the said Court, and not permitted to be recorded, from their individual knowledge of the facts above stated, although no person whatsoever appeared to oppose it."

The bill farther stated, "that John Clanton, in his life-time, sold the tract of land

above mentioned to Isaac Sever and Micajah Hines, and their heirs, whose title to the same cannot be good or effectual, because the title of him under whom they claim is founded on a fraud, and the derivative cannot be superior to the original title; that Clanton departed this life, (after the death of Howell,) to wit, in the month of August, 1790, after having made his last will and testament, in which he bequeaths all his negroes (and those above mentioned of course) to his wife Sally Clanton, during her life, or widowhood, and at her death, or marriage, to be equally divided among his children; that the plaintiff Mary, "who is also a person of weak mind, (and on whom, on that account, divers tampering experiments were made by the said John Clanton with a hope to perfect and establish his said iniquitous title,) has for many years past resided in the state of North Carolina; and that no administration has been taken of the said William Howell's estate until very lately; which is the reason why this odious transaction has not been sooner exposed to the view and indignation of the world."

The prayer of the bill was, that 559 Edward Whitehorn and Sally "his wife, (late the widow of the said John Clanton,) Drury Clanton and others, his infant children, James C. Bailey and Benjamin Wyche, executors of Michael Bailey, who had been his surviving executor, (after the death of Burwell Lofton, who had also qualified,) and the said Isaac Sever and Micajah Hines, purchasers of the land as aforesaid, should be held, as defendants to answer the same; that the aforesaid "fraudulent" deed should be declared and rendered null to all intents and purposes; that the slaves, and their increase, should be restored, and their reasonable hire, from the date of the said deed, paid to the plaintiffs, administrators of William Howell; that the land should be delivered up to the plaintiffs, Millison and wife, as her absolute estate in fee-simple; that Clanton's representatives should account for and pay to them the reasonable rents and profits of the said land, from the date of the said deed, until the same was conveyed to the said Sever and Hines respectively; and that Sever and Hines should account and pay, in like manner, from the dates of their respective conveyances until the decision of this suit; concluding with a prayer for general relief.

The deed (exhibited with the bill) is dated the 9th of October, 1783, and recorded the 18th of March, 1784; being for, and in consideration of the love and affection which he (the said William Howell) hath and doth bear unto his cousin John Clanton, and for his said John Clanton's finding and providing for him, from time to time, and at all times hereafter, sufficient and plentiful meat, drink, washing, lodging and clothing in a comfortable and plentiful manner, during his the said William Howell's life, or his the said William Howell's remaining a bachelor; as well as for the farther consideration of the sum of five pounds current money." The land and slaves were conveyed to the only proper use and behoof of him the said John Clanton, his heirs and as-

(1) Note. In this case the measure of relief was the money for which the land was sold, with interest; no other evidence of its value appearing.—Note in Original Edition.

signs for ever: provided nevertheless, that, in case the said William Howell shall hereafter intermarry, that the said estate, as well land as slaves, with the increase of the said slaves, (if any,) shall revert unto the said William Howell and his wife during their joint or several lives; and that, in case the said William Howell shall have lawful issue, that the said estate above mentioned, and every part thereof, shall be subject to the disposal of the said William Howell, by deed or will, to and amongst his child or children as aforesaid, or, in case of

560 his failing to make such distribution, shall pass, go, and descend agreeable to the act of Assembly in case of his dying intestate; but, in case of said marriage, and the said William Howell and wife dying and leaving no lawful issue of their body, then the property of the said estate, both land and slaves, with the increase of the said slaves, to revert to the said John Clanton, his heirs and assigns for ever."

The joint and several answers of Benjamin Wyche and James C. Bailey stated, that Michael Bailey, their testator, "had, previous to his death, fully closed and returned to the Court his executorial accounts; and that they were entirely ignorant of any fraud or iniquity."

The separate answer of Micajah Hines alleged, "that he was personally acquainted with the said William Howell, deceased, and, from his own knowledge, conceived him to be a man of weak mind and intellect, but not in so much as to render him incapable of conducting his own affairs, or to class him with propriety and lawfully amongst those called idiots: that the said William Howell, (jointly and first named in the conveyance made to this defendant,) with John Clanton, appeared in Court, and acknowledged the deed, with the said Clanton, on the 19th of October, 1786: that as to any fraud or injustice committed by the said Clanton on the said Howell, in obtaining the deed of conveyance for the said Howell's land and negroes to the said Clanton, this defendant cannot conceive that there was any;" that he never heard of the deed's being offered for probate and rejected by the Court, until very lately: that the deed appears to have been written by Col. David Mason, now deceased, and attested and proved as a witness, by him, "who, at that time, was supposed to be a very good judge of law: this defendant cannot therefore suppose that the said Mason conceived the said Howell to come within the description of an idiot, or he would not have proven a deed, whereby himself and his heirs were divested of a handsome estate."

Isaac Sever, in his separate answer, says, "that he was not acquainted with William Howell, deceased; but, from what he has understood by others, he does not conceive that the said Howell could with propriety be classed amongst those whom the law deems idiots: that the said William Howell and John Clanton, jointly, sold the tract of land which this defendant at present holds to a certain William Milner, by deed recorded the 19th October, 1786; and from said Milner it was sold to a certain Henry

561 Caton, and "by said Caton's admin-

istrator, at public sale, to this defendant, by deed recorded February 3, 1791: that, as to any fraud or iniquity practised by the said Clanton towards the said Howell in obtaining the deed or conveyance aforesaid, the same to this defendant is entirely unknown; but the said deed appears to be very artfully and subtilly drawn, on the part of the said Howell, in reserving to himself and heirs the right and title to the said estate on his marriage and having lawful issue."

The children of John Clanton, by their guardians respectively, say, in a joint answer, that they are not acquainted with the transactions mentioned in the bill, but call upon the plaintiffs for proof thereof. Edward Whitehorn also answered to the same effect; but farther relied, for his protection, on a bond bearing date the 20th of February, 1783, executed by Mary Howell, the feme complainant, to William Howell, the decedent, who went himself to North Carolina, for the express purpose of making a settlement with her, according to his mother's will."

The defendant Sarah Whitehorn saith, that the complainants are very much mistaken in the representation which they have made. The said William Howell was about 19 or 20 years of age at the time of his mother's death; and this defendant avers, that, for several years before his mother's death, the said William had been afflicted with sores and ulcers which some time covered a great part of his body: that he continued in this situation, or worse, until he died, which was about the year 1789; that, when the ulcers dried, as they occasionally did, the bodily pains and afflictions of the said William seemed to increase. The defendant believes that the ulcers rose inwardly, because there were frequent discharges of matter from his mouth and nose. These circumstances will account, at once, for the unsightly appearance of the said William, and the society in which he might sometimes be seen. The defendant farther saith, that the said William was afflicted in this way at the time when he came to live with her deceased husband John Clanton; that, when at home, he always dined with the family when he pleased, and was lodged as comfortably as his diseased condition would admit; that he was not an idiot as the complainants suppose: it is true that, from continued and excessive affliction, his mind was impaired; but he generally had understanding enough, not only to preserve his person from mischief,

562 *but to converse rationally and socially, and to guard against any deception or advantage which others might be disposed to take of him. She farther saith, that the said William proposed to the said John to make such a conveyance as is contained in the deed hereto annexed, several times before it was actually executed; and this deed, as well as that which the complainants allude to as having been rejected when offered for record, are attested by Mr. David Mason. That which is dated on the 1st day of October, 1783, was not recorded; because, as she has been told, it was thought to be informal; and not because there was any suspicion of advantage.

This defendant farther saith, that the bargain made by the said William was, in her estimation, a proper one; because the confinement to which his disease often condemned him would have made it inconvenient, if not impracticable, for him to manage his estate."

The bond of Mary Howell (now Mary Millison) to her brother William Howell, (exhibited with these answers,) was dated the 20th of February, 1783, in the penalty of two thousand pounds specie dollars at six shillings each; conditioned, that "whereas the above-named William Howell having, at the date of these presents, made unto the above bound Mary Howell, her heirs and assigns, a good and lawful right unto three negroes, to wit, a wench named Annekey, and her two children Liddy and Tabby, and their increase; now if the said Mary Howell, her heirs, executors, or administrators shall ever claim, demand, sue for and recover, any part of the aforesaid William Howell's estate, should he die without issue lawfully begotten, then the above obligation shall be in force, otherwise void and of no effect."

(Signed) "Mary M Howell,"
her mark;

and attested by three witnesses, namely,
"James Nicholson,
her
"Winne M Woodroof,
mark,
"and Urbane Nicholson."

The will of Hannah Howell (also exhibited) bequeathed to her son William five shillings; and, after payment of her just debts, gave the remaining part of her 563 estate, of every kind and quality, unto her daughter Mary, to her and her heirs for ever, "but it was her will and desire that if her son William, when he should arrive to lawful age, should give and convey unto his said sister Mary two negroes, to her and her heirs for ever, then the estate devised to the said Mary be equally divided between the said William and Mary Howell."

By articles of agreement dated the 1st of October, 1783, between William Howell and John Clanton, the said Howell "agreed to let the said Clanton have the use of ten slaves (the same mentioned in the subsequent deed aforesaid, dated the 9th of the same month) during the said Howell's life, as also all his lands, stocks of all kinds, household and kitchen furniture, upon the said Clanton's finding the said William Howell a sufficient quantity of decent clothing, meat, drink, mending and board, with every other necessary for his subsistence, or till the said William Howell lawfully marries, or has issued lawfully begotten of his body, and when the said Howell shall lawfully marry, or have issue, then the said Howell and Clanton shall both be released from this their agreement: and should the said Howell die without lawfully marrying, and having lawful issue of his body, then the said William Howell doth give and bequeath, of his own free will and accord, all his estate, both personal and real, to the said John Clanton, to him, his heirs or assigns for ever: and should the said William

Howell marry and have lawful issue, then the said William Howell doth bind himself, his heirs or assigns, to make the said Clanton sufficient satisfaction for all his trouble and expense that he the said Clanton has been, or may be at, in finding both himself and negroes a good sufficient maintenance, as also for raising and taking good care of his young negroes; and should the said Howell's lawful issue die before* he marries, then the said William Howell devises and agrees that the whole of his estate should return unto the said John Clanton, to him, his heirs or assigns for ever." This instrument of writing (which it seems the Court refused to admit to record) was "signed, sealed and delivered" before three witnesses, namely, Gray Judkins, Robert Jones, and Nathaniel Parham, and afterwards, on the same day, "acknowledged" before "Mary Mason, John Mason, 564 and David Mason." *The subsequent deed (of the 9th of the same month) was attested by

"John Hawthorn,

his

"Richard M Bailey,
mark,

his

"Thomas M Bailey,
mark,

"and David Mason."

The depositions (amounting in number to thirty-three) generally proved, that, in the opinion of the witnesses, (many of whom were intimately acquainted with him, and knew him from his childhood,) William Howell, though not an idiot, was a person of uncommonly weak understanding, and totally incapable of conducting his own affairs with propriety. This opinion was declared by John Massenburg and Cyril Avery, (members of the Court, who rejected the deed, on that ground, when offered to be recorded,) John Chappell, sen. John Chappell, jun. Levi Rochell, Joseph Rosser, Drury Cooper, Marcus Pennington, Thomas James, Burwell Gilliam, John Key, Frederick Pennington, William Massenburg and Hinchia Rochell. Drury Cooper gave, as an instance of his insanity, that he once saw him endeavour to swallow money, though he did not accomplish it. Other evidence, as to particular facts, tending to shew infirmity of intellect, consisted of hearsay only; but the opinions of most of the witnesses above mentioned were expressed as founded on their own knowledge of Howell, and all in a very positive manner: some also mentioned the general opinion as agreeing with their own.

Robert Jones, sen. (one of the witnesses to the articles of agreement) deposed, that (after reflection) he refused to prove that instrument, and asked Clanton what was its intention? "Clanton answered, it was well known that Howell was not capable of taking care of his estate: this deponent replied the same reason held good, with him, that he was not capable of conveying it; after which this deponent heard the said Clanton had got another deed from the said

*So in the record; but the Reporter presumes there must be some mistake.—Note in Original Edition.

Howell, (something different from the former, and had got it recorded.)"

Barham Moore was well acquainted with Howell, who lived with John Clanton, at the time he executed a deed to the said

Clanton for his estate, and had lived there for some considerable *time before. The deponent "believes the said Clanton had great influence over the said Howell, in his personal conduct, so as to have done almost any thing that the said Clanton requested him to do; and he further says, that he never thought the said Howell to have common sense so as to be allowed to transact his own affairs."

Hinchia Rochell's deposition was nearly to the same effect with this.

Mary Mason swore that, "on the day the deed of conveyance from Howell to Clanton was written, she asked said Howell if he had neither brother or sister that he had rather give his estate to than a more distant relation; who told her he had a sister who had had her part of the estate, and that he had rather his cousin John Clanton should have his estate than any other person in the world; that said Clanton was to maintain him for it. The deponent then asked said Howell what would be his situation if he was to marry and have children; who told her, in that case, the estate was to be returned to him." On being asked whether she believed him to be a man of sound understanding, she said she was not sufficiently acquainted with him to form an opinion.

Person Williamson deposed, that he thought Howell was a man of sound understanding, though not as capable of conducting a family as some men, and did not know whether he was as capable as common men. He farther stated that, at the Court when the deed was recorded, three persons who were acting magistrates of the County of Sussex, viz. David Mason, (who wrote it,) George Rives, and George Booth, or Nathaniel Dunn, were called on, at the instance of Howell and Clanton, (but, as the witness was inclined to think, not by order of the Court,) to inquire into the state of the said Howell's mind; that those persons met at the house of David Mason to make the inquiry, and "were of opinion that the said Howell was capable of conveying his estate."

Holt Clanton swore, "that he lived in the family of John Clanton, where the said Howell lived, for a considerable time, and that the said William Howell said it was his wish and desire that, if he died without lawful heir, his cousin John Clanton should have his estate, and, for the time he the said Holt Clanton lived in the family, he thinks there was no reason for any complaint from the said Howell, against said Clanton, for bad treatment; that the said Howell

lived as one of the family, and, as to *the cheating him out of his land or slaves, it is not his opinion it could be fairly done from any trial that ever he made, or was acquainted with. He farther saith, that he believes that there was few persons that would have taken the trouble of Howell for the expectations of the profit that was specified in the articles of the deed of gift."

Nathaniel Clanton's deposition was (so far) the same, word for word, with that of Holt Clanton. They both, however, expressed a belief that Howell's understanding was inferior to that of common men. Holt Clanton also said that he was subject to bodily infirmities which rendered him troublesome. William Clanton deposed that he had sore legs, or a sore mouth; that, when his legs got well, his mouth would break out; and that this indisposition did not confine, but rendered him disagreeable. As to this point, the deposition of Hetty Northcross stated, "that he had very sore legs, hands and mouth, which rendered him disagreeable and indecent;" and that of Betty Bailey, "that he was much afflicted with sore legs, ulcers, and the like, which rendered him incapable of seeing to his business, or appearing in a decent manner."

On the subject of Howell's treatment by Clanton, the general result of the testimony seems to be that, before the deed was recorded, and while he stayed at Clanton's house, he was treated well, but was afterwards removed or compelled to reside at the plantation originally his own, where he was allowanced in food, and that very scantily, badly clothed, and greatly neglected, as was fully proved by the depositions of Barham Moore, Patsy Hutchins, Drury Cooper, Burwell Gilliam, John Key, and Robert Jones, sen. The last-mentioned witness said, that Howell came to him and complained that Clanton did not use him well, and "made the deponent large offers if he would get his estate from the said Clanton for him."

As to the bond from Mary Howell to William; the deposition of John Faulcon, of Warren County, North Carolina, proved that that bond was written by him, at the request of William Howell and James Nicholson; but he was not present when it was executed. Urbane Nicholson was one of the subscribing witnesses; but does not recollect any of the circumstances. Mary Nicholson, his wife, was present when it was executed, at James Nicholson's, in Warren County. Being asked by the

567 *complainant William Hines, whether she thought William Howell to be a man of such sound mind and memory as to be capable of transacting his own business, or conveying his estate in any legal manner, or knowing the value of it, she answered, "from the acquaintance I had with him I do not think he was." James Nicholson swore, "that Mary Howell lived with him at the time she gave her bond to her brother William; that it was executed in his presence, at the solicitation of William Howell, as an indemnification to the said William Howell, for the delivery of three negroes mentioned therein, in lieu of her proportion of her father's and mother's estate, and his own estate; that the said William Howell refused to make a deed to the said Mary for the said negroes, unless she would give him the said bond; that William Howell went to North Carolina to have the said bond executed; and the deponent had no doubt but what he was capable of conveying his estate." Levi Rochell deposed, "that he was well acquainted with Mary

Howell; that she was a very weak woman, and might easily be imposed on."

The cause came on to be heard the 4th of February, 1803, when the County Court "being of opinion that William Howell, deceased, the brother of the complainant Mary, was, throughout his life, a person of weak mind, unable to manage his own estate, and easily to be imposed upon, and that the indenture executed by him to John Clanton, now deceased, was executed for an inadequate consideration, in consequence of the undue influence which the said John Clanton had over the said William Howell, and of fraud and imposition practised by the former on the latter; being of opinion also, that the bond of release obtained from the complainant Mary Howell, an illiterate person, ignorant of its full import, by the over diligence and assiduity which it manifests, is an additional badge of fraud;" therefore decreed, "that the negroes mentioned in the said deed, with the increase of the females to the present day, be delivered to the complainants, and that the defendants deliver to them the original deed from the said William Howell to the said John Clanton to be cancelled;" that certain "Commissioners do make up and state an account to the Court of the reasonable hire of the slaves mentioned in the said deed, from the death of the said William Howell to the time of their report; deducting therefrom such sum as to them may seem reasonable for raising and supporting

568 *the young and chargeable negroes; and also do report the sum for which the lands in the said deed mentioned were sold by the said John Clanton to Micajah Hines and Isaac Sever, together with the interest thereon from the death of the said William Howell until the time of such their report; and the Court dismissed the bill as to the defendants Micajah Hines, and Isaac Sever; they appearing to be fair purchasers without notice of the fraud above stated."

The Commissioners reported the sales of the two tracts of land, with the interest thereupon, and the hire of the slaves, with interest on that hire; amounting in all to 772l. 17s. 11d. 1-2 after making a reasonable deduction for the support of the young and chargeable negroes; and, in their report, stated that, by the approbation of William Hines, one of the complainants, and of Sally Whitehorn, and Nathaniel Chambliss, who acted as special guardian to the infant defendants, the said sum of 772l. 17s. 11d. 1-2 was reported as the balance in favour of the complainants. "The defendants having made no exception to this report, but approving the same, the same was therefore confirmed and ratified;" and the final decree was, for the slaves, against the defendants in whose possession they were, and for the above balance of 772l. 17s. 11d. 1-2 against the defendants, executors of John Clanton, deceased, to be paid out of his assets in their hands to be administered.

Upon an appeal to the Superior Court of Chancery for the Williamsburg District, that Court, on the 26th day of July, 1805, was of "opinion, that the weakness of intellect in the said William Howell; the inadequate consideration in the deed from him to the said John Clanton; the kind of

provision, or revocation, (if it can be so called,) contained in that deed; the undue influence the said John Clanton obtained over the said William Howell, his young and weak relation; the violation of trust and confidence in the said John Clanton, and the strong presumption of fraud and imposition arising out of the examination of witnesses, together with those presumptions, still stronger, incorporated in the transaction itself, furnish abundant reason for the decree of the County Court; and, therefore, there is no error in the said decree. This Court would have directed an adequate allowance to have been made for the clothing and maintenance of the said

William Howell, but that the Court 569 discerneth, by the report of *the Commissioners, that no charge for the hire of slaves, or interest of the money arising from the sale of the land in the proceedings mentioned is made, until after the death of the said William Howell, which hires and interest must have been intended for that allowance, and which this Court considers as a very ample allowance. And, with which report the appellees appearing to be satisfied, this Court is content to approve. Therefore, it was decreed and ordered, that the decree aforesaid be affirmed; and that the appellants, executors of the said John Clanton, out of his estate in their hands to be administered, pay, unto the appellees, damages according to law for retarding the execution thereof, and their costs by them about their defence in this behalf expended."

From this decree an appeal was taken to this Court.

Hay, for the appellants, observed, that the testimony as to the treatment of Howell by Clanton (relating to circumstances subsequent to the contract) was foreign to the cause, and introduced merely to excite prejudice. The influence said to have been exerted by Clanton over Howell is not charged in the bill; neither is any fraud alleged, except that of obtaining the deed from an idiot. The plaintiff therefore is precluded from introducing evidence as to fraud or influence; for, both in law and equity, the allegata and probata ought to agree. (a) The question then is, whether Howell was an idiot? And I contend that, according to the legal definition, he was not. (b) Following facts, and not opinions, (for opinions of witnesses, I contend, are no evidence,) there is not a tittle of proof of idiocy. And, even as to opinions, not a single witness says that he thinks him an idiot. The testimony, such as it is, only goes to weakness of understanding.

2. But if proof of weakness of understanding (falling short of idiocy) could be received in support of this bill, there is no legal evidence even of this; the whole consisting of opinions only, except in one solitary instance. The single fact of Howell's attempting to swallow money is not conclusive; and, indeed, is entitled to no weight, unless all the circumstances were stated, to shew how much was serious, and

(a) Coop Eq. pl. 7; 11 Ves. Jun. 240. Clarke v. Turton; 3 Atk. 110. Jones v. Jones.

(b) 1 Tuck. Bl. 2d part, p. 303; 1 Fonb. 56; 4 Com. Dig. 861.

how much frolic. Opinions are not evidence where facts can be obtained; according to the maxim, that the best evidence the nature of each case admits shall always be required; for facts are better evidence than opinions. This Court ought to exert its own opinions; not depend on the 570 *opinions of others. Besides, here

are conflicting opinions, and how can the Court decide, without the facts on which the opinions on both sides were formed?(a)

In an action of assumpsit on an account, would an opinion that the money was due, be admissible? Certainly not. Even in the case of proving hand-writing, mere opinion is not evidence; but a witness who has seen the person write must be produced. Opinion is admissible only where matters of fact are not within our reach; as, in the case of a man's being wounded and dying, the opinion of physicians may be taken as to the question whether his death was occasioned by the wound: but if they differ in opinion, their evidence has no weight.* I admit it to be extremely difficult to tell exactly, in all cases, where fact ends and opinion begins; but the present case is very plainly one of opinion only: the total omission of facts shews that facts did not exist. Indeed, in the case of attacking the character of a witness, opinion only (as to his general reputation) is admissible, and not facts; and this for very good reasons; because the person whose character is attacked, is not prepared to rebut such facts. But in all other cases the rule is inflexible that facts are to be preferred to opinions.

3. Weakness of intellect, even if fully proved, is not sufficient to vitiate the contract. The witnesses say that Howell was incapable of managing his estate: but many men are subject to this incapacity; and yet the validity of their contracts is never questioned. (b)

4. But Howell's competency to contract is admitted by the plaintiffs in the cause. Mary Howell, the plaintiff beneficially entitled, executed a bond to him as a person competent; and that bond is a bar to her maintaining this suit.

5. The contract is said to be unequal. But inadequacy of price is not charged in the bill as a ground of relief. Neither will the Court set aside a contract on the ground of inadequacy only. (c) This contract might have been a good, or a bad one, on the part of Clanton. The value of the consid- 571 eration must depend upon *the feelings of the parties. Few would have had such a member in their family for the whole County of Sussex. The land was not only poor, having been sold for 140l. though the quantity was 264 acres, but the negroes were young, and an expense. A contract, too, is never set aside for inadequacy, where, by its terms, the property might be

regained by the vendor. Besides, inadequacy of price is only regarded in contracts; and this deed is partly a gift in consideration of affection, and partly a contract. 2 Bl. Com. 297.

6. The decree was erroneous in allowing interest on the hire of slaves. (d)

George K. Taylor, for the appellees. Mr. Hay's first point, that the bill charges idiocy only, and that therefore nothing else must be proved, is not correct in point of fact. The bill charges "a weakness of understanding which rendered Howell incompetent to regulate his own affairs, and classed him among those who are called idiots." The latter part of this clause is only the amplification and deduction of counsel. But if this were a direct charge of idiocy, is it not competent for a party to prove his allegation as far as he can? Even in criminal cases, the prisoner may be charged expressly with murder, and, yet, circumstances may be proved which subject him to punishment for manslaughter. In *Bennett v. Wade*, 2 Atk. 325, it was decided, that a bill may be framed with two different aspects, that, if one fails, the other may as effectually answer the purpose. In that case, indeed, the bill was amended, in order to insert the charge of fraud; but, here, fraud is originally charged, without the necessity of any amendment.

2. It is said there is no legal evidence of Howell's weakness of understanding. But, surely, opinion is the best evidence of a man's state of mind. No other, indeed, can be given. To state instances in which weakness of intellect was discovered, is often difficult and impossible. Opinion must be formed from general observations on the conduct of the party. To what would the doctrine lead, that instances must be specified? A witness may have seen him engaged in an equivocal act which might have been the effect of weakness, or of levity. Would this evidence be as strong as that of a person who had known him from his infancy, and declares an opinion that he was uncommonly weak, and incap- 572 able *of managing his own affairs?

The testimony of Robert Jones, sen. proves clearly that Clanton himself was sensible of Howell's want of capacity. This is a very important fact; and Jones's refusing to prove the deed, for that reason, together with the Court's refusing to admit it to record, from their own knowledge of the weakness of Howell, are also important facts.

It is objected that inadequacy of consideration is not charged in the bill; but if the word "inadequacy" be not used "incompetency" is; which is the same thing. The case then amounts to this; that Howell was and is proved to be a man of extremely weak understanding; that Clanton took him to his house, affecting to be his protector; acquired considerable influence over him, and became, in equity, a trustee; and, instead of protecting, induced him to sign a deed conveying to himself all his estate for a very inadequate consideration: a combination of circumstances fully sufficient to set aside the deed. (e) In *Clarkson v. Han-*

(a) Doug. 580, *Syers v. Bridge*; 12 Vin. 86; 3 Vin. 8; 1 M'Nally, 262.

*Note. See also *Peake's N. P. Cas.* p. 25. *Thornton v. The Royal Exchange Assurance Company*; and *ibid.* 41. *Chaurand v. Angerstein*, also cited by Mr. Hay, as examples of cases where opinions of persons skilled in particular trades or business are admissible evidence.—Note in Original Edition.

(b) 1 Foub. 65, 66; 3 P. Wms. 180.

(c) *Sug. Law of Vend.* 169, 170; 3 Powell on Contracts, 152; 1 Foub. 116, n. (v); 9 Ves. jun. 246, *Coles v. Trecothick*.

(d) Ante, p. 183, *Dillard v. Tomlinson*, &c.

(e) 2 P. Wms. 208, *Clarkson v. Hanway*.

way, it was considered a badge of fraud that Hanway only took a bond to secure the annuity, and not a mortgage. In our case no security at all was taken; but a tract of land and ten negroes were given for the privilege of breathing in this world. Mr. Hay contends that the land was worth only ten shillings per acre, and the negroes were all young and expensive. But, as to the negroes, this is not probable; and, in fact, the report of the Commissioners proves they were profitable; for it shews they were equal to the support of Howell.

Again, it is said that Howell's competency of understanding is proved by his obtaining the bond from his sister! If that act proceeded from Howell it was wonderful indeed! From a man who never before had been out of the County of Sussex! But it was, evidently, a mere artifice of Clanton; and Howell was only his instrument; through abundant caution; for, if he had gone out himself he might have been suspected. This bond is relied on as a bar! But if the transaction was fraudulent, shall the person who was guilty of the fraud shelter himself under it?

But there is one damning fact which makes this a stronger case than any in the books. The power of revocation inserted in the deed is relied on shewing that no fraud existed in the transaction. Yet in *Bennett v. Wade*, (a) a similar power in the deed from Sir John Lee is relied on as evidence of fraud. But what was the power of revocation in Howell's deed? In 573 *case of his marriage! A man who was a mere mass of corruption to marry! But, in fact, in less than two years afterwards, Clanton sells the land, and induces this poor ignorant boy to join in a deed! Where then was the habitation for his wife?

In *Filmer v. Gott*, (b) the deed was set aside on account of importunity in obtaining it, inadequacy of price, the vendor living alone and having no friend to consult. But whom did Howell consult? The man interested to receive him. From the death of his mother to the date of this deed, he continued an inmate of Clanton's house, who abused the confidence reposed in him. All the witnesses prove extreme kindness to Howell before the deed, and, afterwards, extreme brutality. Wherever there was a remarkable intimacy, and undue influence, the Court will look with a jealous eye on the transaction, and set aside the deed if there be not perfect reciprocity; as in 1 *Veaz. 400*, (c) where the case was of a parent and child; 1 *P. Wms. 118*, (d) of undue influence in prospect of marriage; 3 *P. Wms. 129*, (e) of an heir entrusted to a servant who imposed upon him; (in which case it is said that "a breach of trust is, of itself, evidence of fraud, nay, of the greatest fraud;") 1 *P. Wms. 310*, (f) of a young heir induced to sell an expectancy at an under rate. (g) So,

too, a bond is not obligatory where its effect was not known to the obligor. (h)

As to Mr. Hay's sixth point that interest ought not to have been allowed on the hire of the slaves; I shall not contend, after the decision of this Court, that interest on conjectural profits is allowable. But there are circumstances in this case which take it out of the general rule. Both sides consented to the report as it stands. Indeed, the Commissioners made no report, but only signed what the parties had agreed too. It is stated on the record (in the final decree) that the defendants not only made no objection, but approved of it.

Wirt, on the same side. Admit the fact that Howell was not an idiot; yet weakness of understanding, though not amounting to idiocy, is amply sufficient, when connected with any one of the other circumstances of this case, to set aside the contract. Weak-

ness of intellect alone is not sufficient; but coupled with *any thing else, as inadequacy, fraud, &c. it is. (i) So also inadequacy, per se, is not enough, in general. Yet gross inadequacy is considered as evidence that the mind was under undue influence. (k) But it is not necessary, in this case, to rely on the principle that gross inadequacy, of itself, vitiates the contract; for it certainly is sufficient to have that effect when combined with Howell's weakness of intellect, and bodily distress; with his being just of age at the time; or with Clanton's near relationship and great influence over him; all which circumstances are here united. (l) Actual fraud, or imposition, in such a case, is not necessary to be proved, but may be presumed in a Court of Equity. (m)

But it is said there is a farther consideration for this deed besides a support for life; viz. love and affection. In *Gwynne v. Heaton*, (n) very particular care in the wording of a contract is mentioned by Lord Thurlow, as a sign of fraud. But the consideration of affection must be for a near relation. 4 *Cruise's Digest*, 25, carries it no further than to brothers, or children of brothers; which does not extend to a first cousin, or father's brother's child. But the consideration of blood is a mere nonentity, where a deed is drawn from a weak man.

As to the objection that the charges in the bill are not sufficient to let in our evidence as to weakness of intellect, inadequacy of consideration, undue influence and fraud; the result of the authorities is, that where there is a single insulated charge, the plaintiffs shall not be permitted to surprise the opposite party, by shifting their ground. But a charge of fraud in general

the editor. 3 (Coxe's) *P. Wms.* (5th edit.) p. 181; in which the authorities generally are collected.—Note in Original Edition.

(h) 2 *Pow. on Cont.* 208; 2 *Bro. Ch. Cas.* 150, *Evans v. Llewellyn*.

(i) *White v. Small*, 2 *Ch. Cas.* 108; *Clarkson v. Hanway*, 2 *P. Wms.* 208.

(k) 1 *Bro. Ch. Cas.* 6, 8, 9, *Gwynne v. Heaton*; 2 *Bro. Ch. Cas.* 167—175, notes, *Heathcote v. Paignton*; 10 *Ves. jun.* 209, *Underhill v. Horwood*.

(l) *Heron v. Heron*, 2 *Atk.* 161; *Young v. Peachy*, *ibid.* 287; *Chesterfield v. Janssen*, 1 *Atk.* 301; 3 *Veaz.* 156, *S. C.* *Cole v. Gibson*, 1 *Veaz.* 503; *Proof v. Hines*, *Cas. temp. Talb.* 111.

(m) 2 *Ves.* 156; 1 *Fonb.* 124, note (b).

(n) 1 *Bro. Ch. Cas.* 1.

(a) 2 *Atk.* 323.

(b) 7 *Bro. Parl. Cas.* 70.

(c) *Cocking v. Pratt*.

(d) *Duke of Hamilton et ux. v. Lord Omhoun*.

(e) *Osmond v. Fitzroy & C.*

(f) *Twisleton v. Griffith*.

(g) See also *Heathcote v. Paignton*, 2 *Bro. Ch. Cas.* 167—175.*

*See on this subject a very comprehensive note of

terms is sufficient. (a) In *Jones v. Jones*, 3 Atk. 110, forgery was the single charge in the bill. But here the separate badges of fraud are expressly mentioned; and the bill concludes with a prayer that the deed may be set aside for fraud.

Again, it is contended that opinions of witnesses are not admissible evidence to prove weakness of understanding. But as to this point, opinions are the best evidence. Mr. Hay admits that opinions may be given by physicians and artists. So also opinions are admissible as to hand-writing; because in such case the witness has had opportunities of forming opinions, which the Court and Jury had not, and which are not susceptible of description. If he should attempt to specify, he would have to state the manner in which the writer cut

575 each particular letter. So, in cases of weakness, opinions are formed from a variety of circumstances; frequently not so much from active, as passive. If insulated facts were taken as evidence, Sir Isaac Newton might have been convicted of lunacy; for he has been seen to go into company with only one stocking on. To oppose this unfavourable circumstance by other facts, a witness must read his principles.

In 2 Atk. 337, (b) it is even doubted whether particular facts can be given in evidence at all. But at length it is held that you may give evidence, both as to general opinion and particular facts, in an issue on non compos mentis. So, witnesses to a will are only called upon to speak of the general state of the testator's mind. The circumstance, that Howell told Mrs. Mason the object of the deed, is no proof of his having capacity to make such a contract as ought to bind him; and does not make the case stronger than that of *Gartside v. Isherwood*, 1 Bro. Ch. Cas. 560. Great reliance is placed upon his trip to North Carolina, and obtaining the bond from Mary Howell; but, taking that fact with all its circumstances, it is rather a proof of additional fraud practised by Clanton, who must have instigated him to such an uncommon exertion. That Howell acted under Clanton's influence, and did not understand the nature of the bond, is evident; for a condition was introduced into it which made him an instrument of fraud upon himself.

Hay, in reply. A cousin is unquestionably within the degrees of consanguinity to raise a use on a covenant to stand seised to uses. (c)

Fraud is never to be presumed. If all the Chancellors from the time of Adam to this day were to say that it may be presumed, my judgment would still rise in rebellion. 1 Vesey, jun. 20, (d) 2 Com. Dig. 314, and 1 Fonb. 399, shew that fraud is never to be presumed; though, I admit, it may be inferred from circumstances calculated to justify such inference.

The clause in the bill charging idiocy, is improperly subdivided by Mr. Taylor. The first part of that clause ought to be taken in connection with the last. Idiocy is not

the consequence of weakness of understanding; but the converse is true: and saying that a man is "classed with idiots" is equivalent to saying that he is an idiot.

576 *Monday, June 4. The Judges pronounced their opinions.

JUDGE TUCKER. This is a bill to set aside a conveyance of lands and negroes, made the 20th of February, 1783, by William Howell to his cousin John Clanton, both deceased, on the grounds stated in the bill.

The bill states, that "Howell, from the time of his birth to the time of his death, laboured under a lamentable and invincible weakness of understanding and intellect, which rendered him absolutely incapable of regulating his own affairs, and classed him, with propriety, among those who are called idiots;" that this was universally, known, and assented to, by all who knew him; that, soon after he arrived at the age of twenty-one, his cousin John Clanton, to whom his situation had been long and perfectly known, induced him, although he had a sister then living, who is one of the complainants, to execute a deed, for all his lands and slaves, as his absolute property and estate, for the incompetent consideration of finding and providing for him sufficient and plentiful meat, drink, washing, lodging and clothing, in a comfortable and plentiful manner, during the said Howell's life, or remaining a bachelor; as will more fully appear by the deed, in which there is the following clause, not mentioned, or in any way noticed in the bill; "Provided nevertheless, and it is hereby agreed on by and between the parties to these presents, to be the true intent and meaning of these presents, that, in case the said William Howell shall hereafter intermarry, that the estate above conveyed, as well land as slaves, with the increase of the said slaves, shall revert unto the said Howell and his wife, during their joint and several lives; and, in case the said Howell shall have lawful issue, that the said estate, and every part thereof, shall be subject to his disposal among them, by deed or will; or, in case of his failing to make such distribution, then it shall pass, and go, and descend agreeably to the act of Assembly, in case of his dying intestate; but if no such issue, the same to revert to Clanton and his heirs, after the death of Howell and his wife." The bill then proceeds to state that, after this deed had been thus fraudulently obtained from an unfortunate and wretched being, who was ignorant of its operation, the said Clanton having had the same, after several ineffectual attempts, proved and recorded, treated Howell as a vagabond and outcast, and a slave; and, in

577 *order to manifest, more plainly, the palpable and infamous fraud practised on this occasion by the said Clanton, the complainants aver and offer to prove that the deed above mentioned when offered, at first and several times after, to the Court for probate, was rejected by the Court, and not permitted to be recorded, from their individual knowledge of the facts before stated; and after stating some other circumstances not material to be noticed in

(a) Coop. Eq. pl. 7.

(b) Clarke v. Periam.

(c) Saund. on Uses, 436.

(d) Lewis v. Pead.

this part of the cause, they pray that the Court may declare and render null to all intents and purposes the aforesaid fraudulent deed, &c.

The answer of Sarah Whitehorn, who was the wife of John Clanton, saith, that the complainants are very much mistaken in the representation which they have made; that Howell was about nineteen or twenty when his mother died; and she avers that, for several years before his mother's death, he had been afflicted with sores and ulcers which sometimes covered a great part of his body; that he continued in that situation, or worse, until he died, which was about the year 1789; that, when the ulcers dried, as they occasionally did, his bodily pains and afflictions seemed to increase. She believes that the ulcers rose inwardly, because there were frequent discharges of matter from his mouth and nose; which will account for his unsightly appearance, and the society in which he might sometimes been seen: that he was afflicted in this way when he came to live with her deceased husband Clanton; that, when at home, he always dined with the family when he pleased, and was lodged as comfortably as his diseased condition would admit; that he was not an idiot, as the complainants suppose. It is true that, from continued and excessive affliction, his mind was impaired; but he generally had understanding enough, not only to preserve his person from mischief, but to converse rationally and sociably, and to guard against any deception or advantage which others might be disposed to take of him. She further saith, that the said William proposed to the said John to make such a conveyance as is contained in the deed, several times before it was actually executed; that that deed, as well as the one which the complainants alluded to as having been rejected when offered for record, is attested by David Mason; that which is dated the first of October, 1783, (which is admitted by consent, and appears at the end of this record,) was not recorded, because, as she has been told, it was thought to be informal,
578 *and not because there was any suspicion of advantage. She adds; that the bargain was, in her estimation, a proper one, because the confinement, to which his disease often condemned him, would have made it inconvenient, if not impracticable, for him to manage his estate.

About two thirds of the witnesses (of whom there are near thirty) testify either their own, or the general opinion of the neighbourhood, that Howell was a person of extremely weak intellect; but it was conceded by the appellees' counsel that there is no proof that he was an idiot. The rest of the witnesses corroborate the account given of him in the answer. There is, however, this obvious distinction between the answer and the depositions taken in support of the bill. The answer states facts; the latter, in general, opinions only. If it be objected, that the answer is not entitled to the same credit as the deposition of a witness, who is supposed to be disinterested; there are circumstances apparent upon this record, that, in my opinion, place

this answer, in point of credibility, upon very high ground. First, it is perfectly responsive to the bill, and stands uncontradicted even by a shadow of evidence, in a most material point, which I shall hereafter notice. Secondly, it appears from the will of John Clanton (among the exhibits) that his widow, upon her marriage with the defendant Whitehorn, forfeited every provision made for her in Clanton's will. She, therefore, is presumably a defendant without interest in the cause, whose answer, where it is responsive to the bill, is thereby entitled to the utmost credit; especially, where it stands uncontradicted as to the fact alleged. It states, then, in my opinion, in a very candid manner, a good and sufficient inducement to the contract on the part of Howell. Helpless and forlorn, as he appears to have been, from the whole current of the testimony, it was certainly an object with him (if he had any intellect at all) to secure to himself, during his miserable existence, "sufficient and plentiful meat, drink, washing, lodging, and clothing, in a comfortable and plentiful manner." These are the cogent inducements to the bargain, and some of the considerations (and certainly the principal) mentioned in the deed. That he possessed sufficient intellect to know this, appears not only from what passed between himself and Mrs. Mason, when he came to her husband to draw the deed; but from his subsequent complaint to Robert Jones, one of the complainants' witnesses, "that Clanton
579 *did not use him well; and from the large offers which he made to Jones, if he would get his estate from Clanton for him." But a farther and more convincing proof that he was not a person of such weak understanding as not to know what he was about, when making a bargain, appears from the singular and uncontradicted fact of his taking a journey by himself, (as far as appears to the contrary,) to the house of James Nicholson, in North Carolina, where his sister (one of the complainants) lived, for the express purpose of giving her three instead of two negroes, which his mother, by her will, had required of him to give that sister, before he should be entitled to any part of the mother's estate. The bond of relinquishment which he took from his sister on that occasion, was drawn by John Faulcon, of North Carolina, and executed at Nicholson's house, where she resided, and attested by Nicholson, his wife, and a third witness. Not a syllable is heard of Clanton on this occasion; and, yet, this very transaction is imputed to him as an evidence of fraud, although neither charged as such (nor even hinted at) in the bill, nor mentioned by any other of the witnesses. This transaction, therefore, as it appears by this record, is conclusive evidence, that Howell was neither an idiot, (as the charge in the bill imports,) nor yet a person of such weakness of intellect, as not to be able to understand the nature of his own interest, or of any bargain he might be about to contract.

But it is insisted, that an advantage was taken of him by his relation Clanton, immediately, or very soon after he came of age; and, although weakness of under-

standing alone may not be sufficient to set aside a contract fairly made, and for an adequate consideration, yet, when it is coupled with such a circumstance as that just mentioned, or with previous dependence; (as appears to have been the case, in some degree, at present;) or with trust and confidence; or with unbounded influence; or with gross inadequacy of price or consideration; or with extreme distress of situation; or with the pretermission of an unoffending sister, who was his nearest relation and heir; that a Court of Equity will rescind the contract.

I shall not enter into a minute discussion of all these several points, all which I conceive to be put completely out of the question, either by the facts apparent in the record in support of the defendants' right, or the want of such facts on the part of the complainants; or the want of charges
580 in the bill upon some of *these subjects. The only direct charge in the bill (except that invincible weakness of understanding, of which there is no proof) is, that Clanton induced Howell to execute the deed for the incompetent consideration therein mentioned. Now the answer of Sarah Whitehorn (which is expressly responsive to this charge of Clanton's inducing Howell to execute the deed) states, "that Howell proposed to Clanton to make such a conveyance several times before it was actually executed." There is not a scintilla of evidence to the contrary in the whole record: on the contrary, Mary Mason's testimony may well be considered as corroborating this assertion in the answer. Neither Howell's supposed youth, nor previous dependence, nor his trust and confidence in Clanton, which seem rather to have sprung from his affection and a sense of gratitude, than from any other cause, nor his unbounded influence, (of which there is no sort of proof,) can derive any strength, in opposition to this uncontradicted testimony, so perfectly responsive to the most material charge (except idiocy) in the bill. I shall therefore proceed to the inadequacy of consideration, as the next subject of inquiry.

Neither the value of the land, nor that of the negroes, is stated in the bill; nor in either of the answers; nor in any of the depositions, that I can discover. An obvious reason for the omission in the latter appears to be, that it was not put in issue by the former. The Commissioners appointed by the Court of Sussex County to state an account of the reasonable hire of the slaves mentioned in the deed, (from the time of the death of Howell to the time of their report,) and to report the sum for which the lands were sold, (by Howell and Clanton jointly, as appears from one of the answers, though neither the consideration money, nor the person to whom the same was paid, or, if to both, in what proportions such payment was made, anywhere appears,) have furnished some data by which a conjectural estimate of the actual fee-simple value of the lands, when sold, and the annual worth, or hire of the slaves, during the whole period that elapsed between the date of the original deed in October, 1783, and the date of the Commis-

sioners' report, the 1st of October, 1804, a period of one and twenty years, may be guessed at. They state the sales of the two tracts of land, containing, as alleged in the bill, 264 acres, at 145l.; which is just eleven shillings au acre. They estimate the negro hire for the year 1789, due
581 January 1, *1790, nothing. This might be because Howell died late in 1789; but whether it were so or not does not appear; nor are we informed when he died. The next year we find the value of their hire (reasonable deductions for their maintenance and support being first made by Commissioners) charged at six pounds. The next year 12l. 17s. 6d., the third year, 19l. 9s. 1d. 3-4; the average value of those three years being 12l. 15s. 6d. 1-2 per annum: but, if the year 1789 ought to be taken into the account, (as it would seem, from the Commissioners' thinking it necessary to notice that year,) the average value of the slave hire, after making due deductions for the support and maintenance of such as were young and chargeable, for those four years, was only 9l. 11s. 7d. 3-4. Taking it, however, at the highest average, and adding thereto the interest of 145l., for which the lands were sold, amounting to 7l. 7s. 6d. more, the average value of Howell's whole annual income for those three years amounts to 20l. 3s. 0d. 1-2. But we have no reason to rate it so high, at any period during his life. For the value of the slaves being only 6l. the first (or second year) after his death; upwards of 12l. the succeeding year; near 20l. the next; and, so on, gradually increasing from year to year, till we find it valued to 37l. 4s. 6d. in 1802, which is the highest estimate of the whole; we are well warranted in supposing that the greater part, or the whole of them, consisted of young negroes, who were either chargeable, or, at most, not very profitable. Taking it either way; and, even supposing the annual profits of Howell's estate, at that time, to have been equal to 20l. 3s. the average for those three years, I should not deem that sum, by any means, a sufficient consideration, for the comfortable and plentiful accommodation and support of a miserable object, such as Howell is described to have been.

Objection. That it was not the yearly value of the lands and negroes only that Clanton was to have by this deed, as a consideration for the maintenance of Howell; but the absolute property therein.

Answer. That is not the case. If Howell had married, the annual profits were all Clanton was to have till the death of Howell and his wife both; and, if he had lawful issue, the property was gone from him for ever. And, though it may be supposed the chance of Howell's marriage was not great, yet he was free to do so, and
582 *thereby to put an end to the present, and, possibly, to the future interest and hopes of Clanton; who had during the life of Howell, no more than an estate upon an express condition in deed, which it was in the power of Howell to avail himself of at any moment, and thereby defeat the estate, if he thought proper so to do.

Objection. Howell was not supported and

maintained in the manner he ought to have been by Clanton. This, if true, might have been some ground for an application to a Court of Equity by Howell, in his life-time, either to rescind the contract, or to compel Clanton to pay him a stated allowance for his support, as, from all the circumstances of the case, might have been most proper: but it furnishes no ground for the representatives of Howell to apply, at this time of day, for the rescision of a contract, the beneficial provisions of which terminated, on his part, with his life. If the person to whom he complained that Clanton did not use him well, had applied to a Court in his behalf, to permit him to sue in forma pauperis, the case might have appeared such as to entitle him to some relief; but, what it ought to have been, this Court cannot, at this time, by any possibility, judge. It appears to me, therefore, that there is neither a gross inadequacy of consideration, nor, under all the circumstances of this case, any inadequacy of consideration at all. Neither is there any evidence in this record, of any advantage being taken, by Clanton, of the extreme distress of Howell, nor of his exerting, at any time, any improper influence over him; nor is there, that I can perceive, the smallest proof of fraud, or any undue practice whatsoever on the part of Clanton; unless we are to presume it from the face of the deed itself, which has not even the slightest colour of it, in it; or, unless we infer it from what has been said of Howell's complaints of not being well used, which the answer of Sarah Whitehorn, and the depositions of several of the witnesses to the same effect, render questionable at least; and certainly, those complaints, if true, fall very far short of establishing a charge of fraud, unless we were to denominate every breach of a positive contract, a fraud; which no Court of Equity has yet ventured to do, that I know.

I have preferred considering this case upon the real merits, as it appears upon the face of the record, to an investigation of the practical points which have been argued at the bar; because I would never wish to reverse a decree of a Court of Chancery, upon any other ground than the merits of the cause, where they can be fairly got at. In the present instance, my opinion is, that both decrees be reversed, and the complainants' bill dismissed with costs.

But if the complainants were entitled to a decree in their favour, I am still of opinion that the present decree is erroneous.

My first objection to the present decree is, that the Commissioners have allowed interest on the hire of the slaves, from year to year, from the period of Howell's death, to the day of making their report.

In giving my opinion in the case of Dilliard v. Tomlinson, this term, I stated several instances, where I thought an executor or administrator could not be chargeable for interest upon money, actually received by him. Much less with interest upon the hire of slaves, which, peradventure, he may never have received, or not for several years after it became due. I beg leave to refer to what I then said, as containing

my deliberate opinion, and the reasons for it.

Objection. The report states that the same was made in the presence, and with the approbation, of the defendants.

That is not the case. Sally Whitehorn, wife of one of the defendants, and Nathaniel Chambliss, who acted as special guardian to the infant defendants, are stated to have been present. But the executors are neither stated as being present, nor even as having notice to attend. The consent of the others, who were present, therefore, cannot possibly affect the executors. Neither (I presume) could Whitehorn be affected by the consent of his wife, unless it were proved she acted as his attorney, under a special power and authority from him. Nor will this Court, sitting as a Court of Equity, suffer the interest of infants to be committed, by a careless or ignorant guardian ad litem. And I must be permitted to doubt whether a Court of Equity ought ever to sanction the report of its Commissioner, when he mistakes the law; although the parties may submit to his decision, without filing any exception to his report. For his office is to state facts for the consideration of the Court; where he undertakes to do more, I conceive that his report is no less open to impeachment for error than the decree of the Court, proceeding upon a mistake in law, is. For a contrary doctrine would be putting the Commissioner's report, in point of legal obligation, upon higher ground than the decree of the Court itself. Upon these grounds, I think the charge of interest on the hire of the negroes is utterly erroneous; for this suit was not brought till near eleven years after Howell's death, and, until a very short time before it was brought, there was no administrator to whom any debt due to him from any person whatsoever could be paid or tendered. The legal right in the slaves being in the executors of Clanton; had there been an executor of Howell, how could Clanton's executors have been justified in paying them for the negro hire, until the decree should fix their right to demand it. How then are the executors to be made chargeable for interest upon money which they had no right to pay? The most that equity can do, as to make them accountable for the hire of the slaves, free of interest upon that hire.

But here a question occurs. From what period are the executors to be charged with the hire, if, indeed, in this case, they are chargeable at all?

John Clanton died before the second of September, 1790; this suit was not brought until April, 1800. Burwell Lofton and Michael Bailey, who qualified as his executors, were at that time both dead; Michael Bailey, the surviving executor, had, before his death, fully closed and returned to the Court his accounts as executor of Clanton, as is positively stated by the defendants, J. C. Bailey, and Benjamin Wyche, his executors, in their answer; to which there was no replication, that I can discover; nor are there any depositions taken which bear any relation to this fact. So that the answer, if not actually admitted

to be true, in all its parts, stands uncontradicted in this particular. If Michael Bailey, the surviving executor, had been alive when the suit was brought, and had put in an answer to the same effect as that of his executors; and the cause had been heard in the same manner as it was; the bill against him (I conceive) ought to have been dismissed. For, surely, when an executor has settled all claims against his testator's estate, (of which he had no notice,) and has settled his accounts with the Court which granted the probate of the will, and made distribution, he ought not to be affected by any dormant equitable claim, which may rise up against his testator's estate, at any distance of time afterwards. Much less ought his executors, who, under such circumstances, cannot be supposed to be consulant of the affairs of the first testator, as the present defendants expressly state in their answer. And, yet, the

585 decree *in the present case must be understood as against them for nearly 8001. On this ground, therefore, I consider the decree as palpably erroneous.

Objection. Clanton appointed his wife Sarah (now the defendant Sarah Whitehorn) his executrix, together with Lofton and Bailey, his executors.

But she did not qualify; they did; and, on her marriage with Whitehorn, which was previous to the commencement of this suit, she forfeited every benefit under her husband's will. And it does not appear that she renounced the will, nor that she ever qualified as Clanton's executrix. The decree, therefore, which, in its terms, imports to direct the executors of the said John Clanton, "out of his assets in their hands to be administered, to pay to the complainants the money reported by the Commissioners to be due, for the hire of the slaves, and the sale of the land," must be understood (I conceive) as against the executors of the surviving executor of Clanton.

Objection. The executors, before distribution, made, ought to have taken an indemnifying bond of the distributees to answer any future debts or demands against the testator's estate.

I do not know that the law requires this of an executor. In the case of an administrator, the law will not compel him to make distribution, until bond with security be given, by the distributees, to refund their proportional parts of any future debt or demand against the estate. This is a security which the law gives to the administrator; but as it does not give it to the executor, and as he is bound to perform the will, I am not prepared to say that he can refuse to pay a legacy, or to make distribution of the residuum, unless the legatee or distributee will give him a similar bond. *Walden v. Payne*(a) is to that effect. Be that as it may, the complainants in this cause have followed the effects of Clanton into the hands of his children,(b) and for aught that appears to the contrary, they are the proper persons, not only to make restitution of the slaves, but compensation for their hire. The question then recurs,

from what period ought they to be charged with it. And my opinion is, that they ought not to be charged with the hire of the slaves, or with the interest on the sales of the land, until the commencement of this suit. For, first, this is a dormant equity, of which these defendants, who are infants, cannot be presumed to have

586 *had any notice; nor, if they had, could they, or their guardian in their behalf, have given up the slaves or paid their hire. For neither the infants themselves, nor their guardian, were competent to do this of their own mere motion, without the authority or direction of a court. Secondly, they could not know to whom to make restitution or payment; there being no legal personal representative of Howell until a short time before the suit brought. And surely, there is as much reason to adopt this rule, in this case of a dormant equity against infants, as in the case of a widow who come into a Court of Equity to demand her dower; in which case the rule seems to be, that she shall not be allowed for the rents and profits which accrued previous to the filing of her bill; although, at law, she is entitled to recover damages, equal thereto, from the time of the husband's death until the day of the judgment, whereby she recovers seisin of her dower.(c)

Admitting, then, that the complainants are entitled to a decree in their favour, this decree appears to me to be manifestly erroneous, for the reasons last mentioned. It ought, therefore, (in any event,) to be reversed, I conceive, and sent back to be reformed by the Court of Chancery, agreeably to the preceding principles.

JUDGE ROANE observed, the case appeared to him so plain on the testimony and principles of law, that he did not think it necessary to give a detailed opinion. He then read the decree of the Chancellor, and said; so far the decree relates to and decides upon the principles of the cause, and I can only say, that, on examination of the record, most, if not all, the positions taken by the Chancellor are correct. If the decree, so far as it respects the account, defended upon the report only, perhaps I might not be disposed to sanction it; on account of the incompetency of some of the parties to consent before the Commissioners: but it appears from the decree of the County Court that the defendants not only made no objection, but approved of the report.(1) With respect to interest on

(c) 1 Rev. Code, c. 94, s. 4.

(1) Note. In a subsequent case of *Clarke and White, Executors of White v. Johnson and others*, June 12th, 1811, the Court (consisting of JUDGES ROANE, BROOKE, and CABELL) unanimously decided, that reports of Commissioners, which are not erroneous upon the face of them, shall not be impeached in an appellate Court, (where not specially excepted to in the Court below.) "on grounds, or in relation to subjects, which may be affected by extraneous testimony." In that case the question was, whether interest ought not to have been charged against White's executors, in the settlement of their administration account by Commissioners, in a suit brought against them by the legatees. The Commissioners made no charge of interest: (without assigning any reason:) and, no exception being taken to their report, the County Court decreed accordingly. The Chancellor reversed that decree, and allowed interest against the executors. But this Court reversed his decree, and affirmed that of the County Court: declaring, in the decree of affirmance, "that

(a) 2 Wash. 7.

(b) *Vid. Burnley v. Lambert*, 1 Wash. 812.

587 hire of negroes, I cannot *conceive it to be improper on general principles. Negroes are generally hired, taking bonds payable at the end of the year; which bonds carry interest, if the money be not paid; and "it is natural justice that he who has the use of another's money should pay interest for it." (a) I should therefore be of opinion to affirm the decree in omnibus, except (the executors having, perhaps, parted with the estate) to correct it so as to make the property liable in the hands of the legatees.

JUDGE FLEMING. With respect to the principal point in controversy, to wit, the invalidity of the deed from Howell to Clanton, I have no doubt, for the reasons stated in both decrees of the Courts. 1. The extreme weakness of intellect and want of capacity in Howell, (though not a perfect idiot,) manifested by the depositions of a number of witnesses, who were acquainted with him from his early infancy, and, particularly, the rejection of the first deed (offered to be recorded in Sussex Court) from the magistrates' personal knowledge of the imbecility of Howell's mind; 2. The consequent undue influence Clanton had over him, which appears through the whole course of the transactions; and especially in his prevailing on him to join in the absolute sales of the land to Milner and Micajah Hines, in October, 1786; when a principal and most important covenant in the deed of 1783 was, "that in case the said William Howell should thereafter intermarry, that the said estate above conveyed, as well land as slaves, with the increase of the said slaves (if any) should revert unto the said William Howell and his wife, during their joint and several lives," &c. And, if such an event had taken place, after the sales in 1786, he would not have had a hovel to shelter his wife from the inclemency of the weather; 3. The inadequate considerations in the deed; besides Clanton's subsequent harsh and ungenerous treatment of Howell, very different

588 from what was *stated as a consideration therein. It was, however, contended by the appellants' counsel, in the argument, that that circumstance, if true, ought to have no influence with the Court: but, to me, it appears a circumstance among many others, to shew that the principal object of Clanton was to secure to himself the estate, and, after he had effected his purpose, he cared very little what became of Howell himself; which, in a case like this, has, I confess, considerable weight with me.

But it appears to me that the decree is erroneous in allowing interest on the hire of the slaves; and, on that ground, the decree in the case of Dilliard v. Tomlinson was lately reversed in part, by this Court: and the reasons for disallowing the interest in the case before us appear much stronger than in that case. Here the slaves

came to the possession of infants under the will of their father, John Clanton, upon the marriage of his widow Sally Clanton with the appellant Whitehorn, several years (but how long doth not appear) before the commencement of this suit; and, though I am of opinion that those who have had the benefit of the negroes' labour, ought to pay a reasonable hire for them, they ought, according to precedents of this Court, and especially in this particular case, to be exonerated from the payment of interest, as it does not appear that the negroes were ever actually hired out; and the contrary is to be presumed; but the Commissioners justly thought proper to charge a reasonable hire for their labour in the possession of the legatees, under John Clanton's will.

I have, also, a doubt with respect to the correctness of the decree in ordering that the executors of John Clanton do, out of his assets in their hands to be administered, pay to the complainants the sum reported to be due for hire of slaves, &c.

It appears by the record that John Clanton, who died before the 2d of September, 1790, appointed two executors who qualified, and that the survivor of them (Michael Bailey) died, and made the defendants Benjamin Wyche and James C. Bailey, his executors; who, in their answer, say, that their testator, the surviving executor of John Clanton, had, previous to his death, fully closed and returned to Sussex Court a statement of his executorial accounts, and conceive that the complainants have no cause of complaint against them; they being entirely ignorant of any fraud or iniquity, and pray to be dismissed with their costs, &c.

589 *As it appears also, from this answer, that no part of John Clanton's estate ever came to their hands, their testator, as surviving executor of Clanton, having closed and returned his executors' account to Sussex Court many years before the commencement of this suit, can it with propriety be said that they have in their hands any assets of John Clanton unadministered to pay the sum of money decreed to the complainants?

It seems to me, therefore, that an account ought to be taken, and that the legatees of John Clanton pay their ratable proportion of the money due, for hire of negroes, and on the sales of the land, with interest at 5 per centum per annum, on the latter from the death of William Howell to the time of payment.

The following was entered as the decree of the Court. "A majority of this Court is of opinion, that the said decree of the Superior Court of Chancery is erroneous in affirming the decree aforesaid of the said County Court, whereby it was adjudged and ordered that the appellants, executors of the said John Clanton, deceased, out of his assets in their hands to be administered, should pay to the appellees the sum of 772l. 17s. 11d. 1-2 it appearing by the report of certain Commissioners appointed by a decretal order of the said County Court of Sussex, made the 4th day of February, 1803, to make up and state an account to the Court of the reasonable hire

the report, so far as it related to the interest claimed against the appellants, was of a nature to be affected by extraneous testimony, and, not being objected to, was conclusive between the parties."—
Note in Original Edition.

(a) 2 Call, 102, Jones v. Williams.

of the slaves, named in a deed in the proceedings mentioned from the death of the said William Howell to the time of their report, that the sum of 103l. 1s. 2d. 3-4 part of the said sum of 772l. 17s. 11d. 1-2 reported by the said Commissioners to be due from the appellants to the appellees, was charged for interest on the hire of the said slaves from the 1st day of January, 1791, until the 1st day of October, 1804; which said report was approved and established in the whole by the said County Court. Therefore it is decreed and ordered, that the decree aforesaid of the said Superior Court of Chancery be reversed and annulled; and that the appellees, administrators of the said William Howell, out of his goods and chattels in their hands to be administered, if so much thereof they have, pay to the appellants their costs in this Court. And this Court proceeding to make such decree as the said Superior Court of Chancery ought to have rendered; it is decreed and ordered that the decree aforesaid of the said County Court 590 be reversed "and annulled;" "and that the appellees, administrators of the said William Howell, out of his goods and chattels in their hands to be administered, of so much thereof they have, pay to the appellants their costs in prosecuting their appeal in the said Superior Court of Chancery. And it is further decreed and ordered that the appellants, in whose possession the slaves in the bill mentioned are, do deliver the said slaves and their increase to the appellees. And, it appearing to this Court by the answers of the defendants Benjamin Wyche and James C. Bailey, executors of Michael Bailey, deceased, who was the surviving executor of the said John Clanton, deceased, that their testator had, previous to his death, fully closed and returned to Sussex Court a statement of his executorial accounts, (which answers, not having been denied nor replied to, must be taken as true,) it is therefore presumed that the said defendants, executors of the surviving executor of the said John Clanton, deceased, can have none of his assets in their hands to be administered. It is therefore further decreed and ordered, that an account be taken of the legacies bequeathed to the other defendants by the last will of the said John Clanton, deceased, and that the said legatees pay to the appellees their respective ratable proportion of the balance of the said 772l. 17s. 11d., 1-2, after deducting the said sum of 103l. 1s. 2d. 3-4 charged in the Commissioners' said report for interest on the money due for the hire of the slaves. And the cause is remanded to the said Superior Court of Chancery for further proceedings to be had therein, agreeably to the principles of this decree."

Greenhow, Principal Agent of the Mutual Assurance Society, v. Barton.

Argued at March Term, 1810.

1. Mutual Assurance Society—Sale of Property Declared for—Liability of Purchaser.*—Quære, whether the

*Mutual Assurance Societies—Lien of—Liability of Purchaser.—By the statutes relative to the Mutual Assurance Society against fires on buildings,

purchaser of property, for which a declaration, in the Mutual Assurance Society against fire, has been made by the vendor, be liable for the premium; no policy of insurance having issued, and no notice, of such declaration, given, until after payment of the purchase-money? And, if he be liable, is the proper remedy against him by motion in a summary way, or by action at common law?

2. Same—Same—Same.—Quære, also, is the property declared for liable, in the possession of the purchaser, who bought, and paid for it, without notice of such declaration.

A motion was made in the County Court of Spottsylvania against Seth Barton, on behalf of William Price, Cashier of 591 the "Mutual Assurance Society, against fire on buildings of the State of Virginia," and judgment rendered for 117 dollars and 47 cents, for premiums under a declaration of insurance made by John James Maund, (for whom the property declared for was purchased by the said Barton,) with lawful interest, from the date of the declaration, until payment, and costs.

At the trial in the County Court, a bill of exceptions was signed and sealed, which stated that, "it appearing that John James Maund had made a regular declaration, and then sold to Barton, and that no policy had issued, the Counsel for the defendant moved the Court that no judgment should be entered, inasmuch as the plaintiff did not prove a notice from John James Maund to Barton, until the purchase-money had been paid; but the court overruled this motion, and gave judgment for the plaintiff."

From this judgment Barton appealed to the District Court holden at Fredericksburg, where it was reversed, and judgment

and the constitution and rules of the society. the society has a lien on property insured, for all quotas called for under the original act of incorporation of 1794, and for additional premiums upon revaluation and reinsurance under the act of 1806, and for all contributions required under the act of 1809 or 1819; and this lien attaches to, and follows, the property in the hands of a subsequent bona fide purchaser without notice of the lien or of the insurance. *Mut. Assurance Soc. v. Stone*, 8 Leigh 218.

Upon plea of purchaser without notice, if the purchaser has paid the whole purchase money, though he has not got a conveyance of the legal estate, yet if he has acquired the preferable right to call for the legal estate, he is a complete purchaser entitled to avail himself of this defense. *TUCKER, P.*, in *Mut. Assurance Soc. v. Stone*, 8 Leigh 218, citing the principal case at p. 232. *JUDGE TUCKER* said: "In *Greenhow v. Barton* (1 *Munf.* 590). *JUDGES FLEMING and ROANE*, though differing in the judgment they gave, seem to have agreed in the opinion, that until the payment of the premium the insurance was incomplete, and the property was not bound in the hands of the purchaser." The principal case is also cited by *JUDGE TUCKER* at pp. 233, 237. The principal case was also cited and distinguished in *Shirley v. Mut. Assurance Soc.*, 2 Rob. 708; *Stratton v. Mut. Assurance Soc.*, 6 Rand. 25.

See generally, monographic notes on "Insurance, Fire and Marine" appended to *Mutual, etc.*, Soc. v. *Holt*, 29 Gratt. 612.

entered for the defendant. An appeal was thereupon taken to this court, and (Price the Cashier having afterwards departed this life) was revived in the name of Samuel Greenhow his successor.

Randolph, for the appellant, insisted, 1. That, although no policy had been executed, the premiums on the declaration would have been recoverable, on motion, against Maund.(a)

2. That Barton, the purchaser from him, was equally liable for such premiums,(b) and equally subject for the summary remedy by motion;(c) and

3. That it was not incumbent on the society to prove that Maund gave Barton notice of the declaration of insurance.

Nicholas, for the appellee, did not controvert the first of these positions; but contended that Barton, the purchaser, (not having received notice before he paid the purchase-money, and no policy having issued,) was not liable for the premiums; and that John James Maund alone was.

Wednesday, April 18. The JUDGES ROANE and FLEMING (JUDGE TUCKER not sitting in the cause) pronounced their opinions.

592 *JUDGE ROANE, after stating the case. It is not necessary, in this case, to inquire, whether a judgment for the premiums could not have been legally obtained against Maund, personally, by motion or otherwise; nor whether the land in question could not be made liable in the hands of the appellee, for the sum recovered; nor even whether the appellee himself is, or is not liable personally therefor, if proceeded against by a regular suit at law, or bill in equity: nor is it necessary to inquire, whether if a remedy by motion had been given against the purchaser from a subscriber, it would have been a good defence against that motion, that the Society had not given the notice to the purchaser which is made the ground of the defendant's objection in the County Court. In the actual case before us, a plainer and broader question arrests us at the threshold; and that is, whether a summary judgment can be rendered against the purchaser from a subscriber, for a premium upon property which, although declared for, is not insured by reason that the said premium has not been paid? The 8th sect. of the act of 1794,(d) relating to the liability of purchasers and mortgagees, is undoubtedly confined to cases of property, the insurance of which has been perfected, by the payment of the premiums. The term "subscriber" mentioned in the latter part thereof, must be construed to mean "member;" both because the property, which the section was contemplating in the first part thereof, is "property insured by virtue of the act," (which is not the case of property merely declared for;) because this same idea is kept up by the part of the section which makes it incumbent on the person transferring, to apprise the purchaser of the assurance, and endorse to him or them the policy thereof; and because, in the last

part of the said section, the property is declared to be liable for "the quotas," (and not the premiums,) and therefore is to be confined to cases in which quotas only are due, or in other words, to cases in which policies have issued. The same, or a correspondent interpretation must be given to the term "subscribers" mentioned in the 6th section; which section, also, (upon the whole context thereof,) relates only to property of which the assurance has been perfected. With respect to the 10th section, it relates expressly, it is true, to "subscribers" (i. e. such as have not paid their premiums), and makes them and their property liable for the payment of such premiums; but there it stops: it

593 neither gives a "remedy by motion against such subscribers, or gives any remedy at all against the purchasers from such subscribers. These two essential ingredients are not to be found in this act, nor in any other act, that I have been able to discover; however the general liability of purchasers may stand, on grounds dehors the particular acts of our Legislature. With respect to this remedy by motion, it was first given to the fire company by the act of 1799, c. 30.(e) The preamble thereof states the justice and expediency of giving an immediate recovery against "delinquent subscribers or members;" and the enacting clause is only commensurate therewith, and does not go further: this remedy is not given by that act, or any other, against those who claim under subscribers, by purchase, or otherwise. The testimony of this Court has been often emphatically borne against the extension of summary remedies. In the case of Asberry v. Calloway, (f) it was held, that an act of Assembly directing judgment to be rendered for the principal sum, with which a Sheriff was chargeable, and the damages, and not for the penalty, to be discharged by such payment, ought "to be strictly pursued; on the ground of being a new remedy contrary to the course of the common law;" although it is not easy to be discerned that the defendant could have been injured by the deviation, and, if not so injured, would not (in other cases) have been entitled to succeed upon an appeal, under the decisions of this Court; and, in the case of Anderson v. Bernard,(g) the Court was divided on the question, whether a Sheriff could justify making a distress on account of fees due to "A. C. deputy clerk," on the ground that the law only allows distresses for fees due to Clerks. Various other instances might be added to the catalogue; but I presume it requires no further proof to shew that a man is not to be ousted of his ordinary and constitutional mode of trial, unless (at least) it be by an express legislative declaration, or by a constructive declaration so strong as to leave no doubt of the meaning of the legislature, that another remedy should be substituted. On this ground, I am of opinion, that the judgment of the District Court reversing that of the County Court is correct, and should be affirmed.

(a) Acts of 1794, c. 26, s. 10, and Acts of 1799, c. 30, s. 1.

(b) Acts of 1794, c. 30, s. 8.

(c) Acts of 1799, c. 30, s. 1.

(d) 2 Rev. Code, App. (No. VII.) p. 76.

(e) 2 Rev. Code, App. (No. VII.) p. 78.

(f) 1 Wash. 74.

(g) 1 Wash. 177.

JUDGE FLEMING. Two questions were made by the appellant's counsel in this case. First, whether Maund would 594 have *been liable, and subject to a judgment on motion, had the transfer not been made? and, if so, secondly, whether Barton, who purchased from him, be not equally liable?

As to the first point, whether Maund would have been liable, and subject to a judgment on motion, it seems admitted by the appellee's counsel, as being too clear to be controverted. With respect to the second point, whether the appellee be equally liable, it requires more consideration. Let us recur, first, to the act of Assembly, passed in December, 1794, establishing the Mutual Assurance Society, and a subsequent act of 1799; and, secondly, to the objections stated in the bill of exceptions, taken at the trial in the County Court of Spottsylvania.

By the 8th section of the act of 1794, "subscribers selling, mortgaging, or otherwise transferring such property, shall, at the time, apprise the purchaser or mortgagee of such assurance, and endorse to him or them the policy thereof; and, in every case of such change, the purchaser or mortgagee shall be considered as a subscriber, in the room of the original; and the property so sold, mortgaged, or otherwise transferred, shall still remain liable for payment of the quotas, in the same manner as if the right thereof had remained in the original owner."

By the 10th section, "the subscribers, in default of paying the premiums, at the time fixed therefor, shall, on the request of the cashier, be compelled to pay the same, with six per cent. interest thereon, to the day of payment," &c. By the 8th section, "in every case of such change," (that is, by sale, mortgage, or other transfer,) "the purchaser or mortgagee shall be considered as a subscriber, in the room of the original;" and, in my conception, subject to all regulations, judgments and penalties, that the original subscriber would have been subject to, had such change or transfer never been made: otherwise, the frequent sales, or transfers of assured property would greatly tend to abolish the institution altogether.

The act of January, 1799, gives to the society power to recover, on motion, the whole, or any part, of such premiums or quotas, of delinquent subscribers, "saving the trial by Jury, if required;" and, under the 8th section of the act of 1794, I consider Barton a subscriber so far as respects the premium; but, no policy having ever issued, he is no farther liable. And 595 he *had an option to be tried by a Jury, but declined it; and therefore had no cause to complain of the summary proceeding.

Let us next consider the objections stated in the bill of exceptions, taken at the trial in the County Court. First, that no policy had ever issued on the declaration, or subscription of Maund. And, secondly, that the plaintiff did not prove a notice from Maund to Barton, who purchased the property of him, until the purchase-money for the same had been paid.

The reason why no policy had issued to Maund was, that he had never paid the premium on which the policy should have issued; and therefore was not entitled to one; and that premium, still in arrear, is the subject of this controversy. The want of a policy, then, (by no means imputable to the society) cannot, in my conception, affect the merits of this case.

The circumstance, however, of the assurance being incomplete, exempts the property from being bound for the quota; but does not, I conceive, exempt the appellee from being personally responsible for the premium. "But," says the bill of exceptions, "there was no proof of notice from Maund to Barton, at the time of the purchase, nor until the purchase-money had been paid." And the counsel relied on the general principles of law, equity, and fair dealing, respecting the subject of notice; but general principles do not apply to the case before us. Neither law, equity, nor fair dealing, requires that to be done, which, from the nature of things, is impossible. The plaintiff, in Spottsylvania Court, was required to prove a notice from Maund to Barton, at the time of the transfer, when it was impossible that he, or the society, whose agent he was, could have any knowledge of the transaction between them. And such transfers frequently take place at the distance of some hundreds of miles from the office of the society. The law requires, indeed, that the seller of insured property shall, at the time of the transfer, apprise the purchaser of such assurance, &c. "to the end," says the preamble of the clause, "that purchasers of property insured by the act, may not be losers thereby," which is a matter merely between the seller and purchaser; and if Maund, in the case before us, failed so to apprise the purchaser, the society should not be responsible for, nor injured by, the neglect: but the appellee must have recourse to the representatives of Maund for redress of any injury he may sustain in consequence of the omission.

596 *On these grounds, I am of opinion that the judgment of the District Court ought to be reversed, and that of the County Court affirmed. But the Court being divided, the latter judgment must be affirmed.

Smith v. Ambler and Others.

Smith and Weaver v. The Same.

Tuesday, May 29, 1810.

1. **Landlord and Tenant*—Replevin Bond—Motion on by Landlord.**—A landlord is not entitled to the summary remedy by motion, on a three months' replevin bond: unless it appear that such bond was taken by a Sheriff, or other officer legally authorized to make distress, and to sell the distrained effects.

2. **Same*—Distress—Sale of Distrained Effects.**—A landlord, in person, or by a private agent, may levy a distress; but cannot sell the distrained effects, which, in such case, are only to be held as a pledge, to compel the tenant to pay the rent.

***Landlord and Tenant.**—On this subject, see monographic *note* on "Landlord and Tenant" appended to *Mason v. Mayers*, 2 Rob. 606.

These two cases were argued and decided together. In each a judgment was obtained on motion, (the parties being heard by their attorneys,) in the County Court of Fauquier, on a three months' replevin bond, dated the 3d of May, 1804; the condition of which recited, that, "whereas Ambler and others, heirs and devisees of John H. Norton, had distrained upon the goods and chattels of the above bound (Augustine Smith, in one instance, and James Smith in the other) for rent in arrear and due on the land of Effingham-forest, in the County of Fauquier, amounting to the sum of 63l. 16s. 4d. 1-2, in one instance, and 58l. 15s. 10d. 1-2, in the other) including all costs to this date, which said goods and chattels have been again restored to the said Smith in consequence of entering into this bond," &c.; without stating, in any part of either bond, that the same was taken by a Sheriff or other officer. Both bonds were witnessed by "James Edmunds, D. S."

The judgments in question were affirmed by the District Court holden at Haymarket; and writs of supersedeas to both were awarded by a Judge of this court.

The petition for the supersedeas assigned three errors in each case; 1. That it did not appear by the replevin bond what was the amount of rent due for which the distress was made;

2. That it did not appear, from any thing shewn by the proceedings, what were the costs charged by the persons levying the said distress, which are said to be included in the condition of the said bond; and,

3. Because it appears by the condition of the replevin bond that the said distress was made by the obligees, to whom
597 the *rent was payable, in person, and not by any officer who could have been authorized to make sale of the property distrained.

Botts, for the plaintiffs in error, did not waive the two first points, but pressed the third, as sufficient to reverse the judgments.

Call, contra. The act of Assembly, (a) it is true, speaks only of the "Sheriff or other officer serving the distress;" though by the common law, distress might actually be made by the landlord himself; and the constant practice is for him to give a warrant of distress. But that is no question in the present cases. The defendants made no objection on that ground, so as to enable the plaintiffs to shew that, in fact, the distresses were served by an officer. The court will intend that all the requisites of the law were complied with, since the contrary does not appear; especially when it appears that the general tenor of the law has been followed. On the same principle this Court affirmed a judgment on a forthcoming bond, in which no security had been given. (b)

Wickham, in reply. As I understand the law, though the landlord may distrain in person, he must, in that case, proceed according to the course of the common law. He must hold the property as a pledge, to compel the tenant to pay the rent; but he cannot sell. If he proceeds under the statute, he must employ an officer. The tenant has one advantage, he may gain time: the

landlord has another, the property may be sold. The case of a forthcoming bond (referred to by Mr. Call) is not analogous to this. The granting the debtor indulgence, without requiring security, was a benefit to him; and no man shall be permitted to object to that which is for his own benefit.

I have no doubt but these are good bonds at common law, and actions may be maintained upon them. Suppose no statute had been made; and the tenants had offered security for the money on being indulged three months; the landlord, I apprehend, might have accepted the bonds, and recovered upon them. But he cannot resort to the summary remedy by motion,
598 without *strictly complying with the terms of the statute which gives that remedy.

Wednesday, May 30. The Judges pronounced their opinions.

JUDGE TUCKER. This appeal is from a judgment on a replevin bond taken to replevy goods distrained for rent.

The condition of the bond recites, that the appellees (not saying by a Sheriff or other officer) had distrained the goods, &c. of the appellant, A. S. for rent in arrear, which had been restored to him in consequence of entering into that bond. There is the name of a witness to the bond, who does not designate himself as an officer; nor is there in the record any thing to shew that the distress was in fact levied by an officer. The County Court gave judgment by the obligees, on motion: that judgment was affirmed by the District Court.

The right of distraining for rent arrear is a common law right, which every landlord may exercise in person, or by his bailiff; that is, by an agent, authorized for that purpose, who might seize any goods or chattels of the tenant found upon the premises. But the distress so taken was, by the common law, only in nature of a security for the rent, and could not be sold to make satisfaction. This proving a great inconvenience to landlords, statutory remedies have been provided, both in England and in this country; which are nearly the same. Our law declares, that "where any goods or chattels are distrained for rent, if the tenant shall not, within ten days, replevy the same, by sufficient security given to the Sheriff or officer serving such distress, to pay the money, &c. such Sheriff or officer shall and may sell the goods," &c.

In the case of *Ferguson v. Moore*, (c) Judge Lyons, in delivering the opinion of the Court, said, "It is true that at common law a distress might be levied by any private person, authorized by the landlord for that purpose; but it is equally true, that such person, so appointed, had no right to sell the property distrained, or to take a replevy bond." The power of selling is given by statute, and can only be done by an officer; that is, one duly qualified as such. Now, here, it does not appear that this distress was served, or the bond taken, by an officer. We must, therefore, understand it (as the bond seems to import) to
599 have been levied *by the landlord himself, or his private agent. To entitle him to the benefit of a statutory proceeding

(a) 1 Rev. Code, p. 153, c. 80, s. 1.

(b) 3 Call, 18, *Washington v. Smith*.

(c) 2 Wash. 57, 58.

by motion, instead of an action of debt, the plaintiff ought to have shewn that he had proceeded regularly according to the directions of the statute. That not being the case, the judgment is erroneous, and ought to be reversed.

The acceptance of a bond for rent (unless taken as the act directs) does not extinguish the rent; for that is higher than the bond; and, where the tenant gave a note for the rent, and the landlord afterwards distrained for the rent, upon trespass brought by the tenant, it was held that the landlord might nevertheless distrain. Our act of 1748, c. 10, (a) declared, that bonds taken pursuant thereto should have the force of judgments; which shews the great difference the law intended to make between a bond taken by a private person, and one taken by an officer pursuant to the statute. (b)

JUDGE ROANE. It ought to appear in the bond, in order to justify this summary remedy by motion, that it was taken by a Sheriff, or officer making the distress, in whom confidence is reposed by the act, touching the amount of the money, or tobacco, and the costs due, for which the bond is to be taken, as well as respecting the sufficiency of the surety to the bond. Where it does not appear to have been the act of the officer, the party himself may have exacted bond for more than was due, or been otherwise guilty of duress or extortion: in which case he ought not to have the high privilege of getting judgment in a summary way, and the further privilege that on the execution of his judgment, "no security is to be taken." I will hold the party to a strict, if not literal, compliance of the law, (and that as appearing to this Court,) before I extend to him the privilege of the summary remedy.

The case of *Ferguson v. Moore* (c) is supposed to be an authority, that a bond taken under the act in order to warrant a judgment by motion, ought to be taken by an officer.

My opinion, therefore, is, that the judgment be reversed.

JUDGE FLEMING was of the same opinion.

600 *By the whole Court, the judgments of the District Court and County Court both reversed, and the motions overruled with costs.

Moon v. Campbell, Executor of M'Donald.

Wednesday, April 18, 1810.

1. Evidence—Witnesses—Competency.*—A vendor of land according to certain lines must be presumed interested, and therefore incompetent as a witness, to establish those lines, unless it appear that he did not warrant the title.
2. Chancery Practice—Execution of Release—Parties.—In a Court of Equity, a plaintiff may be decreed to execute a release, and to procure a third person

*See monographic note on "Witnesses" appended to *Clalborne v. Parrish*, 3 Wash. 146; monographic note on "Evidence" appended to *Lee v. Tapscott*, 3 Wash. 276.

(a) Edit. of 1769, p. 202.

(b) See Bull. N. P. 182.

(c) 3 Wash. 54.

(under whom he claims) to join him therein: without making such person a party to the suit.

This case was argued by Hay, for the appellant, and Wickham, for the appellee; being an appeal from a decree of the Superior Court of Chancery for the Staunton District, by which a decree of the County Court of Berkeley was reversed.

The only point of importance was, whether Magnus Tate, who had sold the land in controversy to M'Donald, the plaintiff in equity, was a competent witness in his favour to establish the lines by which he had purchased from Tate, as the plaintiff himself alleged in his bill. The deed from Tate to M'Donald did not appear in the record; nor was it stated whether it contained a clause of warranty or not. Wickham contended, that the party attempting to impugn the competency of the witness, ought to prove that he warranted the land according to the lines in question. On the other side it was insisted, that *prima facie* the witness was incompetent; and that the burden of proof lay on the party who wished to avail himself of his testimony.

Saturday, May 12, 1810. The Judges delivered their opinions.

JUDGE TUCKER. This cause, which has been eight and twenty years nearly depending, had its origin in a tortious partition and sale of lands held in joint-tenancy between James Moon, of full age, and Jacob Moon, an infant under the age of twenty-one years, by the former, without the consent of the latter. The partition is alleged to have been made some time in the year 1755; and the metes and bounds are particularly set forth in the bill. In June, 1755, James Moon conveyed the part which he had allotted to himself, and which, by a survey made in the cause, is found to contain 504 acres, to Magnus Tate, by deeds of lease and release, leaving to his younger son brother 292 acres, as his "moiety of a tract which contained 796 in the whole. Tate in the year 1762 sold to Andrew M'Donald; by whom the original bill was brought, twenty years afterwards, against Jacob Moon, the younger brother, to compel him to confirm the partition so made, and to release all claim, &c. to that part of the whole tract, which is comprised within the lines above described. The grounds of equity stated in the bill are, that the partition was made by Henry Bowene, Jacob's guardian; and that when he came of age he (Jacob) pretended to call in question the justice of the decision, and threatened to compel another partition of the land; whereupon Magnus Tate (with the consent of James, the elder brother, who agreed that the same should be deducted out of the price of the land) agreed with Jacob, that he should release to him all claim which he might have to the before described land (stated to contain 337 1-2 acres, or an exact moiety of the lands as held by the patent) in consideration of 11l. current money, which Tate actually paid him.

The answer of Jacob Moon denies that H. Bowene was his guardian, or that any such division as in the bill is set forth was ever made with his (the respondent's) consent and approbation; and declares that he

believes James Moon made such a conveyance as in the bill mentioned to Magnus Tate; but expressly denies that he ever agreed to such a division, as in the bill is set forth; only so far as it went through the cleared land according to the line first run, which is now much altered, and greatly to his injury and disadvantage; that in consideration of his agreeing to what is in his answer set forth, he received the 11l.; and that he is, and always has been, ready to make a fair, just and equitable division, &c.

Magnus Tate (whose deposition, on account of apparent interest, was objected to be read at the hearing) deposes, that he purchased a tract of land from James Moon for 337 1-2 acres; being half of the tract held jointly between James and Jacob; and, having it divided before Jacob came of age, a dispute arose; Jacob alleging that James has laid off more upon the water than was his right; and that they agreed, after Jacob came of age, and James paid Jacob 11l. in consideration of confirming the line laid out by James for the deponent; whereupon a deed was made and executed by James to himself.

Benjamin Thornbury deposes nearly 602 to the same effect. Another *witness, James M'Donald, swears that Jacob Moon frequently shewed him the line, and observed it was the division line between himself and the witness's father, the complainant. These are all the witnesses on the part of the plaintiff. Two witnesses depose to conversations between James and Jacob Moon, which go to support that of the answer, which restrains Jacob's agreement to the line run, to that part which went through the cleared land.

I have already said, that the commencement of this dispute was founded in a tortious attempt by one joint-tenant, of full age, to sever the joint-tenancy by an unfair and unequal partition during the infancy of the other joint-tenant. The deeds, as set forth in the bill, import to convey an equal moiety by metes and bounds: and Magnus Tate's deposition is to the same effect.

The infant probably was deceived into a supposition that the line run did in fact divide the land into two equal parts; though his own observation, as far as the cleared land went, shewed him that his brother had taken to himself the far greater proportion of the most valuable land. His complaint was confined to that object, probably not knowing, or even suspecting, that his brother, instead of one half, had taken more than five eighths of the whole tract to his own share. There was either fraud, or palpable mistake on the part of James and Magnus Tate. There was evidently misrepresentation on their part to Jacob; since the deeds import to convey a moiety only. There was consequently mistake on the part of Jacob, induced by misrepresentation on the part of his brother, and of Tate. The complainant does not pretend that he was a purchaser without notice. He must therefore be presumed to have notice of all that he has stated in his bill. I think the answer clearly and fully supported by circumstances, as well as by the evidence of the two Browns. The objection to Magnus

Tate's deposition also appears to me to be well founded. For, if there was originally any fraud in the case, he can scarcely be presumed quite clear of it. At all events, his being both the purchaser and the seller of the lands creates a presumption, *prima facie*, that he is interested in the event of the suit. There is nothing in the record to countervail that presumption. I therefore think the Chancellor's decree erroneous, in reversing that of the County Court directing an equal partition of the lands to 603 be made; beginning at the point *A. in the plat returned by the surveyor, and pursuing the line A. B. as far as the same went through the cleared lands, at the time of the agreement made between James and Jacob, and, from that point, to the back line of the lands, along the dotted line B. E. in the plat, so as to divide the same into two equal moieties; assigning to the complainant the lands on the north, and to the defendant those on the south of that line; and that the remainder of the decree, as far as is consistent with such a division, be affirmed, and the cause sent back to be proceeded in accordingly.

JUDGE ROANE. It appears, as upon the face of the bill itself, that M. Tate was an incompetent witness, as he is therein said to have conveyed the land in controversy according to the lines claimed by the appellees, and was therefore interested to establish them. I do not know, however, that the result of my opinion on the case, would be varied, admitting his testimony to have its full weight: or, in other words whether his testimony may not be reconciled with the statement made in the answer (after a denial of the division as stated) and proved by other testimony, and be satisfied with considering the line to have been established only from A. to B., after James Moon came of age; and, being established up to that point only, as by the answer and testimony, it resulted that the partition line should be completed, so as to divide the tract into two equal parts, which is done by the dotted line B. E.

It may be very probable, independently of the testimony in the cause, that the line was actually run up to a certain point only, and an ideal line contemplated by the parties for the residue, so as to make an equal division: and this notwithstanding the payment of the 11l. to the appellant; which may have found its consideration in the superior value of the land (or the improvements thereon) contained on the other side of the line so far as the same was run. I therefore consider the decree of the County Court correct on the merits, and that so far as it decrees releases, it is a decree of mutual and simultaneous releases.* It 604 was not *necessary to make the representatives of James Moon parties in order to this end; nothing being more common than for one man to covenant that an-

*Note. The decree of the County Court was, "that the defendant execute a release to the plaintiff for the land to which said M'Donald claims title to the north of the said lines A. B. and B. E. containing one half the tract in the bill mentioned, amounting to 308 acres; and that the said M'Donald shall execute a release, and procure the said James Moon to join him in such release, to the defendant, for the land to the south of the division lines aforesaid."—Note in Original Edition.

other shall do a particular act, and for the Court of Chancery to decree that one man shall procure an act to be done by another, as the condition of the relief which is granted to him.

My opinion is, that the decree of the Chancellor be reversed, and that of the County Court affirmed.

JUDGE FLEMING. It appears from a survey and plat made under an order of the County Court of Berkeley, that the tract of land held by James and Jacob Moon in joint-tenancy, which is now the subject of controversy, contains 796 instead of 675 acres, the supposed quantity at the institution of this suit.

It appears from the evidence in the record, that James Moon, the elder brother, during the infancy of Jacob, the appellant, made a partial, and unequal division of the land; sold and conveyed his moiety to Magnus Tate; and (what seems very material) took an over proportion of the improvements, and most valuable land lying on Middlecreek; of which Jacob, when he came of age, complained, and threatened to compel another division of the land; and that he, for the consideration of eleven pounds, consented to the division made by his brother James; so far as it extended through the cleared lands; which is supposed to be from the letter A. to the letter B. in the said plat, but no farther.

The decree of the County Court of Berkeley, after the return of the survey and plat, rendered the 8th of May, 1798, ordered, "that the line from A. to B. and from B. to E. be established as the division line," which should give to each party 398, being a moiety of the whole tract of 796 acres; and directed an exchange of releases between the parties; which I am of opinion was perfectly correct. But this decree was reversed by the District Chancery Court of Staunton; which decreed and ordered, that the appellee (the appellant here) do release unto the appellant his right to the land north of the line A. B. mentioned in the said

transcript, and that the appellant release to the *appellee all the land south of the said line, &c. which would give to the present appellee 504 acres, and leave to the appellant 292 acres only. I therefore concur in the opinion that the decree of the Superior Court of Chancery ought to be reversed, and that of the County Court affirmed.

Glascok's Administratrix v. Dawson.

Wednesday, May 23, 1810.

1. Execution—Forthcoming Bond—Variance.—A writ of fieri facias against an administratrix, "to be levied, as to certain damages and costs, of the goods and chattels of her intestate, and as to other damages and costs of her own goods and chattels," was returned "executed on certain slaves the property of the administratrix, and a

***Execution—Forthcoming Bond—Variance.**—By a fieri facias, the sheriff is commanded to cause principal, interest and costs to be levied of the goods and chattels, of J. W. deceased, in the hands of S. H. his administrator, if so much thereof he hath, but if not, then out of the goods and chattels of S. H. There being no goods and chattels of J. W. in

forthcoming bond taken," &c. The bond being given by the administratrix, eo nomine, but expressing that the fi. fa. was against the goods and chattels of the said administratrix, was decided to be variant from the fi. fa. and therefore quashed.

2. Appellate Practice—Forthcoming Bond—Judgment by Default.—In reviewing a judgment by default on a forthcoming bond, the appellate Court will compare it with the execution on which it was taken.

John Dawson obtained a judgment in the County Court of Lancaster against Catharine Glascock, administratrix of George Glascock, deceased, for 130 dollars and 19 cents damages, and 49 dollars and 40 cents costs; which judgment was affirmed by the Northumberland District Court; the damages allowed for retarding the execution thereof by the appeal being 24 dollars and 10 cents, and 6 dollars and 87 cents costs. A writ of fieri facias issued, commanding the Sheriff that, of the goods and chattels of the decedent in the hands of the admin-

the hands of S. H., the sheriff levies the execution on the individual property of S. H. and takes a forthcoming bond, which recites the execution as being against the goods and chattels of S. H. administrator of J. W. deceased. There is no substantial variance between the execution and the recital thereof in the forthcoming bond. *Hairston v. Woods*, 9 Leigh 308. In this case, both BROCKENBROUGH, J., and TUCKER, P., distinguished the principal case, *TUCKER, P.*, saying (p. 310): "The case is not like *Glascok v. Dawson* (1 Munf. 605). There the administratrix was to be liable, in the event of there being no assets, for the damages and costs only; yet her own proper goods were seized for the whole debt. The bond was therefore properly quashed. Here, as there were no goods of the decedent, the defendant was liable for the whole: It was, therefore, unnecessary to preserve the distinction in the recital of the bond: nor was there any thing illegal in levying on his own proper goods for the whole, since the court would intend, even if it did not appear by the return, that the officer could find no goods of the intestate on which to levy."

For further information on this subject, see monographic note on "Executions" appended to *Paine, Surv., etc.*, v. Tutwiler, 27 Gratt. 440; monographic note on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107.

To the point that, where there is a material variance between a forthcoming bond and the execution upon which it is taken, the bond must be quashed, the principal case is cited in *Holt v. Lynch*, 18 W. Va. 571.

†**Appellate Practice—Forthcoming Bond—Judgment by Default.**—If there be a judgment by default on a forfeited forthcoming bond, the appellate court will regard the execution as a part of the record; but if there be a variance between it and the execution, the judgment will be reversed. When therefore there is a judgment by default, it is very proper to recite in it that the execution, as well as the bond, was produced and inspected by the court. *Central Land Co. v. Calhoun*, 16 W. Va. 373, 373, citing the principal case, and *Preston v. The Auditor*, 1 Call 471. To the same effect, the principal case is cited in *Couch v. Miller*, 2 Leigh 549; note to *Hill v. Harvey*, 2 Munf. 526; note to *Harrison v. Lane*, 4 Munf. 240.

See also, monographic note on "Appeal and Error" appended to *Hill v. Salem, etc.*, *Turnpike Co.*, 1 Rob. 233; monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

istratrix, he cause to be made the above-mentioned sums recovered in the County Court; and of her own goods and chattels the damages and costs adjudged in the District Court. The return on this execution was "executed on one negro woman and child, the property of the within named Catharine Glascock, and forthcoming bond taken," &c. The bond expressed that "Catharine Glascock, administratrix of George Glascock, deceased, and her security, were held and firmly bound, &c. in the penalty of 445 dollars and 50 cents; to which payment they bound themselves, their heirs, executors, &c. jointly and severally. Its condition recited that the writ of fieri facias had been sued out against the goods and chattels of Catharine Glascock, administratrix of George Glascock, deceased, for the sum of 211 dollars and 56 cents, together with the sum of 10 dollars and 59 cents for Sheriff's commission, and sixty-two cents for taking this bond, amounting in the whole to the sum of 222 dollars and 75 cents, which writ had been executed on a negro woman and child, (without saying to whom they belonged,) and the said Catharine Glascock, being desirous of keeping the said property in her possession till the day of sale, &c. hath given bond, &c.

A judgment was rendered on this bond in general terms, against Catharine Glascock, administratrix of George Glascock, 606 deceased, *but not expressing that any part thereof was to be satisfied out of the goods and chattels of the decedent in her hands to be administered, to which judgment a writ of supersedeas was awarded by a Judge of this Court.

Warden, for the plaintiff in error, made four points; 1. That the execution was erroneous in directing the damages and costs, incurred by the appeal to the District Court, to be levied of the goods and chattels of Catharine Glascock herself; 2. That it was improperly levied for the whole amount, on two slaves, the property of the said Catharine; 3. Because the Sheriff oppressively inserted in the condition of the forthcoming bond, not only his commission, but also a fee for taking the same bond; and, 4. Because it appears by computation that the condition of the forthcoming bond requires more money to be paid than is warranted by the execution independently of these two items.

Nicholas, contra. The judgment for damages and costs to be levied de bonis propriis is correct. The appeal was the individual act of the administratrix, for which therefore she ought herself to be charged, and not the estate of her intestate. (a) The case comes up on a judgment on a forthcoming bond; by entering into which she bound herself individually. If the property was not liable, she ought to have contested the right: but, by giving the bond, she is now estopped. (b)

The Sheriff's commissions were properly included in the bond. (c)

Friday, May 25. The Judges pronounced their opinions.

JUDGE TUCKER (after stating the case) observed: It is the duty of the Sheriff to pursue the directions contained in the execution. The execution commanded him to levy the damages on the goods and chattels of George Glascock, deceased: the forthcoming bond recites an execution as having issued against, and been levied on, the goods and chattels of Catharine Glascock, administratrix of George Glascock. There is a variance, then, between the execution and the forthcoming bond, which is fatal. (d) For the Sheriff might have levied an execution, on the goods and chattels of Catharine 607 Glascock, corresponding *with the description thereof in the forthcoming bond. The judgment therefore appears to me to be erroneous, and it ought to be reversed, and the forthcoming bond quashed.

JUDGE ROANE. This is a supersedeas to a judgment of the District Court upon a forthcoming bond. The judgment was for 445 dollars and 50 cents, the penalty of the forthcoming bond to be discharged by the payment of 222 dollars 75 cents, with interest from July 31, 1805, till paid, and the costs. The style of the judgment as headed in the record is against Catharine Glascock, administratrix of George Glascock, deceased. The bond on which the judgment was rendered is set out in the record, and states that Catharine Glascock, administratrix of George Glascock, deceased, (with a surety,) is bound to the appellee in the sum of 445 dollars and 50 cents; and the condition states, that whereas the appellee had sued out of the District Court "a writ of fieri facias against the goods and chattels of Catharine Glascock, administratrix of George Glascock, deceased, for the sum of 211 dollars and 56 cents, together with 10 dollars and 59 cents, for Sheriff's commissions, and 62 cents for taking this bond, amounting in the whole to 222 dollars and 75 cents, which has been executed by the Sheriff on a negro woman and child, (without saying whose, but the case of Lewis v. Thompson, 2 H. & M. 100, cures that omission,) and the said Catharine Glascock, being desirous of keeping the same in her possession till the day of sale, has tendered security, &c. The bond therefore agrees, with the judgment, both as to the penalty thereof, and the sum by which it is to be discharged.

Several objections, however, are taken to this judgment, by referring to the execution, which it is admitted may be properly looked into, under the decisions of this Court, in reviewing the judgment upon the bond.

In the first place it is said, that the bond shews that the goods taken were the goods of Catherine Glascock, in her own right, and not those held by her administratrix. If this objection were founded in fact, it might be fatal: but I conceive that it is not founded in fact. In the penal part of the bond she binds herself as administratrix of George Glascock, deceased; and, although the condition states that the execution issued against the goods of Catharine Glascock, yet it does not stop here, but adds, "administratrix of George Glascock, deceased." This annexation in the condition, taken

(a) Toller's Law of Executors, 336.

(b) Syme v. Montague, 4 H. & M. 180.

(c) 1 Rev. Code, c. 178, s. 11, p. 326.

(d) 1 Wash. 260, Hubbard v. Taylor; 2 Wash. 180, Downman v. Chinn.

608 in connection *with the description in the penal part of the bond is satisfactory to shew, that the goods directed by the execution to be taken, were those held by her as administratrix, and not her own proper goods. We need not require technical precision in such cases: it is enough that we can discern from the whole bond, taken together, that the property against which the execution issued, was the property liable thereto. In this case we cannot take them to have been Catharine Glascock's own proper chattels, without rejecting the annexed words "administratrix of George Glascock, deceased;" and I consider this as only an irregular mode of describing the goods of the intestate, in the hands of his administratrix: if, therefore, the case stopped here, I should have no hesitation to affirm the judgment.

But it is objected that this bond is illegal, and the judgment on it erroneous, in having included in the bond the fee of 62 cents for taking the same. I am inclined to think that the act of 1794(a) does not authorize the Sheriff to include in the forthcoming bond, the fee for taking the same, which would probably have been provided for, as well as the commissions, had the Legislature intended it: or, if they so intended, it is a casus omissus in the act. This being a summary proceeding, execution could only be awarded "for the money or tobacco mentioned in the execution" under the act of 1793,(b) and for the commissions, (in addition) under the aforesaid act of 1794. It cannot be said that this objection cannot be taken by the appellant, because it is beneficial for her: the same answer existed in case of the commissions, prior to the act of 1794; and yet it was held that the inserting them was erroneous. It might be equally argued in both cases, that it is favourable for a party to give him credit for a sum by including it in the bond, rather than compel it to be paid down.

(a) 1 Rev. Code, p. 826.
(b) Ibid. 298.

Again, this whole execution issuing against the goods of the intestate, as I have supposed, as aforesaid, the appellant in her character of administratrix objects that, by the execution, a part thereof, viz. the damages and costs on the appeal, were only leviable upon her proper estate, as appears by the execution. It is not for us in this case, to investigate that execution, in this particular: the judgment and execution is to be taken to be correct; and, being so, a departure from that execution in the respect in question is injurious to the estate of the appellant's intestate by levying more upon it than the judgment au-

609 thorized. *It is of no consequence that both rights happen to exist, in this case, in Catharine Glascock solely. The maxim "that, when two rights concur in the same person, they are to be considered as if they existed in different persons," seems in this case to apply; and I can give no other judgment in this case than I should if the persons were entirely distinct, or if other persons were associated with Catharine Glascock in her character of administratrix.

Again, the sum for which this judgment is given exceeds, in a small sum, (say 98 cents,) the "sum mentioned in the execution." I will not decide, at present, whether this single exception of a trifling error in calculation would be sufficient to overturn this judgment; but I am clearly of opinion that these three last objections taken together must have that effect.

JUDGE FLEMING. It is the unanimous opinion of the Court that the judgment is erroneous and to be reversed; and it is my opinion that the bond, not pursuing the judgment, must be quashed.

Judgment reversed, and bond quashed.*

*Note. In this case, the writ of fieri facias was made a part of the record without any plea or bill of exceptions: the judgment on the forthcoming bond being by default, on a notice proved by a witness, but not inserted in the record.—Note in Original Edition.

APPENDIX

JUDGE ROANE'S opinion in the case of Reed v. Reed.

The principal question arising out of this special verdict is, whether the lessors of the plaintiff, who were born in Ireland prior to the year 1770, and who did not become citizens of this Commonwealth, until after the descent of the lands in question, were, at the time of such descent, disabled to take and hold lands within this Commonwealth, and to bring any real or personal action concerning them. Such being the disabilities under which an alien labours by the common law, the question may be more succinctly stated to be, whether, in respect of the lands in question, the plaintiffs are to be regarded as aliens, or not.

I will consider this question.

1st. In relation to the doctrines of the common law of England, as handed down to us in the Reports and Treatises on the subject, with no other variation than what arises from the erection of a new government in Virginia in 1776.

2dly. I will inquire how far those doctrines are controlled or affected by the principles of the revolution, and the provisions of our constitutional and legislative acts.

And, 3dly. Whether any, and what, effects have been produced on this question, by the treaty of peace of 1783? The treaty of 1794 is entirely out of the question, as being subsequent to the commencement of the plaintiff's action.*

Under the first view, I will remark, that the terms "alien" and "alien born" are used synonymously in the English law books: for it being an established principle of the English law, that a subject born can never shake off his natural allegiance, (a) it follows that none are there considered aliens, but those who are born so.

The terms "alien" and "alien born," and "subject" or "citizen," are in their nature relative: and to what else can they have relation; what else is their correlative, but the sovereignty or government where the discussion is?

The question then in this case is, more particularly, whether or not the plaintiffs were, at the time of the descent cast, aliens, in respect of the Commonwealth of Virginia?

This idea is entirely borne out by the English cases themselves. In Calvin's case, (b) the question was, "whether the plaintiff, who was born in Scotland after the descent of the English crown to James I. was an alien born, and, consequently, disabled to hold any real or personal action for lands within the realm of England;" (c) but in the same case it was adjudged, that "whosoever is an alien born is so accounted by law in respect of the king;" (d) the question, therefore, in Calvin's Case was, more particularly, whether he were an alien born, or not, in respect of the King of England?

Am I not therefore correct in saying, that the present question is, whether the plaintiffs were aliens or not, in respect of the Commonwealth of Virginia?

An idea has sometimes been urged, that all those who are born subjects of the same common allegiance, can never be considered as aliens in relation to each other, (e) I admit the truth of this position in every case where the plaintiff can shew himself to be no alien to the sovereign where he sues; I deny the truth of it, in every other case: in other words, the relation which existed between the two

individuals is wholly an immaterial and foreign inquiry. I bottom this position upon Calvin's case itself. I have already said, from that case, that an alien born is so accounted, "in respect of the king," and I will now add from the same case, "that this appeareth by the pleadings so often before-re-
613 membered, that he must be extra *ligeantiam domini regis, without any mention making of the subject." (f) I might further add, from the said case, that "nec cœlum nec solum, sed ligeantia et obedientia," make the "subject." (g) If allegiance gives the criterion, must we not unavoidably have reference to the government, and decide whether or not this allegiance exists? Under the position now controverted, the universal plea in cases of alienage would be wholly improper; (and well established pleadings are good evidence of the law;) the inquiry would be called off, from the question of allegiance or not, to the question of a common birth between the ancestor and heir, and this absurd consequence would follow that a recovery might be had, in any country, by persons born in any other country and not naturalized in it, the plaintiff making out his case, in this latter respect; the same person might also sustain one action, and fall in another, in the same country, and at the same time, according as the person under whom he claims might, or might not, have been born under a common allegiance with him!!

In Calvin's case, (which I principally resort to because it contains the whole doctrine upon this subject,) a definition is given of an alien; and it is "that he is a subject that is born out of the allegiance of the king, and under the allegiance of another." (h) This definition presents to us the only criterion whereby to discern who an alien born is; I say an alien born, because in this country a citizen born may become an alien by expatriation; and even in England, a subject born may become an alien, by the act of the government, though not by his own act.

Much indeed is said, in Calvin's case, about the "time of the birth being the essence of a subject born," &c. (i) but it is evident that the time of the birth is no further material, than as explanatory of the principal question, viz. whether born within the allegiance of the king, or not? This principal question, therefore, may be regarded as the sole one upon the subject. It is further said, in that case, that "natural legitimation respecteth actual obedience to the sovereign at the time of the birth." (k) but this is still also referring to the same standard. It is here to be remarked, that the result in Calvin's case was, to discriminate between a Scotch antenatus and post natus, in respect of a legitimation in England; the time of the birth was, therefore, a very material ingredient of the principal question, and may be regarded as the turning point on which that question depended: it is no wonder, therefore, that, in a very long report and one containing an abundance of extrajudicial matter, the same idea may be exhibited perhaps in different points of view, and be sometimes so indistinctly expressed, as to cause some embarrassment.

In the same case it is adjudged, "that the usual and right pleading of an alien born doth truly and lively express and describe what he is, and that this pleading is both exclusive and inclusive, viz. extra ligeantiam domini regis, et infra ligeantiam alterius regis." (l) I can find no principle of the common law which will exempt a person against whom the above plea will truly apply, from being considered as an alien born; I say of the common law, because by the English statute of 29 Car. II. c. 6, an exception is made to this rule in a particular case, (m) and perhaps there may be other statutory exceptions. I hold it, therefore, to be a universal proposition, that, by the principles of the English law, no man can sustain a real action, unless he either shews that this plea is not true with regard to him; or that, being true, he forms an exception to it, by virtue of some statutory provision, or by

*Note by JUDGE ROANE. Since this opinion was delivered, the decision of the Supreme Court of the United States in the case of Dawson v. Godfrey, 4 Cranch, 321, has been rendered; from which it is inferred that the treaty of 1794 would be held not to apply. In that case the descent to a British antenata was in 1788; and yet the judgment of the Court was, that she was incapable of taking the lands descended; and this although the case of Lambert v. Payne, 3 Cranch, 97, in which this point was much relied on by counsel, was considered by the Court in forming its judgment upon the principal case, and indeed superseded another argument. See also note † post, p. 616.

(a) 1 Bl. 309, 1 Rep. 25, a.

(b) 7 Rep. 1.

(c) Ibid. 2, a.

(d) Ibid. 25, a.

(e) See Wythe's Rep. case of Farley v. Farley.

(f) 7 Rep. 25, a.

(g) Ibid. 6.

(h) 7 Rep. 16, a.

(i) Ibid. 18, b.

(k) 7 Rep. 27, a.

(l) 7 Rep. 16, b.

(m) 1 Bl. 372.

having, subsequently, to his birth and before the accruing of the action, become legitimated in the country where the action is instituted; or, unless his title to the land is preserved to him by treaty or otherwise, and the right of suing is preserved by necessary consequence.

Some supposed exceptions have been confidently stated from the English books, but I flatter myself I shall be able to shew that they all fall strictly within my position. I will now proceed to examine them.

And, first, great stress has been placed, on behalf of the plaintiffs, on a resolution in Calvin's case. (a) The resolution is as follows, viz. "And, as to the fourth, it is less than a dream of a shadow, or a shadow of a dream; for, as it hath been often said, natural legitimation respecteth actual obedience to the sovereign at the time of the birth; for as the antenati remain aliens as to the crown of England, because they were born when there were several kings of the several kingdoms, and the uniting of the kingdoms by descent subsequent cannot make him a subject to that crown to which he was an alien at the time of his birth; so albeit the kingdoms (which Almighty God divert, &c.) should by descent be divided and governed by several kings, yet it was resolved that all those who were born under one natural obedience while the realms were united under one sovereign, should remain natural born subjects and no aliens; for that naturalization due and vested by birthright cannot by any separation of the crowds be afterwards taken away, nor he that was by judgment of law a natural subject at the time of his birth, become an alien by such matter ex post facto; and in that case, upon such an accident, our postnatus may be ad fidem utriusque regis, as Bracton saith in the before remembered place, fol. 477—sicut." &c.

618 "An objection had been made in that case by the defendant, "that if postnati were legitimated in England, what inconvenience and confusion would follow, if the royal issue should fall, whereby the kingdoms might again be divided." (b) The Judges, taking up this supposed case, gave the answer to it which is above quoted. The objection having reference to a supposed inconvenience in England, the answer to it must be considered under the same restriction. The Judges are here of opinion that, in case of a dismemberment of the two kingdoms, and being governed by several kings, the postnatus would still remain legitimated in England. This supposed case, however, differs from the case before us in the following particulars: 1st. The Scotch postnatus, in that case, was born under the allegiance of the King of England; 2dly. This allegiance being, by the English decisions, perpetual, continues (as the king of England continues,) notwithstanding the postnatus may have fallen under a different power; 3dly. And consequently, he may truly be said to be, in the language of the case, ad fidem with respect to the King of England; and, 4thly. The general plea before stated will not exclude this postnatus; for it cannot be said of him that he was born without the allegiance of the King of England. But in the case before us, 1st. The plaintiffs were not born under the allegiance of this Commonwealth, nor had contracted such allegiance at the time of the descent in question; 2dly. There was, consequently, no existing allegiance due from them to it, even on the English principles; nor could they be truly said to be ad fidem with respect to it; and, 3dly. The general plea before stated would truly have applied to them, in both its members.

The above resolution it is also contended will go to sustain a claim, e converso, viz. by an English postnatus in Scotland, supposing the same common law to exist there, after the supposed dismemberment; and this view of the case, it is argued, has a strong analogy to the case before us. I have already said that this resolution should be considered with reference to England only: in relation to a discussion in Scotland, it was no case before the Court; it was wholly extrajudicial: but upon principle, I cannot see a difference. The English postnatus was as much born under the allegiance of the King of Scotland, as the Scotchman was under that of the King of England. The kingdom of Scotland was (before the act of union) wholly independent of that of England, and James's character of King of Scotland was not merged in that of King of England; after the supposed separation, a King of Scotland would still exist; there would be a continuation of the same government, and the allegiance due to the King of Scotland at the time of the birth, (before the separation,) would continue to that king after that event. It might truly be said of the English postnatus, suing in Scotland, that he

was born under the allegiance of the King of Scotland, and was ad fidem with respect to him; and the general plea before stated would not truly apply to him. The effect of this supposed dismemberment, therefore, would not be to destroy the tie of allegiance, by destroying the correlative of the subject, by establishing a different government on the ruins of that government to which the allegiance was due; but to transfer and continue to the persons of two kings that allegiance which before was due to one. I shall presently attempt to shew that, under the doctrines of those times, (as derived from a feudal origin,) it was no novelty for a subject to owe allegiance to two or more sovereigns. In this supposed case, therefore, quacunq; via, there would be, according to the English decisions, an existing allegiance due to the king, in either country, which would capacitate the plaintiff to sustain the action.

The supposed case of a dismemberment, therefore, (entirely extrajudicial and hypothetical as it is,) only proceeds upon the idea of a separation of the crowns, of a descent to several kings: it does not put the case of a destruction of the kingly government. It goes upon the idea of a continuation of the same government, though under different kings, and a consequent continuation of the original allegiance: it is entirely different, therefore, from the case of the destruction of the tie of allegiance, by the erection of a new and different government upon the ruins of the old. Every position to be found in the English cases of this era proceeds, at most, upon the former idea. The right of revolution, and erecting a new government, was not an admitted doctrine of the day: it was incompatible with the *jure divino* ideas which then prevailed. May we not, then, say with confidence, that the case now before us, had never entered the minds of the English Judges? And that their decision, even where general, shall not be applied to a case, in which the grounds and reasons of their actual decision fail us, and which those judges most certainly never contemplated?

These same ideas must be borne in mind, while we examine a quotation from Bracton, 427, which is also much relied on, on the part of the plaintiffs. That quotation says, "there are some Frenchmen in France ad fidem utriusque regis, and always were so both before and since the loss of Normandy, and who plead here and there because ad fidem utriusque regis." (c)

The Frenchmen here alluded to were Normans, born under the allegiance of the King of England, whilst he had possession of Normandy. It is here to be remarked, that the loss of Normandy which Bracton speaks of happened in the reign of King John, and in the year 1206. (d) and that Bracton 614 wrote in the reign of Henry III. (e) which reign began in the year 1216: so that this quotation evidently means those Normans born whilst Normandy was subject to England, very many of whom may be reasonably supposed to have been yet alive when Bracton wrote. Because they were born under the allegiance of the King of England they remained legitimated in England, by the English doctrines, even after the loss of Normandy, and were still considered as ad fidem with respect to the King of England: but they were also born under the allegiance of the King of France. Normandy was a fief holden under him: the King of England was, in respect of it, a vassal, and the King of France, his liege lord; and there are many instances to be found in the history of both nations, of the Kings of England doing homage to the French kings, in respect to their possessions holden upon the continent. By the feudal law, "allegiance, properly speaking, is due to the lord paramount or sovereign." (f) Under this idea, therefore, those Normans owed allegiance emphatically to the French king; and in consequence of this allegiance it was, that they were, by the principles of the common law, permitted to sue in France. In illustration of this position we find it resolved in Calvin's case, "that those who were born in Wales, before 12 Ed. I, whilst it was a distinct kingdom, were natural born subjects, (as to England,) because holden of England, or within the fee of the King of England." (g) These Welchmen, therefore, might as well as the Normans, sue in both countries; and for the same reason, viz. because, and only because, they owed allegiance to both sovereigns.

Whilst I am upon this subject of allegiance, I will beg to refer to 1 Hale's Pleas of the crown 58, et seq. who fully and elaborately proves, that there might be, and really were, in many instances, several al-

(c) 7 Co. 27, b.

(d) 2 Hume, 55.

(e) 7 Co. 20, b.

(f) 1 Bl. Comm. 367.

(g) 7 Co. 22, b.

(a) 7 Rep. 27, a.
(b) 7 Rep. 26, a.

legiances due from a subject to several sovereigns. Thus, in p. 66, he tells us, that when Hen. II. made his eldest son King of England, in his life-time, so that there was rex pater and rex filius, and when William King of Scotland had, at the same time, done homage to Henry the son, for his kingdom, saving the faith due to Henry the father, these several kings, though subordinate in respect of each other, were sovereign in respect of their subjects; and the subjects of Scotland owed an allegiance to their king, saving their faith to the Kings of England, father and son, and an allegiance to Henry the son, saving their faith due to Henry the father. (2) It follows that these Normans, referred to by Bracton, owed at their birth an allegiance to both kings, (viz. of England and France,) and this allegiance continuing during their lives, upon the principles of the English law, they could always be said to be, in the language of the case, *ad fidem utriusque regis*. Blackstone, in confirmation of this position of owing several allegiances, admits that a natural subject of one prince may, even by his own act, subject himself to another, though he may thereby bring himself into straits and difficulties. (b) Without inquiring into those difficulties, or differing the case of two several allegiances produced by the act of the party himself, this quotation is decisive to shew that, under the English doctrines, a natural born subject may owe allegiance to more sovereigns than one, even since the destruction of the feudal system.

Am I not correct, therefore, in accounting for all these supposed exceptions, by shewing that, in every instance, there was an existing allegiance due from the party suing, to the respective sovereigns?

I have said, and I repeat, that no position by any of the English Judges was predicated upon the idea of the erection of a new and different government. If there be any such, let it be produced. Are we not then to consider ours as a new case, not contemplated, nor provided for, by the English decisions? The reign of James I. was not an era when the Judges were independent enough to have dared, or would have been permitted (c) to argue upon the supposition of a destruction of the kingly government. That loyal and devout spirit which caused the Judges in Calvin's case, (27, a.) so much to deprecate a descent of the kingdom to several kings, that slavish devotion of the Judges to the will of King James, which, in relation even to this very case of Calvin, Hume remarks with censure, in more passages than one of his history, (d) while it goes far to destroy the authority of the decision, would not have permitted them, for a moment, to contemplate the idea of the erection of a popular government upon the ruins of a throne, deemed, in the mania of the times, to have been held by divine authority.

In the total absence, therefore, of a case of this kind, either actual or contemplated, in the English authorities, we must reason only from analogy.

It is held in *Cowp. Rep.* p. 208, "1st. That a country conquered by the British arms becomes a dominion of the king in right of his crown," &c. and, 2dly, "That the conquered inhabitants once received under the king's protection become subjects, and are universally to be considered in that light, and not as enemies or aliens;" and in 1 Bl. Com. 108, the reason of this privilege is given: it is, "that in order to put an end to hostilities, a compact is either expressly or tacitly made between the conqueror and conquered, that, if they will acknowledge the victor for their master, he will treat them in future as subjects, and not as enemies." Now nothing 615 "can be clearer than that, if the whole territory of the belligerent nation is not conquered, the inhabitants of the unconquered part continue to be, in respect of the sovereign of the part conquered, enemies and aliens; enemies during the war, and aliens after the peace. They do not become subjects of the conquering power and are not to be considered in that light; because they have not submitted to the conqueror, nor by any compact entitled themselves to the privileges of subjects; and yet they were once inheritable in the territory conquered, and can say as much as the present plaintiffs can say in respect of the territory of Virginia, viz. that, at the time of their birth, they were legitimated here. The people themselves who are conquered are legitimated by virtue of the implied compact only, and cannot claim such legitimation by the paramount title of having been, at the time of their birth, inheritable in that territory under another sovereign. If, then, the territory of Vir-

ginia had been conquered from Great Britain, in the ordinary way, by an existing sovereign, there is no doubt but that, upon the foregoing principles of the common law, the residuary subjects of the British empire, not residing here, nor contracting an allegiance to the conquering power, would have remained aliens, as to the sovereignty established here by such conquest. I confess I cannot see a difference between that case and ours: I see no difference in this respect between a change of the sovereignty of Virginia effected by an existing sovereign, and by a sovereign merely coeval with the change; and I should be sorry to be obliged to admit, that a people forming a government by compact, have not as ample power, both to confer rights upon the members of such compact, and to exclude the rest of the world from a participation of them, as a conqueror dictating at the point of the sword; nor can I agree that the natural (though silent) operation of a compact government is less efficacious, in either respect, than that which, as to these particulars, is produced by a conquest.

I conclude, therefore, that, according to the acknowledged doctrines of the English common law, all the beforementioned supposed exceptions are referrible to a principle which does not exist in our case: I mean that of a continuing and existing allegiance; that the case before us, of the erection of a different government, and the destruction of the ancient tie of allegiance, had never entered the minds of the English Judges, when they were so copiously, and so extrajudicially, (in Calvin's case,) dealing out their doctrines on this subject; that if it had, they could not have sustained the pretensions now set up by the plaintiffs in the present instance, without revolting against, and overthrowing, their own admitted principles; and that as far as we can judge by analogy, the principles of the English law authorize us to say that, in the actual case before us, an English court, itself, would render judgment in favour of the defendant.

This view of the subject supercedes the necessity of saying much on the second branch of my inquiry; namely, how far the English doctrines on this subject are controlled by the principles of the revolution, and the provisions of our constitutional and legislative acts. If the actual principles of the English law will suffice for the defendant in the case before us, that defendant holds a much stronger ground in this country, and in this Court, which must reject such of those principles as are heterogeneous to our republican institutions. All the English decisions upon this subject are bottomed upon three main principles, neither of which can be admitted in the case before us. They are, 1st. That allegiance is perpetual, and cannot be renounced by the subject: 2dly, A supposition of the continuation of the same sovereignty to which this perpetual allegiance was originally due; and, 3dly, The character of that allegiance, by the English law, is, that it is due to the person of the sovereign, and not to his political character. (e) As to the last position, we have, happily, no king, to whose sacred person this allegiance may be said to be due. It is the government only, which affords protection to the citizen, and to this government only, which is perpetually changing, as to the persons who administer it, though itself is permanent, the allegiance of the citizen is due. As to the second position, I need not repeat that the American people have erected a different as well as a new government. The first position requires more consideration.

The decisions by the English Courts at remote and arbitrary periods, and the municipal treaties of that country bottomed thereon, have denied the existence of a great natural right: I mean the right of expatriation. It is the character of the common law that it draws from various sources, is compounded of parts of various laws and codes, and refers to various arts and sciences. It is also a maxim of that law that "cullibet in sua arte credendum est;" and Lord Coke tells us, somewhere, that it is better "petere fontes quam sectari rivulos." Shall we not, under the sound sense of these maxims, correct the mistakes of a municipal code, touching a question of general law, by referring to the fountain from which itself has drawn? Shall we decide a question of natural right, and of general law, by referring to the most approved writers, and to the sense of the world, on that subject, or be governed by the particular municipal codes of a particular country? I believe, sir, that this position of the English judges has always stood condemned by the most enlightened writers upon natural law.

I mean not (as being unnecessary in the present 616 case) to investigate this point at this time; but I beg leave to refer to the new edition of Blackstone, (vol. 1. part 2. note K, p. 90,) where the editor has elaborately discussed the subject, and his conclusions seem fully to sustain my

(a) 1 Hale's P. C. 66.

(b) 1 Tucker's Bl. part 2d, p. 370.

(c) See 11 Co. Rep. passim, to prove this.

(d) See Hume's Hist. vol. 5, p. 664, and vol. 6, p. 160. See also in 4 Cranch, 210, other authorities cited to shake the decision in Calvin's case.

(e) 1 Tuck. Bl. part 2d, p. 371.

position. (a) I rather choose to refer to the sublime principles contained in the declaration of independence, and in the Virginia bill of rights, consecrating the right of expatriation; to the memorable assertion of that right by the American people, who, sword in hand, expatriated themselves from the government which tyrannized over them; to the limited and qualified adoption of the common law, as a part of our code; and to that dignified act of the Virginia legislature which prescribed the mode of effecting an expatriation, but did not presume to bestow the right. (b)

While these great authorities destroy some of the main pillars on which the English doctrines on this subject are founded, the Virginia legislature by several acts have declared who shall be deemed citizens, and who aliens. Under those acts, the plaintiffs, at the time of bringing the action in question, must have fallen into the latter class. It has been supposed by some that, inasmuch as the act of May, 1779, c. 55, after declaring who shall be deemed citizens, declares that all others shall be deemed aliens, and as in a subsequent act (October, 1783, c. 16), on the same subject, this latter declaration is omitted, that the last law is to receive a more enlarged construction in relation to aliens than the former. (c) These answers occur to me, however, to this position. 1st. As every man, according to the English doctrines, is either "an alien born or a subject born." (d) and, according to those doctrines, as here received, is either an alien or a citizen, it was perhaps a work of supererogation after declaring who, and who only, should be deemed citizens, to declare, also, who should be deemed aliens; and, 2dly. That position proves too much, for it would equally legitimate the subjects of all other countries in the world, as of England, whereas the same authority seems to think that the omission was produced by the intermediate conclusion of the treaty of peace between America and England. To say nothing of the absurdity of the legislature's doing away, in the gross, the disabilities of alienage, when, at the same time, it was granting in detail, the rights of citizenship, it is contrary to all fair deduction to infer a conclusion, which is very general and extensive, from a cause which is limited and particular.

Such is the construction which I deem myself obliged to adopt in the present instance. If the adherence of the British subjects to their own government, on the erection of our government in 1776, has thrown them into the class of aliens by election, a definition I think properly applied to them in the new edition of Blackstone. (see vol. 1, part 2, App. p. 102,) they stand on as good a footing as our own expatriated citizens. Subjects of foreign nations have no reason to complain at receiving the same measure as is dealt out to our own citizens, unless they have ulterior rights secured by treaty. Such a treaty would not be natural nor reasonable; but if such a one exists, it must probably have its effect. Whether there be any such treaty rights in the present instance, we shall presently inquire. These British subjects have, however, less pretensions to sue than our own expatriated citizens; for the latter can say (which the former cannot) that they were once under the allegiance of the Commonwealth of Virginia; nay, in some instances, that they were born under the allegiance of this Commonwealth. Why then shall we not consider these British subjects as expatriated, in respect of the Commonwealth of Virginia? expatriated, by having refused to yield to us their allegiance, and to unite their destiny with ours.

I have thus chosen to consider the pretensions of the antenati, or in other words, the common law doctrines of legitimization, somewhat at large; because those doctrines have been often pressed upon this court, particularly in the cases of *Fairfax v. The Commonwealth*, and have received countenance from the opinion just delivered.* In all the elaborate discussions which have taken place in this Court upon this subject, there has been heretofore no difference of opinion upon this point, as far as I have understood the Judges; and our late venerable President† (who did not sit in those causes) has informed me, since they were determined, that he entirely agreed in opinion with the Court upon this subject.‡ But for the foregoing considerations,

I might perhaps have saved myself this trouble, for it appears that both the treaty of peace and the treaty of 1794 have repudiated the pretensions of the antenati. (c) The latter treaty does not immediately apply to this case, being posterior to the judgment in question, and would not now be mentioned, but as corroborating and explaining the former.

That treaty abandons those pretensions by setting up a new criterion, viz. the actual holding of the property at the epoch of its date. In setting up this epoch, and establishing a new criterion in relation to British subjects, that treaty goes beyond the common law idea of antenati, which calls merely for the period of our separation from Britain; and by superadding the other requisite, (an actual holding at its date,) it also abridges the pretensions of such antenati, for all the residue of their lives, subsequent to the signature thereof. In thus enlarging and abridging the common law pretensions of the antenati, am I not correct in saying that the treaty of 1794 has set up an entirely new rule, and has abandoned those pretensions altogether? So, with respect to the treaty of peace, the case is precisely the same, if that treaty be considered as relating at all to the laws of alienage of the several states, and the epoch of its signature be resorted to as protecting from the operation of those laws rights accruing before that time; and this, perhaps, is the most that can be contended for. Whether the construction thereof be correct will presently be considered. At present I will remark that it is entirely incompatible with the before mentioned common law rights of antenati which are commensurate with the duration of their lives. Am I not, therefore, correct in saying that both these treatise have abandoned the pretensions of the antenati, and taken a new ground (whatever it may be) in favour of British subjects? If that ground of claim exists, therefore, in the case before us, it is not upon the foundation of either of the said treatise.

We come next to consider, somewhat more at large, the application and effect of the treaty of peace, in arresting the operation of the laws of alienage of the several states.

Under this head, I will consider, for the sake of greater perspicuity, the rights of British subjects, in a fourfold point of view. 1st. In relation to land actually holden by such subjects in this country, at the epoch of our separation, or declaration of independence; a right of this sort not existing in the present case, this topic will be but slightly and incidentally touched;

2dly. In relation to lands purchased by such subjects in this country, since the epoch last mentioned, and which, if they be aliens, enure to the Commonwealth by way of "forfeiture;"

3dly. In relation to such lands as since that epoch have descended to such subjects, and which, if they be aliens, enure by way of "escheat." Every thing said on those two points will apply, a fortiori, to the case now before us, being that of a descent cast, since the date of the treaty;

And, 4thly. In relation to the capacity of such subjects to sue for lands so holden, purchased, or descending, as the case may be.

In laying down these points, I must be permitted to cling, with equal pleasure and pertinacity, to the epoch of our declaration of independence, rather than that of the treaty of peace, as erecting us into an independent nation; as affording that precise point of time to which alone the treaty applies, (if it applies at all.) In arresting the laws of alienage of the several states, I must cling to this epoch, because the United States, on that day, for the many weighty reasons then declared, dissolved for ever the connection antecedently existing between us and Great Britain; because, in the emphatical language of the Virginia constitution, the many acts of misrule theretofore committed, by the British king, had dissolved his government over us; because the whole fabric of the old government was, in truth, annihilated and destroyed by that king's withdrawing his protection from us, and our abjuring allegiance to him; and because the British nation itself has conceded this point, by admitting in the treaty of peace, (Art. 1.) that it "treats with the United States as free, sovereign and independent states," and not as revolted subjects; thereby clearly relating, in that treaty, to the era of the declaration of independence. Away then with that absurd and slavish doctrine which would derive every thing from the recognition and bounty of the British king; would postpone, for near eight years, our title to rank among the independent nations of the earth; and degrade for the same period, all our laws and resolutions, to the level of usurped and

(a) See also Vattel, 170, § 230, 172, § 223.

(b) See Acts of Oct. 1783, c. 16.

(c) 2 Tuck. Bl. App. p. 62.

(d) 7 Co. 601.

*BY JUDGE TUCKER.

†JUDGE PENDLETON.

‡Since this opinion was delivered, this question has been decided in entire conformity thereto, by the Supreme Court of the United States, in the case of *Dawson's Lessee v. Godfrey*, 4 Cranch, 321. It was so decided by the unanimous judgment of the Court, contained in a very able and luminous opinion.

ion delivered by JUDGE JOHNSON.—Note in Original Edition.

(e) See note to p. 1, of this opinion.

unauthorized acts. We date our independence from this era on grounds paramount to anything in the power of that king to grant or to do: we treated with him for peace, but not for independence: we asked him to put an end to the war, but not to sanction a government already established upon the only just basis, the consent of the governed.*

618 "I would construe the general words of the treaty to relate to this epoch, not only for the abovementioned reasons, but because, in truth, that great event, in connection with the laws of alliance of the several states, drew a prominent line of distinction, in relation to lands acquired in this country by British subjects. While it exhibits all lands previously acquired, and then holden in this country, as being lawfully acquired, under the faith of existing laws, and entitled to the attention of the contracting parties, it throws into the class of nullities, and illegal and unauthorized acts, all posterior acquisitions of lands by British subjects. Powerful reasons existed, therefore, on this ground, for embracing the epoch of our independence, rather than that of the treaty, in applying that instrument to the arrestation of the laws of alliance of the several states, admitting, for the present, that it at all relates to such laws. On the part of the United States the great considerations just stated, (to say nothing of others which will be presently noticed,) must have had great weight; and the British king might, on his part, while he admitted himself bound to treat for a guaranty of lands fairly acquired by his subjects in this country before that epoch, have justly considered himself absolved from any obligation to create, or at least enlarge titles in favour of his subjects; to support and extend that nullity of an interest acquired here, by them, after the commune vinculum was broken.

In contemplating the effect of the treaty of peace upon the case before us, I will first consider, as being a stronger case for the plaintiffs, than that of a right accruing by escheat, "the right of the Commonwealth by way of forfeiture," to lands purchased by British subjects, since the era of our independence.

The words of the treaty, which are supposed to have an effect on the present question, are, that "there shall be no future confiscations made." (Art. 6.) What is the import and extent of the term "confiscations" here used?

The right of the Commonwealth to lands purchased by an alien, is an ordinary right derived from the common law. It exists at all times. It is independent of, and does not arise out of a state of war. In the present case it resulted to the Commonwealth from the establishment of a new government here, and the nonaccession of the plaintiffs to that government, prior to the commencement of their claim. Although in fact, the plaintiffs were enemies to their country, from the commencement of our hostilities with Britain, they were not, legally speaking, aliens, until the erection of our new government. Anterior to that event, the right now in question could not have resulted to the Commonwealth. So, on the other hand, if the erection of our new government had preceded or been unaccompanied by a state of war, the right in question would have resulted, as well prior as subsequent, to the existence of hostilities. Therefore it is that I say this right does not arise out of a state of war: it results from a mere municipal regulation. It accrues not because the person purchasing is an enemy, but because he is an alien. It is not a right pointed against the subjects of a particular power with whom we may chance to be at war, but against the subjects of all foreign nations whatsoever. This right is, by the common lawyers, technically

denominated a "forfeiture." "Forfeitures of lands and goods for offences," (and this right is founded on the offence of an alien in presuming to purchase lands contrary to law.) (a) says Sir William Blackstone, "are called by the Civilians bona confiscata, because they belonged to the Fiscus or imperial treasury, or, as our common lawyers term them, bona foris facta." (b) Indeed, Lord Coke seems, in one passage, to consider "confiscation" and "forfeiture" as synonymous terms; (c) and the author of the Commentaries appears also, in a few passages of his work, to have used the term "confiscation" as descriptive of a forfeiture into the treasury; but keeping in view the distinction,

619 "which this elegant and accurate writer has taken, between the terms as above stated; (the one being a civil law, and the other a common law term); and finding that he has expressly treated of the right now in question in a chapter headed "title by forfeiture," (d) I must conclude that the technical and appropriate term, descriptive of this right, is forfeiture, and not confiscation. At least, it must be granted, and that is sufficient for my purpose, that the former is a much more usual and proper term than the latter, to designate the right in question. I urge it as a very respectable authority in favour of this opinion, that the constitution of Virginia, in transferring this, among other rights, from the king to the Commonwealth, uses the terms "escheats, penalties and forfeitures." (e) without making any mention of "confiscations."

I admit that, where the term "confiscation" shall occur in a treatise or instrument relating only to the common law, it shall there, from obvious necessity, be taken as synonymous with "forfeiture;" and, indeed, in any other treatise or instrument, where the term may not otherwise be satisfied, or where it appears evident it was intended to have that extensive signification. But on the other hand, in instruments which concern the civil law, or the jus belli, it is reasonable to tie up the meaning of the term confiscation to forfeitures of that kind; or rather to understand the word in its proper and legitimate signification: it would be unnatural and unnecessary, in that case, to extend it so as to comprehend forfeitures arising only from the common law.

Besides this ordinary and municipal right of forfeiture, there is, as I have before said, an extraordinary one accruing to belligerent nations, of confiscating the property of their enemies. This right does not await and attend on the contingent event of a purchase by, or descent to, an alien: it effects property then actually holden by the enemy; it is not carried into effect by the ordinary course of the municipal laws; the property is seized and confiscated by an extraordinary act of the government of the belligerent nation. It is seized, not because it is the property of an alien, but of an enemy. This right is technically and properly denominated a right of confiscation; I know of no other term which will properly designate it.

Here, then, are two senses, in which the term "confiscation" may be used. The one, (to omit its civil law signification,) a restricted sense, going merely to a seizure by a belligerent nation in right of war; the other an extensive sense, meaning not only what is just mentioned, but, further, a mode of acquiring property by the Commonwealth under a permanent municipal regulation: a sense extensive enough, not only to repeal the general laws of alienage of this Commonwealth, in cases like the present, but also, (if not restrained by other considerations,) to remit perhaps, all forfeitures whatsoever incurred, in this country, by British subjects or refugees, by crimes or otherwise! Let us inquire in which sense this term was intended to be used in the article in question.

This article is contained in a treaty of peace. "A treaty of peace," says Vattel, "naturally and of itself relates only to the war which it puts an end

*Since this opinion was delivered it has been decided by the Supreme Court of the United States, in the case of *M'Ilvaine v. Cox*, 4 Cranch, 211, that the "treaty of peace contains a recognition of our independence, not a grant of it;" that the laws of the several states were, after the 4th of July, 1776, the acts of sovereign states; and that this was not derived from the concessions of the British king. This doctrine had before been agreed to even by the English courts themselves, as may be seen in *H. Black. Rep. 149*; *Wright v. Nutt*, and *ibid. 185*; *Folliott v. Ordery*, by Lord Loughborough; and *Judge Chase* had, in his very able opinion in the case of *Ware v. Hylton*, (3 Dallas, 205,) laid it down as an established doctrine "that the independence of the United States commenced with the declaration of congress of July 4th, 1776; that no other period could be fixed for the commencement of it; and that all laws passed by the legislatures of the several states after that epoch were the laws of sovereign and independent governments."—Note in Original Edition.

†I might here observe that in 4 Bro. Parl. Cas. and Parker's Rep. p. 168, it is said to have been holden by the house of lords that the disability of an alien to purchase lands was not a penalty or forfeiture, but arose from the policy of the law; and on this ground a demurrer to a bill, praying a discovery in this particular, was overruled; to which I will add that, if it is not considered as a penalty or forfeiture under the construction of the English laws, much less can it be considered in the stronger light of a confiscation *jure belli*. In giving my opinion, however, I will admit the most, that it is a forfeiture under the provisions of the common law.—Note in Original Edition.

(a) 1 Bl. Com. 372; 2 Bl. Com. 274.

(b) 1 Bl. 209.

(c) 3 Inst. 227.

(d) 2 Bl. Com. 207.

(e) Art. 20.

to, and therefore it is only in such relation that it is to be understood." (a) Such a treaty, therefore, does not naturally relate to a mere municipal forfeiture or regulation, no way dependent on, or produced by a war. This construction is much strengthened, in the present case, by the consideration that the American government, which formed the treaty in question, was much limited in its powers by the articles of confederation. That compact had emphatically reserved to the several states "their sovereignty, freedom and independence, and every power, jurisdiction and right not thereby expressly delegated to the United States in congress assembled." (Art. 2.)* Such stipulations in treaties, therefore, and such only as were warranted by the express grant of power to the United States, were binding on the several states when opposed by their laws. This construction of that compact is admitted by the circular letter of congress of April 18th, 1787, (b) requesting the several states to repeal all acts contrary to the treaty of peace; it is asserted by the legislature of Virginia in their two acts of 27th June, 1784, and 12th December, 1787, which have only made such repeal in relation to British debts, on the conditions therein contained; it is expressly maintained and acted upon by our commissioners 620 who negotiated that treaty, (c) and is admitted by the British commissioners, who acceded to a recommendation only, in relation to the restitution of the confiscated estates. (See art. 5.) In short, the limited government of the confederation was principally a government of requisition. In some cases a recommendation, or request to the several states, to repeal their conflicting laws, is expressly contained in the treaties themselves. In other cases, such request is inferable from the insertion in treaties of such stipulations as congress deemed necessary for the public good, but which yet required the sanction of the state legislatures. The 5th article of the treaty in question, just noticed, furnishes an instance of the former kind; and instances of the latter are to be seen in several of our foreign treaties which expressly waive the disabilities of alienage, in favour of the subjects of certain friendly powers.

The documents just referred to entirely shew that the American commissioners who negotiated the treaty in question strenuously disclaimed a power in congress to "interfere in matters appertaining to the internal polity of the several states;" and even declared that their power did not extend to stipulate for a restitution of confiscated estates, because those confiscations had been made under the authority of the several states; and hence a mere recommendation was proposed by them, and acceded to by the British commissioners. Congress did possess the power, and did exercise it, to prohibit confiscations (*i. l. jure belli* confiscations) in future; but they disclaimed the power to restore such property as confiscations, even of this class, had brought into the treasuries of the several states. This last case is much stronger than the one before us. As congress had the power of peace and war, it might well have been argued that a right arising only out of the war appertained to them, rather than to the several states, and that their power would reach even the case of a restitution; yet the several states having actually exercised this right, by seizures and sales, congress disclaimed the power to interfere otherwise than by recommendation. But the right of escheat and forfeiture now in question could on no construction appertain to congress; it strictly "appertained to the internal polity of the several states," and was, emphatically, beyond the power of congress. Congress had a right, by treaty, to convert enemies into friends, and to release the disabilities attached to the former character; but they had no power to invade the ordinary rights of the several states, and to invest with the privileges of citizens of Vir-

ginia, those whom the policy of her laws had thrown into the class of aliens. If congress, by the confederation, could not draw a shilling of money from the several states, but by requisition, it would seem to follow, that the assent of the states was equally necessary to pass their right to property, which needed only the formality of an inquisition and sale to bring it into their treasuries. If congress, by the 8th article of the confederation, were bound to defray "all charges of war and other expenses to be incurred for the common defence and general welfare, out of a common treasury, to be supplied equally," (by a given rule,) "by all the states," shall we make a construction, in the case before us, which would throw the price of peace, in the present instance, on some of the states, in case of others? upon the states' keeping up the laws of alienage, as incidental sources of revenue, in favour of such states wherein no such laws existed?

If by the 9th article of the compact aforesaid, the powers expressly specified, and delegated to congress, are only those of peace and war, and other powers of an external nature, relating chiefly to our intercourse with foreign nations, shall we adopt a construction in the present instance, which will depart from the general character of those powers, and invade a right of the several states, entirely of an internal and municipal nature?

But, independently of these considerations, I have supposed the word "forfeiture" to be a more proper term than "confiscation," to extinguish the right now claimed. The English law and ours are precisely the same on this subject: nay, I have even taken my ideas upon the subject entirely from the English authorities. As the English commissioners are not to be supposed ignorant of the real powers of our government, neither can they plead ignorance in relation to their own laws or technical terms, in forming the treaty. If the right now in question had been intended to be extinguished, would not the most appropriate terms have been used, especially in an instrument which, of itself, does not naturally reach that right? As these commissioners must have known, and were even warned, (as the aforesaid documents shew,) of the incompetency of congress to affect the municipal polity of the several states, would they not at least have used the strongest and most unequivocal terms to effect that purpose, had it been contemplated or intended? Is it not an established principle of the law of nations, "that the state in which things are found at the moment of the treaty shall be considered as lawful; and, if it is meant to make any change in it, the treaty must expressly mention it; and that, consequently, all things about which the treaty is silent remain as they were found at its conclusion?" (d) and does not the sound sense of this rule equally extend to cases where

621 terms are used which, to say the least, "are equivocal," and may be otherwise amply satisfied? If several of our treaties of amity and commerce with friendly European powers, the several states are called on, by the most particular and express stipulations, to waive their laws of alienage, in favour of the subjects of such powers, does it readily follow that in a treaty of peace with an enemy nation, an expression entirely congenial with the character of such treaty, and which can be otherwise abundantly satisfied, shall have this most important effect? Nay, even, if in the treaty of amity and commerce, formed by us with the same power, (Great Britain,) in 1794, some partial privileges on this subject could only be obtained for British subjects, and those conferred by the most explicit and unequivocal terms; if even these privileges, notwithstanding the lapse of eleven years since the date of the treaty of peace, created a general ferment in our country, arising from the recollection of ancient injuries; shall we construe the general words of the treaty before us, to have an equal or more extensive effect?

The term "confiscation," then, when occurring in a treaty of peace, and especially in such a treaty formed by the limited government of the confederation, naturally means, *ex vi termini*, a confiscation *jure belli*, and nothing further. If I am right in this idea, it was unnecessary, in the 6th article of the treaty before stated, to annex other and tautologous words, to make this more plain, to confine its signification to forfeitures, on account of the part taken in the war. Such was already its meaning, and additional words would have been entirely superfluous; and this is an answer to the objection arising from the annexation of such words to the prosecutions mentioned in the same article, of which more hereafter. I hold it also to be of great weight, in favour of my construction in this particular, that the confiscations here prohibited have this character more clearly designated, by being interdicted in the

(a) Vattel, p. 84.

*In the same opinion of JUDGE CHASE, (mentioned in the note before the last,) these sentiments are contained: "I entertain this general idea that the several states retained all their internal sovereignty, and that congress properly possessed the great rights of external sovereignty. That congress did not possess all the powers of war is evident from this consideration alone, that she never attempted to lay any tax on the people of the United States, but relied on the several state legislatures to impose taxes, &c. and that after the confederacy was completed, the powers of congress rested on the authorities of the state legislatures, and the implied ratifications of the people, and was a government over governments."—Note in Original Edition.

(b) See it quoted in Jefferson's letter to Hammond, p. 48, § 38.

(c) See documents 7, 8, 9, 10 and 11, p. 70. attached to Jefferson's letter aforesaid.

(d) Vattel, b. 4, s. 21.

same article, and sentence of that article, with prosecutions on account of the part taken in the war.

If I am right in the above idea, as to the natural and general signification of the term "confiscation," when occurring in treaties of peace: that construction gains additional weight in relation to the treaty before us, by the further consideration that there were, in fact, many such confiscations made by the several state governments, during the revolutionary war. Perhaps I shall be warranted in saying that there were in fact such confiscations made by every state in the union. (a) Some of those confiscations were made by the very bills of rights or constitutions of the several states, but in general by legislative acts. Of the former class it may be seen that the 25th article of the bill of rights of North Carolina seems to confiscate the proprietary rights to lands within the limits of that state: the legislative acts were of various descriptions, as acts of attainder, of seisure and confiscation, &c., as may be seen at large in the documents attached to the letter just referred to. The Virginia act, upon this subject, after reciting that, by the declaration of independence, by the United States, the residuary subjects of the British empire became enemies and aliens to the said state, enacts, that all the property lying within the Commonwealth, belonging at that time to any British subject, &c., shall be deemed to be vested in the Commonwealth; and a subsequent clause describes who shall be deemed British subjects within the meaning of the act. (b) The passage of this act, ipso facto, confiscated the property therein contemplated; and the only inquiry necessary to be made, or which in fact was made, (c) under this act, as it respected the proprietor of the land, was whether he were a British subject, or not, within the meaning of the act: there was no inquiry whether he was, by law, an alien.

This act was emphatically an extraordinary act of confiscation. It was in addition to, and not in exclusion of, the ordinary municipal law of escheat and forfeiture, on account of alienage. It only reached British property then actually holden; whereas the general law extended also to lands afterwards acquired by British aliens. This act confiscated the property of all British subjects; whereas, the general law only reached the real property of those who were aliens. It may not universally hold, that all British subjects were then aliens, and if the ideas of the plaintiff's counsel were correct the general law would not reach lands acquired here by British antenati. These are prominent marks of distinction between the two laws; and this partial exercise of the extraordinary right of confiscation certainly did not supersede, or interfere with the general law, further than that act has expressly gone.

Some stress has been laid upon the act of October, 1784, c. 53, respecting future confiscations. It is not proper for me to avail myself of a knowledge acquired in another place, that it was decidedly the intention of the then legislature to avoid construing the treaty. There were various opinions then existing as to its true construction, and the prejudices and animosities of the day were not inconsiderable. Hence the act eventuated in using the very words of the treaty itself; and that merely by way of yielding the sanction of this state to that instrument as it really existed. That act meant

not to take any new or extended ground whatsoever; and the proviso, contained therein, prohibiting suits commenced posterior to the ratification of the treaty, can only extend to suits grounded on such confiscations as were intended by the treaty and the act to be prohibited.

Before I come to a particular examination of the 6th article of the treaty, I will take a short view of the 5th. The character of the confiscations interdicted by the 6th article will be elucidated by considering what kind of confiscations are contemplated in the 5th.

That article is in the following words:

"It is agreed that congress shall earnestly recommend it to the legislatures of the several states, to provide for the restitution of all estates, rights, and properties, which have been confiscated, belonging to real British subjects, and also of the estates, rights, and properties, of persons resident in districts in possession of his majesty's arms, and who have not borne arms against the said United States. And that persons of any other description shall have free liberty to go to any part or parts of the thirteen United States, and therein to remain twelve months unmolested, in their endeavours to obtain the restitution of such of their estates, rights, and properties, as may have been confiscated; and that congress shall also earnestly recommend to the

several states a reconsideration and revision of all acts or laws regarding the premises so as to render the said laws or acts perfectly consistent not only with justice and equity, but with that spirit of conciliation which on the return of the blessings of peace should universally prevail. And that congress shall also earnestly recommend to the several states that the estates, rights and properties of such last-mentioned persons shall be restored to them, their refunding to any persons who may now be in possession of the bona fide price, (where any has been given,) which such persons may have paid on purchasing any of the said lands, rights or properties since the confiscation. And it is agreed that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights."

This article, upon a general view, relates only to legislative acts of confiscation. It relates materially to the refugees, who, not being aliens, were already safe from the operation of the laws of alienage. It relates, also, it is true, to confiscations made of the property of real British subjects; but as it purports to provide for the "restitution of their estates, rights, and properties," it cannot mean to extend to cases of purchases of lands by, or descents to, British aliens, posterior to our separation, nor to the common law proceedings adapted to such cases. In such cases such aliens have not any estate, right or property in such lands, nor would they be restored thereto: If the treaty arrests such proceedings, it would not restore, but create and enlarge the estates of such aliens. Cases of this kind, and the ordinary proceedings of forfeiture founded thereon, were not therefore contemplated in this article. With respect to the superior claims of those who held land here at the era of our separation, I am not prepared, at present, to say, whether the ordinary proceedings of escheat and forfeiture could ever have devastated them. Meaning to touch this topic slightly hereafter, I will only at present say that, if they could not, then, (as no necessity exists for it,) such proceedings shall not be construed to be comprehended in the confiscations mentioned in this article; nor will the case be otherwise, admitting the law to be different, if (as I believe) no forfeitures of this class had in fact taken place in America prior to the date of the treaty; and such, therefore, could not have been the ground of any stipulation in it. During the existence of the war, the ordinary law of escheat and forfeiture had not been put in force against British subjects. It had yielded to the more powerful and direct course of legislative confiscation, which was deemed preferable, and was universally pursued. I am authorized to assume this as an indubitable fact, because Mr. Hammond, (d) after ransacking all our laws and judicial decisions, from the beginning of the war to the time of his writing, has only stated one case (that of Harrison's representatives) in which a decision on this point has been given. That case will be set out presently from the documents attached to the before mentioned correspondence; from which it will appear that it was neither rendered by the Supreme Court of the State (Maryland) in which it was decided, nor rendered until the year 1790. When the devise in question in that case accrued is not stated. Am I not, therefore, correct in saying that no instances of the enforcement of the ordinary laws of alienage had taken place, in relation to British subjects, prior to the treaty of peace, and that, therefore, in providing for the restitution contemplated in the 5th article, it was wholly unnecessary to meet such cases? Courts, in making their constructions upon laws or treatise, may take notice of general and notorious facts, affecting such construction. The English Courts (for example) have in many instances taken notice of and acted upon the general delusion created by the South Sea bubble in that country in the beginning of the last century. (e) So, as in the present instance, the long and laborious researches of the British minister before

noticed "have produced no instance of the enforcement of the laws of alienage against British subjects prior to the conclusion of the treaty, wherefore shall we give to that instrument a construction confronted by so many objections, and only (at most) necessary, if such decisions had actually existed?"

It is also not unworthy of observation, that congress are called upon by this article, "to recommend to the several states a reconsideration and revision of all acts or laws regarding the premises," thereby meaning such special and particular statutes as may have been passed by the state legislatures on

(a) See Hammond's letter to Jefferson.

(b) October, 1779, c. 14.

(c) See inquiries in the office of the general Court.

(d) See his letter, p. 10, of the correspondence.

(e) See 1 P. Wms. 746.

the subject: they are not enjoined to recommend an exemption in favour of British subjects from such disabilities, as accrued, not by virtue of particular legislative acts, but by the conjoined effect of the revolution, and the common law, relating to alienage, antecedently existing in America.

If, then, the 5th article of the treaty relates to legislative confiscations only, let us next inquire whether the 6th article is to be understood in a more extensive point of view: bearing in mind the general principle: that the same word, occurring in different parts of an instrument, shall generally be understood in the same sense.

That article is as follows:

"That there shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for or by reason of the part which he or she may have taken in the present war, and that no person shall on that account suffer any future loss or damage, either in his person, liberty or property: and that those who may be in confinement on such charges at the time of the ratification of the treaty in America shall be immediately set at liberty, and the prosecutions so commenced be discontinued."

This article, upon the whole context of it taken together, can only relate to those who, being American citizens, afterwards became refugees, and joined the enemy: it cannot relate (in a collective point of view) to real British subjects. Keeping out of view, for the present, that member of the article, which prohibits future confiscations, and which requires a more particular examination, would it not be absurd to stipulate that after peace had taken place between the two nations, we should commence no prosecutions against real British subjects for the part they had taken in the war? That part was not, in them, a culpable, part: it was one which their duty and allegiance as subjects required them to take. Not residing in this country, nor being oppressed as the Americans were, it was not their business to join in our revolt, nor to take a part in our battles. If there had been no such article in the treaty, and America had thereafter commenced such prosecutions against such British subjects, Great Britain would have justly considered them as acts of hostility against her. This provision, then, as relative to real British subjects, is wholly superfluous, and unnecessary: it shall not, therefore, be construed to have relation to them. But, with respect to the American refugees, this stipulation was strictly necessary and proper. They had become citizens of the American states, and without expatriating themselves, had joined the standard of the enemy. After the peace, the several states might justly have called these their offending citizens to a severe account, for their conduct: but the humanity and honour of the British nation was deeply interested to protect them: to protect these American traitors from the vengeance of their own governments. The latter part of this article therefore applies exclusively to them: however it may be with the former. The interdiction of prosecutions for the part they had taken in the war, and of loss or damage accruing therefrom, as it related only to them, so it alone effectually secured them from such common law forfeitures as were incident to attainders or prosecutions for treason. As to confiscations, in relation to these persons as they were not legally aliens, in the several states, they were already sufficiently safe from the effects of the laws of alienage. The inhibition then of legislative confiscations, conjoined with the interdiction of prosecutions on account of the part taken in the war, would entirely secure and protect the refugees. Wherefore then give the treaty a construction which trenches upon the municipal rights of the states, when every necessary end, in respect of the refugees, can be attained, by understanding the term "confiscations" in its usual and ordinary sense?

With respect to real British subjects, it is equally absurd to apply to them the interdiction of the prosecutions, and tautologous to extend to them the confiscations prohibited in this article, even meaning thereby legislative confiscations. At the most, the article can be so understood, as to them, only through abundant caution. We will next inquire whether any necessity exists, in relation to them, (as it clearly does not in relation to the refugees,) to strain the term in question, beyond its usual and proper signification, and so far as to arrest the operation of the general laws of alienage?

The policy of the British government may justly be considered as different in relation to lands held here by their subjects at the time of our separation, and those afterwards acquired. With respect to the former lands, they are safe in the hands

understood in England, not permitting a renunciation of the original allegiance, nor contemplating the event of the erection of a new and different government, the case now before us was never presented in England, nor provided for by their law. The only inquiry in that country had relation to the capacity of the person purchasing or claiming by descent, at the time of such purchase or descent respectively. The British holders of land in this country, at the era of our separation, having been therefore capable of obtaining and holding lands here at their respective times of acquisition, committed no offense against our laws, and are safe from the penalties of the laws of escheat and forfeiture, by the literal terms of the common law. It is a great question, but one respecting which I have formed no final and decided opinion, whether the common law should be moulded, in this country, on the great principle that citizens may become aliens, and of course incapable of acquiring lands, so as to reach this case also, of lands lawfully acquired, and only rendered unlawful to be holden (if at all) by matter ex post facto: or whether a respect for vested and existing rights, falling in with the literal spirit of the modern law of nations on this subject, (a) should turn the scale in favour of a literal adherence to the English law, and thus protect lands actually holden here by British subjects, at the time of our separation.

If such should be esteemed the correct opinion, the lands of the then holders are already safe from the law of escheat and forfeiture: and the treaty therefore need not receive an extended construction in order to protect them: and as such lands are also protected from legislative confiscations, (or, in other words, acts of hostility,) by the mere conclusion of the peace, the stipulation in question need not be applied at all, to real British subjects, even in relation to lands by them holden in this country before the war.

But, however this may be, and whatever strong obligation there may be upon a sovereign to guaranty to his subjects lands held in the enemy's country at the time of the commencement of hostilities, and, however this circumstance might weigh in forming a construction of a treaty when such a case shall actually occur, the case is widely different in respect of future, eventual and possible acquisitions: future, I mean, in relation to the establishment of our new government, and the actual commencement of hostilities. Such is precisely the character of the case now before us: and what makes it still infinitely weaker is, that it accrued even long after the signature of the treaty of peace! In the case of war, all civil intercourse, between the subjects of the different nations, becomes prohibited and unlawful. This was particularly the case in our revolutionary war: the statute of 18 Geo. III. on the part of Britain, and many similar acts on the part of the several states, having prohibited all, but a hostile, intercourse between the people of the belligerent nations. In such a state of things, therefore, there would be but few to purchase lands (in the ordinary sense of the term) in either country: and even in respect of devises and descents to British subjects, we cannot, without imputing a gross ignorance to our people, in relation to the laws of alienage, (an ignorance which could not, especially, be pretended, in this Commonwealth, after the strong legislative declarations on the subject contained in the before-mentioned act of 1779,) suppose that many instances took place of devises being made, or descents permitted, to those who, in the double character of enemies and aliens, were liable to the double penalties of legislative confiscations, and municipal forfeitures on account of alienage. The permission of such vain and fruitless devises and descents, would argue great negligence and weakness on the part of our people: and we may therefore fairly conclude that cases of this class, occurring during the war, were probably few: and those as I have already said, possessed no strong claim on the British king to stipulate in their favour. Besides, no construction can be made, in the present instance, in favour of heirs and devisees, which will not equally operate in favour of actual purchasers of land here, (in the ordinary sense,) who, with their eyes open, have violated the laws, and contravened the policy of their sovereign! If a plaintiff of this description were now before the Court, would the construction of the treaty be extended in his favour? Certainly not. But the construction must be uniform; and it is a sound rule that in making a construction, all the consequences are to be taken into consideration. I repeat, therefore, that the cases of any of these classes were probably but few: that none of them had any strong

claim upon the British king to stipulate in their favour, and that the actors in some of them actually contravened his policy and injunctions. These cases were therefore probably not contemplated nor considered in forming the treaty, or if so contemplated, were abandoned on account of the weakness of their pretensions.

But further, British subjects so claiming on any of the three grounds of descent, devise, or actual purchase, held not actual interests, with reference to the epoch of our independence, but mere possibilities of interest, (even admitting the question of "alienage" to be in their favour,) interests emphatically in nubibus. Interest often assailed by the acts of our legislature, and reprobatd by the decisions of our courts. As well might the eldest sons of our citizens complain of the destruction of the right of primogeniture, living their fathers, as these British subjects object, that long antecedent to the accruing of their claims, they were thrown into the class of aliens by the natural and necessary effect of our pre-existing municipal regulations. It was too much for the British king to ask, (were he even impelled by a strong motive,) or for our government to grant, that the rights of escheat and forfeiture, accruing during the war, should be surrendered in relation to British subjects. Such a relinquishment, in itself, would not perhaps have been very important, had congress possessed adequate powers, but it might have carried with it the appearance of a concession, to which America would have been extremely averse; namely, that the doctrines of alienage did not attach here till the signature of the treaty; or, in other words, that we were not, until then, an independent nation! With respect to such acquisitions here, after the date of the treaty, (as in the case before us,) they stand upon a still weaker ground. It would have been most unreasonable for the British king to ask, or for us to grant, in favour of mere future and possible interests, that his subjects should be, in some sense, the same people with us, after we had established ourselves to be wholly independent of that nation; and that they should, without rendering us any services, or owing us any allegiance, be entitled, through all time, to important privileges in our country, which only the subjects of one or two of the most friendly and favoured nations were, at that time, permitted to enjoy. I will close this part of the subject by one general observation; and that is, that in all those of our treaties in which it was intended to yield up the laws of alienage in favour of the subjects of highly friendly and favoured nations, nay, even in the instrument of confederation itself, in relation to the citizens of the other states of the union, (see art. 4,) express, explicit, and appropriate terms are used to effect such surrender: whereas this is an attempt, under general and ambiguous expressions, (to admit the most,) to infer a surrender of those laws, and to create or enlarge interests in favour of the subjects of a nation, then certainly standing at the head of those the least favoured by America, and which has not been able to obtain from us up to this day, even by the famous treaty of 1794, the boon in question, in the extent now contended for!

I have avoided, as much as possible, in this whole discussion, having reference to that treaty: (the treaty of 1794:) I must, however, here repeat my remark, that that treaty has not left vested and existing rights to rest upon the same basis with future, contingent and possible ones; and that while that treaty has guaranteed, in a remarkable manner, the property in lands then actually holden in either country, it has suffered those future and possible rights, together with this famous doctrine of legitimization, to perish in the quicksands of the revolution; to be cast into the fathomless vortex prepared, by that revolution, for all those parts and principles of the common law of England, which are heterogeneous to our republican institutions! If it should even (contrary to what seems to have been decided by the Supreme Court of the United States as before mentioned) be argued that that treaty protects and enlarges the null and defeasible interests acquired here by British subjects up to the time of its formation, it proves nothing in relation to the treaty of 1788, both because the present general government of the United States has powers, perhaps, competent to that purpose, and because the treaty of 1794 has used strong words to effect it: in both which important respects, the treaty of 1788 is widely different.

As the 5th article of the treaty only recommends to the several states to do what congress had no power to do absolutely, i. e. to refund money produced by confiscations, and if congress, as I contend, had no greater right to arrest property vested in the several states by their laws of

alienage, than to demand the money contemplated by the 5th article, if such arrestation had been contemplated by the 5th article, would not the style of recommendation have been also kept up therein? and as there is a positive interdiction of "confiscations" stipulated by that article, shall we not infer from this change of style that it relates merely to such confiscations as congress possessed an absolute right to prohibit? It may not be improper to add, that another part of the terms of the clause in question seems to favour the construction I contend for. These terms are "that there shall be no future confiscations made." This term "made," seems strongly to import an active measure to effect a forfeiture, such as a legislative act, and not that kind of confiscation which is produced by the ordinary and passive operation of the law of escheat and forfeiture.

I have so far considered this case as if it were a case of forfeiture; whereas it is a right accruing to the commonwealth by way of escheat. Every thing that I have now said, to discriminate between forfeiture and confiscation, holds more strongly in relation to a right accruing by escheat. It is doing much more violence to the "meaning" of the latter term than the former, to make it synonymous with confiscation. I have also viewed it, in general, as if the descent in question had fallen prior to the date of the treaty of peace; whereas it was cast long after. Ours, therefore, is a much stronger case than that: for with respect to antecedent descents and purchases, there was some ground, or semblance of ground, for the treaty to operate upon; but, in this case, as the antenati pretension is entirely exploded, the present plaintiffs cannot recover, unless we are prepared to say that, (bating the treaty of 1794,) through all time, all British subjects, in cases like the present, are entitled to recover!!

The 4th inquiry I proposed to make under the head of the treaty, is in a great measure anticipated: I mean respecting the capacity of British subjects to sustain real actions. This right is, I think, incidental to the right to the subject. In all cases in which lands are preserved to British subjects, (for example, under the treaty of 1794,) their right to sue for them is also preserved; and this right forms, in that case, an exception to the general doctrine of alienage; but, on the other hand, where the principal does not exist, neither does the incident: they stand, or fall, together. While, therefore, I can never subscribe to the position, I had almost said the absurd position, taken by the plaintiffs, that all those are entitled to sue for lands here, who were so entitled at the time of their birth, under another government, of which they were then members, I can readily admit those to sue, in derogation from the general principle attaching a disability to aliens in this respect, to whom our laws or treaties have yielded a right to the subject sued for.

I have thus given to the treaty of peace a construction which outstrips and goes beyond the actual case before us. I have done this, not only because all the aspects of the case seem much involved with each other, but also for the reasons before assigned for discussing somewhat at large the pretensions of the antenati. My observations are so multifarious and desultory, that I fear I shall not be fully understood; but I have not time to reduce them to order, nor even to recapitulate.

The construction of the treaty, which I now contend for, has been impeached, loudly impeached, as gaining nothing for the other contracting party, by merely inhibiting legislative confiscations, while it leaves free the ordinary laws of alienage. To this objection I would answer, 1st. That that construction fully satisfies the words of the treaty, and goes the full length of the actual powers of the government of the confederation on the subject; 2dly. That it secures every thing for the refugees, whose interests were anxiously attended to by the British government in the formation of the treaty; 3dly. That it secures money and personal property to whomsoever belonging; there being no ordinary laws in any of the states to work a forfeiture of such property; and, 4thly. That if the ordinary laws of alienage cannot divest land actually holden here by British subjects at the time of our separation, (on which, however, I give no conclusive opinion,) my construction of the treaty abandons no claims of British subjects to lands in this country, but eventual, contingent and unlawful ones; unlawful, as being acquired at a time when they were equally interdicted by the laws, and by the actual state of things between the two countries; and that if our ordinary laws can divest such lands, (lands holden here in 1776,) it is meet that the British subjects should lose something by the war, when the Americans lost every thing.

While we argue from what was incumbent upon the British king to do, on behalf of his people, we ought not to lose sight of a construction which respects the rights of the sovereign states of America, and the actual temper and situation of the times; we ought not to stickle for literalities in favour of British subjects, when such were not the order of the day, and have not, in fact, been dealt out to us by them. It ought not, however, to be lost sight of as abridging the extent of this evil, (if it be one, and is not otherwise cured,) that in several of the states, (Pennsylvania, I am informed, for example,) no laws imposing forfeitures on account of alienage do exist, and that, therefore, as to those states, every possible end, to be desired in favour of British subjects, will be attained by confining the confiscations intended by the 6th article of the treaty to mean legislative confiscations merely.*

I cannot dismiss this very important subject, without declaring my satisfaction to find the result of my inquiries entirely corroborated by a great authority. A production truly worthy of the pen of the author of the declaration of independence; a production which must ever rank high among the most distinguished of diplomatic 637 "dissertations: which bears the most evident marks of the most patient and laborious investigation; an essay which confounded the British minister, and put him to silence, cannot but be considered by me as a great authority. Americans can never be indifferent to a work written by Jefferson, and sanctioned by Washington. I will even bring this work into a Court of justice, infinitely sooner than the obiter dicta of judges, pronounced without necessity, and founded on no deliberation. There is no magic in the name or character of judges, which will induce me to repel the ablest opinions, of the greatest men, on the most important subjects. Truth and right are my objects; and I will avail myself of all practicable means to endeavour to attain them.

Mr. Hammond, the British minister in this country, had made complaints on the very subject now before us; that is, the subject of infractions of the treaty of peace, and had invited the then secretary of state (Mr. Jefferson) to a discussion. He had complained, *inter alia*, of a decision, in the state of Maryland, on the subject of alienage, in the case of Harrison's representatives. He had complained of this decision; but although he was conjuring up all the infractions of the treaty which the wit of man could invent or suggest, he did not urge it as an infraction of the 6th article, nor even, in itself, of any article of that treaty.

*As the Supreme Court of the United States, in the before mentioned case of Dawson v. Godfrey, seems to have disregarded the treaty of 1794, as applying to a descent to a British alien in 1793, possibly the construction of that instrument in favour of persons then "holding" lands, is to be restricted to cases in which a beneficial holding was permitted by the laws of some of the states; and if so, the ground of that construction equally applies to the treaty of peace, which has no words to shew that interests other than beneficial interests were intended, and may be satisfied, *pro tanto*, in such states as allow aliens to hold lands.—Note in Original Edition.

He did not urge this decision, or any other decision, as an infraction of that article interdicting "future confiscations," although he undoubtedly would have done so, had he concurred with the plaintiffs' counsel in the construction they now contend for. He has come into my construction of the treaty in this instance, by confining his list of infractions of the 6th article to legislative violations only; (see his letter, p. 15, of the correspondence;) he merely complained of the decision in Harrison's case, as establishing a principle which, taken in connection with the laws of some of the states compelling creditors to receive lands in payment of their debts, infringed the fourth article of the treaty guarantying the bona fide payment of British debts. He complained that the fourth article of the treaty was infringed, or eluded, by compelling British subjects to receive lands in payment, while the decisions on the laws of alienage, did not permit them to hold such lands. (Ibid. p. 12.) This, then, seems to be the extent of his complaint on this head. Be that matter, however, as it may, the secretary of state obtained from the senators and delegates of the state of Maryland, in congress, the following statement in relation to that case of Harrison's representatives, viz. "On the disclosure of facts made by the trustees of the will of Harrison, upon oath; in chancery, in consequence of the claim made by the Attorney-General in behalf of the state, the Chancery Court determined it, in behalf of the state, it is believed, on this principle, that however Great Britain might consider the antenati as subjects born, and that they could not divest themselves of inheritable qualities, yet that the principle did not reciprocate on America, as those antenati of Great Britain could never be considered as subjects born of Maryland. The legislature, however, took the matter up, and passed an act relinquishing any right of the state, and directing the intention of the testator to take effect, notwithstanding such right. It is conceived that this was a liberal and voluntary act, on the part of the legislature, in behalf of Harrison's representatives, who are at liberty to pursue their claim." (a)

Mr. Jefferson, the secretary, taking up this case, upon the above report, observes: "The case of Harrison's representatives, in the Court of Chancery of Maryland, is in the list of infractions. These representatives being British subjects, and the laws of this country, like those of England, not permitting aliens to hold lands, the question was, whether British subjects were aliens. They declared that they were; consequently, that they could not take lands; and, consequently, also, that the lands in this case escheated to the state. Whereupon the legislature immediately interposed, and passed a special act, allowing the benefits of succession to the representatives. But had they not relieved them, the case would not have come under the treaty, as there is no stipulation, in that, doing away the laws of alienage, and enabling the members of each nation to inherit or hold lands in the other." (b)

I conclude, sir, as the best result of my judgment, that the law of this case is in favour of the defendant, and that the judgment of the District Court should be affirmed.

(a) Documents, p. 96.

(b) Jefferson's letter, p. 36.

INDEX.

ABATEMENT.

1. A plea in abatement ought not to be received to set aside an office judgment, unless it be of matter which arose prior thereto in continuance.
Bradley v. Welch, 284

ABEYANCE.

1. See Infant, No. 5, &
Templeman v. Steptoe, 239

ACCOUNT.

1. When an account of an executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees, the executor or administrator need not be a party to a suit against such legatees or distributees for contribution.
Hooper and Wife v. Royster and Wife, 119
2. An executor having delivered up the estate generally, and the management thereof, to one of the residuary legatees, for his benefit and that of his co-legatee; nine years and ten months having afterwards elapsed before he was summoned to render an account; the greater part of his executorship having moreover been during the revolutionary war; and the settlement taking place after his death: it was held unreasonable rigour to exact vouchers for many items in his account which appeared probably just, though not supported by proof.
Fitzgerald, Ex'r of Jones, v. Jones, 150
3. Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree: neither, in such case, ought interest to be allowed him on payments to the legatees before the decree: though made in bonds which carried interest. Ib.
4. Under circumstances a commission of 7 1-2 per cent. may be allowed an executor on all his receipts and disbursements; the real and personal estate having, in obedience to the directions of the will, been kept together and managed by him. Ib.
5. On a settlement of accounts in a Court of Equity, a decree will be rendered, against a plaintiff, for a balance of account appearing due to a defendant. Ib.
6. During the pendency of a suit in Chancery, a settlement of accounts between the parties having been made, and reported to the court; but, afterwards, by mutual consent, a new order of reference being made: the commissioner was not precluded from examining the accounts generally, and correcting any error therein: especially, as it appeared that the party who was benefited by such error had torn his own signature, and that of the other party, from the settlement.
Todd v. Bowyer, 447

630

*ACTION.

1. Cannot be maintained on an administration bond, until a devastavit has been established by means of a second suit, after a judgment against the executor or administrator as such.
Gordon's Adm'r's v. The Justices of Frederick, 1
2. Covenant (as well as debt) lies on a bond with collateral condition.
Ward v. Johnston, 45
3. As to the method of assigning breaches in such action of covenant. Ib.
4. See Debt, No. 1.
Meredith's Adm'r's v. Duval, 76
5. If a prisoner depart from the prison rules by an illegal discharge from the sheriff, the creditor, having an assignment of the bond for keeping the rules, has his election to bring suit upon it, or to sue the sheriff. Ib.
6. In an action on such bond, the plaintiff is only required to show a departure from the rules: the burden of proof then devolves on the defendant to show that the prisoner was discharged by due course of law. Ib.
7. A husband surviving his wife (or, in case of his death afterwards, his executor or administrator) may maintain an action on a personal contract made with the wife before the marriage, or for

their joint benefit afterwards; notwithstanding he did not take administration on her estate.

- Chichester's Ex'r v. Vase's Adm'r, 98
8. The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor.
Atwell's Adm'r's v. Towles, 175
9. See Vendor and Vendee, No. 7.
- Hull v. Cunningham's Ex'r, 280
10. Same point decided as in Leftwich v. Berkeley, 1 H. & M. 61.
- Saunders v. Wood, 406
11. Assumpsit, for use and occupation of land by permission of the plaintiff, lies on an implied as well as express promise.
Sutton v. Mandeville, 407
12. If, in a suit upon a prison-bonds bond, a court of competent jurisdiction adjudge the bond void: the plaintiff may sue the sheriff, without appealing from the judgment, though erroneous. 501
- Hoove v. Tebbis and Wife, 501
13. In such case, the sheriff, though not a party to the suit on the bond, is bound by the judgment unless he can prove it was obtained by collusion. Ib.
14. See Escape, No. 1. Ib.
15. It seems, that a prison-bonds bond, taken payable to the plaintiff, is good at common law, and an action may be maintained upon it. Ib.
16. Quære, whether it be not also good under the act of Assembly. Ib.
17. See Debtor, No. 2.
- Dangerfield v. Rootes, 589
18. See Mutual Assurance Society, No. 1, &
Greenhow v. Barton, 590

ACTS OF ASSEMBLY.

1. An assignment made after the act of 1796, by which bonds with collateral conditions were made assignable, is good, though the bond was dated before that act.
Meredith's Adm'r's v. Duval, 76
2. By virtue of the 24th section of the District Court law of 1792, the copies therein allowed, are good evidence in suits brought since that act took effect: although the filing of the originals was before that time.
Atwell's Adm'r's v. Towles, 175
3. Interest on costs could not properly be allowed under the act of 1808, Rev. Code, v. 2, p. 30, c. 29, s. 5. So decided in M'Rea v. Brown, mentioned in note to
Atwell's Adm'r's v. Towles, 179
4. As to the construction of the acts of descents and distributions, in the case of an infant dying intestate. See Infant, No. 1, 2, 3.
Dillard v. Tomlinson, &c., 188
5. By the act of compromise, passed the 10th of December, 1796, the title of Denny Fairfax, and of those who claim under him, to such of the lands in the Northern Neck as were waste and unappropriated at the time of the death of Lord Fairfax was clearly extinguished.
Hunter v. Fairfax's Devises, 218
6. Quære, were the several acts of Assembly, respecting the mode of acquiring titles to waste and unappropriated lands in the Northern Neck, equivalent to an inquest of office, and sufficient to authorize grants of the said lands by the Commonwealth, independently of the said act of compromise? Ib.
7. Construction of the 5th, 6th and 7th sections of the act "to reduce into one the several acts directing the course of descents."
Templeman v. Steptoe, 239
8. See Descents, No. 5, 6, 7. Ib.
9. Construction of the 3d section of the act to suppress duelling.
Leigh's case, 408
10. Construction of the statute to prevent frauds and perjuries.
Henderson v. Hudson, 510

ADJOURNMENT.

- See Depositions, No. 2, 4.
Marshall v. Frisbie, 247

ADMINISTRATION.

- See Executors and Administrators.

AD QUOD DAMNUM.

See Mills.

AFFIRMANCE.

1. If a court give a right judgment for a wrong reason, it ought, nevertheless, to be affirmed.
Newell v. Wood, 555

AGENT.

1. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever; for the vendor himself may be purchasing agent for the vendee by his appointment, and the vendee, 681
by constituting him his agent, "makes him a competent witness to prove the notice.
Blair v. Owles, 38
2. See Attorney in Fact, No. 1, 2, 3. 238
Betts v. Cralle, 238
3. See Depositions, No. 3.
Marshall v. Frisbie, 247
4. A landlord, by his agent, may levy a distress, but cannot sell the distrained effects.
Smiths v. Ambler, 506

AGREEMENT.

1. Where a judgment has been confessed by a principal, the security (if farther proceedings are had against him) ought to be permitted to plead *placitum darrein continuance*, that such confession of judgment was by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal.
Ward v. Johnston, 45
2. Quære, whether such plea, if demurred to, would be good at law; or whether the proper remedy is in equity? Ib.
3. See Contract, No. 3, 4, 5, 6.
Chichester's Ex'r v. Vass's Adm'r, 98
4. See Attorney in Fact, No. 1, 2.
Betts v. Cralle, 238
5. See Contract, No. 8, 9.
Lewis v. Madisons, 303
6. See Equity, No. 18. Ib.
7. See Purchaser, No. 9, 10.
Hull v. Cunningham's Ex'r, 330
8. A purchaser who buys a tract of land as containing so many acres, more or less, and agrees to take upon himself the risk, as to lines, or quantity, (appearing also better acquainted with the land than the vendor, against whom there is no proof of fraud,) is not entitled to any relief in equity, for a loss relating to the risk undertaken. Ib., 336
9. See note to the same case. 338
10. See Covenant, No. 4.
Austin's Adm'r v. Whitlock's Ex'rs, 487
11. See Vendor and Vendee, No. 10, 11, 12, 13.
Humphrey's Adm'r v. M'Clenachan's Adm'r & Heirs, 493, 500

ALIENS.

1. See Treaty, No. 1.
Hunter v. Fairfax's Devisee, 218

AMENDMENT.

1. A judgment at rules in the clerk's office of a County Court ought to be entered as of the last day of the succeeding quarterly term; but, if it be entered as at rules only, it is merely a clerical mispension, and therefore amendable.
Digges's Ex'r v. Dunn's Ex'r, 56
2. In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term.
Hunter v. Fairfax's Devisee, 218
3. A sheriff may be permitted, by order of Court, to make a return upon an execution, or to amend it, according to the truth of the case, at any time after the return day.
Bullitt's Ex'rs v. Winstons, 269

ANSWER.

1. An answer filed in the name of one of three executors, (the decree being in favour of the plaintiff,) is not to be taken as their joint answer; notwithstanding the clerk in the transcript of the record says that they appeared by counsel, and filed their answer, and no steps were taken to compel a further answer from them.
Chinn v. Heale, 68
2. An answer in Chancery (though, in form, responsive to a question put in the bill) is not evidence, where it asserts a right, affirmatively, in opposition to the plaintiff's demand; but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill.
Paynes v. Coles, 373

3. An issue out of Chancery ought not to be directed to try a claim altogether unsupported by testimony, or a title not alleged in the bill, but suggested in the answer, without proof. Ib.

APPEAL.

1. On an appeal from an interlocutory decree, if proper parties to the suit appear to be wanting, the Court of Appeals will not leave it to the Chancellor, but will itself direct such parties to be made.
Hooper and Wife v. Royster and Wife, 119
2. An appeal, having been improvidently granted, was dismissed on motion five years after it was entered on the docket.
Clarke v. Conn, 160
3. On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the Court of Error; though the Court determined on viewing the record only, and therefore did not examine the witnesses.
Eppes v. Cralle, 258
4. An appeal from, or supersedeas to, an order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only.
Bullitt's Ex'rs v. Winstons, 269
5. Upon an appeal from a decree in Chancery, an error to the injury of the appellee ought to be corrected, although he did not appeal.
Day v. Murdoch, 460
6. See Court of Appeals, General Rule of, relating to the correction of such errors as operate to the injury of the appellee. Ib. in note
7. If, in a suit upon a prison-bonds bond, a Court possessing competent jurisdiction adjudge the bond void, the plaintiff may sue the sheriff without appealing from the judgment, though erroneous.
Hooe v. Tebbis and Wife, 501
8. See Appeals, (Court of,) No. 6.
Newell v. Wood, 555
9. If a Court give a right judgment for a wrong reason, it ought, nevertheless, to be affirmed. Ib.
10. In reviewing a judgment by default on a forthcoming bond, the Appellate Court will compare it with the execution on which it was taken.
Glascock's Adm'r v. Dawson, 605

APPEALS, (COURT OF.)

1. See Certiorari, No. 1.
Hooper and Wife v. Royster and Wife, 119
2. See Appeal, No. 1.
3. Neither consent, nor long acquiescence of parties can give the Court of Appeals jurisdiction. An appeal, therefore, (having been improvidently granted,) was dismissed on motion, five years after it was entered on the docket.
Clarke v. Conn, 160
4. See Appeal, No. 5.
Day v. Murdoch, 460
5. General rule relating to correction of errors. Ib. in note
6. The Court of Appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law.
Newell v. Wood, 555

APPEARANCE.

1. Where two defendants have appeared and pleaded, an entry in the record that "the parties came, &c., and the defendant L acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous.
Ward v. Johnston, 45
2. Where appearance bail is required, the defendant cannot appear at the rules, without giving special bail.
Bradley v. Welch, 284

APPELLEE.

See Appeal.

ARBITRAMENT.

1. The plea of "arbitrament and award" (in so many words) is a mere nullity.
Harrison v. Brock, 23

ASSETS.

1. A simple contract creditor, having obtained a judgment by default against an executor, cannot maintain a suit in equity, for marshalling assets, against devisees of the landed property, until he has fully prosecuted his claim at law, against the executor and his securities.
Mason's Devisees v. Peter's Adm'rs, 437
2. A judgment by default, against an executor, is prima facie admission of assets. Ib.

3. See Executors and Administrators, No. 14. Ib.
4. See Equity, No. 28. Ib.

ASSIGNMENT.

1. An assignment made after the act of 1795, by which bonds with collateral conditions were made assignable, is good, though the bond was dated before that act.

Meredith's Adm'r v. Duval. 76

2. A bond for keeping the prison rules should be taken to the sheriff for the time being, and his successors in office; not his executors, administrators or assigns.

Meredith's Adm'r v. Duval. 76

3. But such bond, though taken to the sheriff, as such, and to "his executors, administrators or assigns," may be assigned by him to the creditor; and a suit may be maintained upon it. Ib.

4. Quære, can such a bond, so taken, be assigned to the creditor by the succeeding sheriff? Ib.

5. If the prisoner depart from the rules by an illegal discharge from the sheriff, the creditor, having an assignment of the bond, has his election to bring suit upon it, or to sue the sheriff. Ib.

6. See Bond, No. 13, 14.

Atwell's Adm'r v. Towles. 175

7. As to the nature of the proof requisite to affect an assignee, without notice, by an equity, see Mayo v. Giles's Adm'r. 538

ASSUMPSIT.

1. An award made pendente lite cannot be given in evidence upon the plea of non assumpsit.

Harrison v. Brock. 22

2. Assumpsit, for use and occupation of land by permission of the plaintiff, lies on an implied as well as express promise.

Sutton v. Mandeville. 407

ASSURANCE SOCIETY.

See Mutual Assurance Society.

ATTORNEY AT LAW.

1. The practice of law is not an office, or place, under the Commonwealth.

Leigh's case. 468

2. An attorney at law is not bound, as a requisite to his admission to the bar of any Court, to take the oath prescribed by the 8d section of the act to suppress duelling. Ib.

ATTORNEY IN FACT.

1. If an attorney in fact undertake to have a tract of land (with the situation of which he does not profess himself personally acquainted) surveyed for a part thereof, and upon terms "in case the land cannot be found, to have a proportional part of the damages which may be recovered by his employer of the person of whom he bought, and a proportional part of his expenses paid," he is not bound to have it done at all events, but only to a faithful performance, according to the best information he can obtain.

Betts v. Cralle. 238

2. In this case, therefore, the attorney in fact being imposed upon by the County Surveyor, and, in consequence of such imposition, having a survey made of land not purchased by his employer, was held not responsible for his mistake, and not thereby barred of his claims under the contract. Ib.

3. But, after the survey, the employer having executed a bond to the attorney to make him a conveyance of part of the land so surveyed; and having snatched and torn the bond so given; for which trespass a suit was threatened; and, thereupon, having given two bonds for money, in full satisfaction for tearing the above bond, and for the attorney's services; the last-mentioned bonds were considered as a bar to any claim of the attorney under the original contract, and adjudged valid and obligatory, notwithstanding the mistake in the survey was not discovered until after those bonds were executed.

Betts v. Cralle. 238

4. A landlord, by his agent, may levy a distress, but cannot sell the distrained effects.

Smiths v. Ambler. 506

AUTHORITY.

1. An authority given by law to any officer, whereby the estates or interests of other persons may be forfeited or lost, must be strictly pursued in every instance.

Yancey v. Hopkins. 419

AWARD.

1. An award, made pendente lite, cannot be given in evidence upon the plea of non assumpsit.

Harrison v. Brock. 22

2. The plea of "arbitrament and award" (in so many words) is a mere nullity, and no evidence

should be received to support it, notwithstanding the plaintiff replied generally. Ib.

BAIL.

1. Where appearance bail is required, the defendant cannot appear at the rules, without giving special bail.

Bradley v. Welch. 284

BAR.

1. The taking in execution the body of one of two joint obligors is no bar to an action against the other obligor.

Atwell's Adm'r v. Towles. 175

2. See Attorney in Fact, No. 1, 2, 3.

Betts v. Cralle. 238

BARGAIN AND SALE.

1. A patentee of land, without personally entering upon it, has such seisin as may be transferred and continued by deed of bargain and sale; but if his seisin be interrupted by the actual entry and adverse possession of another, he cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment.

Clay v. White. 162

BILL IN CHANCERY.

See Equity.

1. A decree, dismissing so much of a bill as claims one of two separate subjects in controversy, and, as to the other, determining also the rights of the parties, but directing an account to be taken, is not final in any respect between the parties retained in Court and their legal representatives, but subject to revision and alteration in every part, at any time before a final decree; without the necessity of a bill of review.

Templeman v. Steptoe. 339

2. See Dower, No. 1, 2, p. 554, note; and same note, p. 555.

BOND.

1. An action cannot be maintained on an administration bond, until, after a judgment against the executor or administrator as such, a devastavit has been established by means of a second suit.

Gordon's Adm'r v. The Justices of Fred-

erick. 1

2. Covenant (as well as debt) lies on a bond with collateral condition.

Ward v. Johnston. 45

3. As to the method of assigning breaches in such action of covenant? Ib.

4. A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition; the words being "If the above bound L., and W. his security, shall, &c., then this obligation to be void." &c. Ib.

5. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not binding the obligors to convey any other specific lands to make good a deficiency; the only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable.

Chinn v. Beale. 68

6. In debt on a bond, if the defendant craves oyer, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond; and, though the plaintiff declare against one of several obligors, without stating that they were severally bound, yet, if the bond appear to be joint and several, it is sufficient.

Meredith's Adm'r v. Duval. 76

7. An assignment made after the act of 1795, by which bonds with collateral conditions were made assignable, is good, though the bond was dated before that act. Ib.

8. A bond for keeping the prison rules should be taken to the sheriff for the time being, and his successors in office; not his executors, administrators or assigns. Ib.

9. But such bond, though taken to the sheriff as such, and to "his executors, administrators or assigns," may be assigned by him to the creditor; and a suit may be maintained upon it. Ib.

10. Quære, can such a bond, so taken, be assigned to the creditor by the succeeding sheriff? Ib.

11. If the prisoner depart from the rules by an illegal discharge from the sheriff, the creditor, having an assignment of the bond, has his election to bring suit upon it, or to sue the sheriff. Ib.

12. In an action on such bond, the plaintiff is only required to shew a departure from the rules; the burden of proof then devolves on

the defendant to shew that the prisoner was discharged by due course of law.

Meredith's Adm'r v. Duval, 76

13. At the foot of a bond, with a penalty and condition in the usual form, signed and sealed by I. S., a writing is signed and sealed by T. A. in the following words: "I, T. A. join in the above obligation with I. S., and am his security for the above sum of ——" (mentioning the sum specified in the condition,) this, it seems, is a joint obligation; and judgment may be rendered against T. A. for the penalty, to be discharged by the sum in the condition, with interest.

Atwell's Adm'r v. Towles, 175

14. An assignment of such an instrument, by the words, "I assign the within obligation," is a good assignment of the claim upon T. A. as well as I. S.

Ib.

15. Quære, whether a declaration against the administrator of one of two joint obligors, averring that neither the defendant, nor the other obligor, nor any representative of his had paid the debt; (without stating that such other obligor was dead, or that the defendant's intestate had survived him;) and alleging, in assigning the breach, that right of action had accrued under the premises, against the defendant's intestate, (without setting forth in what manner,) be good after verdict?

Ib.

16. In an action of debt on a bond, the judgment is always entered for the penalty, to be discharged by the principal and interest; and, if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty.

Ib.

17. The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor.

Ib.

18. See Attorney in Fact, No. 1, 2, 3.

Betts v. Cralle, 238

19. See Vendor and Vendee, No. 7.

Hull v. Cunningham's Ex'r, 330

20. Same point decided as in Leftwich v. Berkeley, 1 H. & M. 61.

Saunders v. Wood, 406

Newell v. Wood, 555

21. A scroll annexed to a signature is not sufficient to make a sealed instrument, unless it appear, from some expression in the body of the instrument, that it was intended as such.

Austin's Adm'r v. Whitlock's Ex'r's, 487

22. See Prison Rules, No. 8, 9, 10, 11.

Hoove v. Tebbs and Wife, 501

23. Although the assignee of a bond, with or without notice, takes it subject to all the equity of the obligor, yet such equity must be clearly and manifestly established by proof, before it shall affect an assignee without notice; especially, if the obligor, after the assignment, promise payment of the full amount of the bond to the assignee.

Mayo v. Giles's Adm'r, 533

24. The Court of Appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law.

Newell v. Wood, 555

25. A landlord is not entitled to the summary remedy by motion, on a three months' replevin bond; unless it appear that such bond was taken by a sheriff, or other officer legally authorized to make distress, and sell the distrained effects.

Smiths v. Ambler, 596

26. See Forthcoming Bond, No. 1, 2.

Glascock's Adm'r v. Dawson, 605

BOUNDARIES.

1. In ejectment, if the jury find a special verdict, shewing the plaintiff entitled to a certain number of acres, part of the tract sued for; and do not specify the boundaries of such part, with so much precision as that possession thereof may with certainty be delivered; a venire de novo ought to be awarded.

Clay v. White, 162

BREACHES.

1. In an action of covenant on a bond with collateral condition, if there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failing to pay the penalty; but, where such stipulation is either expressed or implied, the failing to perform the condition may be assigned as the breach.

Ward v. Johnston, 45

2. See Declaration, No. 4.

Atwell's Adm'r v. Towles, 175

3. See Covenant, No. 4.

Austin's Adm'r v. Whitlock's Ex'r's, 487

BREACH OF TRUST AND CONFIDENCE.

1. Is a circumstance from which fraud may be presumed.

Whitehorn and Wife v. Hines and others, 557

BRITISH SUBJECTS.

1. See Treaty, No. 1.

Hunter v. Fairfax's Devisee, 218

CAVEAT.

1. In cases in which the regular remedy is by caveat, a Court of Equity may entertain jurisdiction, under circumstances which render its interposition just and proper, but such circumstances must be made to appear to the satisfaction of the Court.

Depew v. Howard and Wife, 293

CERTAINTY.

1. Quære, whether an entry, for a certain number of acres, "on the waters of Glade creek, joining the lines of I. H.'s land, and the locator's own land on W.'s run," be sufficiently certain?

Depew v. Howard and Wife, 293

2. The rule that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to

636 designate with any certainty the particular land in question.

Lewis v. Madisons, 308

CERTIORARI.

1. In a suit in Chancery, the bill having referred to the proceedings in another suit, "as now remaining of record in the same Court," and the answer having admitted that such a suit was brought, and such a decree, as stated in the bill, existed; the Court of Appeals will award a writ of certiorari for a transcript of the record referred to, and receive it as evidence, so far as admitted by the answer.

Hooper and Wife v. Royster and Wife, 119

CHANCERY.

1. As to the liability in equity of a purchaser having notice of an encumbrance, see

Blair v. Owles, 33

2. In a suit against such purchaser, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party.

Ib.

3. An answer filed in the name of one of three executors (the decree being in favour of the plaintiff) is not to be taken as their joint answer. See Answer, No. 1.

Chinn v. Heale, 63

4. Where a plaintiff sues in Chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency of quantity; (relating to which deficiency he prays a discovery;) but, according to the contract, appears entitled to compensation in money, and not in lands; the Court, after decreeing the first mentioned conveyance, (the deficiency, and the sum to be allowed for it, being ascertained,) will go on to decree the compensation, without turning over the party to a Court of Law.

Chinn v. Heale, 63

5. In cases where it is proper and necessary to go into equity for a discovery, the Court (having possession of the subject) will proceed to decide the cause, without turning the parties round to a Court of Law, notwithstanding (if such discovery had not been necessary) relief might originally have been had at law.

Chichester's Ex'r v. Vass's Adm'r, 96

6. In a suit in Chancery, the bill having referred to the proceedings in another suit, "as now remaining of record in the same Court;" and the answer having admitted that such a suit was brought, and such a decree as stated in the bill existed; the Court of Appeals will award a writ of certiorari for a transcript of the record referred to, and receive it as evidence, so far as admitted by the answer.

Hooper and Wife v. Royster and Wife, 119

7. An administrator to whom a credit for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in Chancery, is a competent witness, in behalf of the award, to prove the payment of the money to her guardian; though the latter was no party to the decree.

Ib.

8. On an appeal from an interlocutory decree, if proper parties to the suit appear to be wanting, the Court of Appeals will not leave it to the Chancellor, but will itself direct such parties to be made.

Hooper and Wife v. Royster and Wife, 119

9. In a suit for contribution against legatees or distributees, the executor or administrator, or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party; unless it appear that the account of such executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees.

Ib.

10. In what case interest ought to be charged against an executor from the date of the decree only.

Fitzgerald, Ex'r of Jones, v. Jones, 150

11. On a settlement of accounts in a Court of Equity, a decree will be rendered against a plaintiff for a balance of account appearing due to a defendant. Ib.

12. See Interest, No. 9.

13. See Jurisdiction, No. 3.

Depew v. Howard and Wife, 203

14. See Decree, No. 8, 9.

Templeman v. Steptoe, 339

15. An answer in Chancery (though, in form, responsive to a question put in the bill) is not evidence, where it asserts a right, affirmatively, in opposition to the plaintiff's demand; but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill.

Paynes v. Coles, 373

16. An issue out of Chancery ought not to be directed to try a claim altogether unsupported by testimony, or a title not alleged in the bill, but suggested in the answer, without proof. Neither is this rule to be varied by the circumstance that infants are interested. Ib.

17. See Equity, No. 22, 23.

18. See Equity, No. 24.

Yancey v. Hopkins, 419

19. See Equity, 29, 30.

Todd v. Bowyer, 447

20. See Mortgage, No. 1.

Green v. Price, 449

21. See Purchase, No. 1.

Day v. Murdoch, 460

22. See Appeal, No. 5, 6.

23. See Injunction, No. 2.

Humphrey's Adm'r v. M'Clanachan's Adm'r and Heirs, 493

24. See Vendor and Vendee, No. 12, 13.

Same case, 500

25. See Set-Off, No. 1.

Dangerfield v. Rootes, 539

26. See Dower, No. 1, 2, note to p. 554, and 555.

27. See Equity, No. 32.

Whitehorn and Wife v. Hines and others, 557

28. See Fraud, No. 4.

29. See Equity, No. 43.

Moon v. Campbell, 604

CLERICAL OMISSION.

1. See Depositions, No. 1.

Marshall v. Frisbie, 247

COLLATERAL CLAIM.

1. A person who joined in a deed for the purpose of relinquishing a collateral claim need not be a party to a suit in equity, by the claimant of an encumbrance, against a purchaser having notice.

Blair v. Owles, 38

636 *COLLATERAL CONDITION.

1. Covenant (as well as debt) lies on a bond with collateral condition.

Ward v. Johnston, 45

2. As to the manner of assigning breaches in such action of covenant. Ib.

3. An assignment made after the act of 1795, by which bonds with collateral conditions were made assignable, is good, though the bond was dated before that act.

Meredith's Adm'r v. Duval, 76

COMMISSIONER IN CHANCERY.

See Account.

COMMISSIONERS OF THE REVENUE.

1. See Lands, No. 24, 25.

Yancey v. Hopkins, 419

COMMISSIONS ON MONEY.

1. Under circumstances a commission of 7 1-2 per cent. may be allowed an executor on all his receipts and disbursements; the real and personal estate having, in obedience to the directions of the will, been kept together and managed by him.

Fitzgerald, Ex'r of Jones, v. Jones, 150

COMMISSIONS TO TAKE DEPOSITIONS.

1. See Depositions, No. 1, 2, 3, 4.

Marshall v. Frisbie, 247

COMMON LAW.

1. Quære, whether a security is exonerated at common law, by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution, by an agreement to which the security was not a party?

Ward v. Johnston, 45

COMMONWEALTH.

1. The practice of law is not an office, or place, under the Commonwealth.

Leigh's case, 468

COMPENSATION.

1. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not binding the obligors to convey any other specific lands to make good a deficiency; the only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable.

Chinn v. Heale, 68

2. Where a plaintiff sues in Chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency of quantity; (relating to which deficiency he prays a discovery); but, according to the contract, appears entitled to compensation in money, and not in lands; the Court, after decreeing the first mentioned conveyance, (the deficiency, and the sum to be allowed for it, being ascertained,) will go on to decree the compensation, without turning over the party to a Court of Law.

Chinn v. Heale, 68

3. See Deficiency, No. 3, 4, 5, 6.

Hull v. Cunningham's Ex'r, 330, 338

4. See Vendor and Vendee, No. 10, 11, 12, 13.

Humphrey's Adm'r v. M'Clanachan's Adm'r and Heirs, 493, 500

COMPROMISE.

1. An attorney in fact having, by mistake, had a survey made of land not belonging to his employer; but, after the survey, the employer having executed a bond to make him a conveyance of part of the land so surveyed; and having snatched and torn the bond so given; for which trespass a suit was threatened; and thereupon two bonds for money being given by the employer, in full satisfaction for tearing the above bond, and for the attorney's services; the last-mentioned bonds were considered as a bar to any claim of the attorney under the original contract, and adjudged valid and obligatory, notwithstanding the mistake in the survey was not discovered until after those bonds were executed.

Betts v. Cralle, 238

CONDITION.

1. In an action of covenant on a bond with collateral condition, if there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breaches assigned should be the failing to pay the penalty; but where such stipulation is either expressed or implied, the failing to perform the condition may be assigned as the breach.

Ward v. Johnston, 45

2. A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition; the words being "if the above bound L., and W. his security, shall, &c. then this obligation to be void, &c."

3. See Bond, No. 12.

Atwell's Adm'r v. Towles, 175

CONFESSION.

1. Where two defendants have appeared and pleaded, an entry in the record "that the parties came, &c. and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous.

Ward v. Johnston, 45

2. In reversing the judgment for that error, the Court ought to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other. Ib.

3. In such case, the plaintiff having, after the judgment, moved for permission to proceed against the security; and it appearing, by a bill of exceptions on this motion, that the judgment had been confessed by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal; *the Court, in reversing the judgment, ought to have given the security leave to plead *pluis darrein continuance*: all the proceedings having been brought up by a writ of *supersedeas*.

Ward v. Johnston, 45

4. Quære, whether a security is exonerated at law, or in equity, by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution by an agreement to which the security was not a party? Ib.

CONFISCATION.

1. See Escheat, No. 8; Purchase, No. 1.

Day v. Murdoch, 460

CONSENT.

1. Of parties, cannot give the Court of Appeals jurisdiction. 160
2. In what cases it may be presumed to have been given to the taking of depositions. See Depositions, No. 1. and 8.
3. See Record, No. 4.
4. Chapmans v. Chapman, 398
5. See Account, No. 6.
6. Todd v. Bowyer, 447
7. A mortgagee without notice shall be protected against a prior equitable title; if the person having such title either encouraged him to take the mortgage, or, knowing of his intention to take it, stood by, and made no objection. 449
8. Green v. Price, 449

CONSIDERATION.

1. See Contract, No. 8.
2. Lewis v. Madisons, 308
3. A deed from a husband and wife, without her privity examination and relinquishment, is utterly void as to her, and furnishes no consideration to support a subsequent conveyance. 518
4. Harvey and Wife v. Pecks, 518
5. Gross inadequacy of consideration is a circumstance from which fraud may be presumed in a Court of Equity. 557
6. Whitehorn and Wife v. Hines and others, 557

CONSTRUCTION OF LAWS.

See Acts of Assembly, Treaty.

CONSTRUCTION OF WILLS.

1. In construing wills, the cardinal rule is to collect the intention of the testator from the whole will taken together, without regard to any thing technical, or any particular form of words; and if such intention be lawful, (as not creating perpetuities, or the like,) full effect ought to be given to it by the Courts.
2. Wyatt v. Sadler's Heirs, and Johnson and others v. Johnson's Widow and Devisees, 557, 558

CONTRACT.

1. A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition; the words being "if the above bound L., and W. his security, shall, &c., then this obligation to be void," &c.
2. Ward v. Johnston, 45
3. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not binding the obligors to convey any other specific lands to make good a deficiency; the only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable.
4. Chinn v. Heale, 68
5. If A. promise B. that if he and A.'s daughter marry, "he will endeavour to do her equal justice with the rest of his daughters as fast as it is in his power with convenience," and the marriage be afterwards had with his consent: the promise is sufficiently certain and obligatory.
6. Chichester's Ex'r v. Vass's Adm'r, 98
7. In such case, A. has not his life-time to perform it in; but, in a reasonable time after the marriage, (taking into consideration his property and other circumstances,) is bound to make an advancement to B. and wife, equal to the largest made to his other daughters. 1b.
8. A promise in the above-mentioned terms enures to the joint benefit of the husband and wife; and is not to be satisfied by a conveyance of lands to the wife. The husband (to whom the promise was made) has his election to consider it a personal contract; and, if he survive the wife, may sue in his own right to recover damages for a breach. 1b.
9. A husband surviving a wife (or, in case of his death afterwards, his executor or administrator) may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate. 1b.
10. See Attorney in Fact, No. 1, 2.
11. Betts v. Cralle, 298
12. It seems, that a contract, under seal, between two brothers, by which one of them, for a fair and valuable consideration, agrees, that, when he shall obtain possession of a tract of land expected to be devised to him by their father, he will convey it to the other, is not contra bonos mores, and may support an action of covenant at law, or be enforced specifically in a Court of Equity.
13. Lewis v. Madisons, 308
14. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does

- not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question. 1b.
15. See Purchaser, No. 9, 10, 11, 12.
 16. Hull v. Cunningham's Ex'r, 330, 336, 338
 17. *11. See Covenant, No. 4.
 18. Austin's Adm'r v. Whitlock's Ex'rs, 487
 19. See Vendor and Vendee, No. 10, 11, 12, 13.
 20. Humphrey's Adm'r v. M'Clenachan's Adm'r's and Heirs, 493, 500

CONTRIBUTION.

1. In a suit for contribution against legatees or distributees, the executor or administrator when to be a party, and when not.
2. Hooper and Wife v. Royster and Wife, 119

CONVEYANCE.

1. Notice of a lien or encumbrance on property binds the purchaser, if received by him at any time before the execution of the conveyance.
2. Blair v. Owles, 38
3. In a suit in equity by the claimant of an encumbrance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party. 1b.
4. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever. 1b.
5. A person out of possession cannot convey by bargain and sale such a title as will enable the bargainee to recover in ejectment.
6. Clay v. White, 163
7. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question.
8. Lewis v. Madisons, 308
9. See Deed, No. 6.
10. Yancey v. Hopkins, 419
11. See Infant, No. 9.
12. See Heirs, No. 2.
13. Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs, 493
14. See Vendor and Vendee, No. 12, 13.
15. Same case, 500
16. See Husband and Wife, No. 7.
17. Harvey and Wife v. Pecks, 518
18. What are badges of fraud in obtaining a deed. 1b.
19. Under what circumstances a deed obtained from a man of weak understanding may be set aside in equity.
20. Whitehorn and Wife v. Hines and others, 557
21. See Purchaser, No. 20, 31.

COPIES.

1. By virtue of the 24th section of the District Court law of 1792, the copies therein allowed are good evidence in suits brought since that act took effect; although the filing of the originals was before that time.
2. Atwell's Adm'r's v. Towles, 175

COSTS.

1. Interest on costs could not properly be allowed under the act of 1803, 2 Rev. Code, p. 30, c. 29, s. 5. So decided in
2. M'Rea v. Brown, note to 179
3. On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the Court of Error; though the Court determined on viewing the record only, and therefore did not examine the witnesses.
4. Eppes v. Cralle, 268

COURT.

1. The Jury and not the Court, are exclusively judges of the credibility of witnesses.
2. Harrison v. Brock, 32
3. A judgment ought not to be reversed on the ground that the Court, at the instance of the party against whom it was rendered, admitted improper evidence, or erroneously compelled the other party to join in a demurrer to evidence. 1b.
4. The Court ought not to trust the Jury with illegal or improper evidence, however unimportant it may be to the cause.
5. Brown and Boisseau v. May, 338
6. If a Court give a right judgment for a wrong reason, it ought, nevertheless, to be affirmed.
7. Newell v. Wood, 555

COVENANT.

1. Covenant (as well as debt) lies on a bond with collateral condition. If there be no stipulation, by

articles, or in the condition itself, that it shall be performed. the breach assigned should be the failing to pay the penalty: but where such stipulation is either expressed or implied, the failing to perform the condition may be assigned as the breach.

Ward v Johnston, 46
2. A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition: the words being "if the above bound L., and W. his security, shall, &c. then this obligation to be void." &c. Ib.

3. See Contract, No. 8.
Lewis v. Madisons, 308

4. In covenant, on an agreement to convey the party's interest in a certain suit, and (in case the defendant in that suit was not legally bound by his undertaking) then to convey the right of such party to certain land, a declaration charging a refusal to convey the interest in the suit, or the right to the land, (without setting forth the failure to recover in the suit, and a subsequent refusal to convey the land,) is substantially defective, and not to be cured, by a general verdict, assessing entire damages.

Austin's Adm'r v. Whitlock's Ex'rs, 487
5. See Vendor and Vendee, No. 10, 11, 12, 13.
Humphrey's Adm'r v. M'Clenachan's Adm'r's and Heirs, 498, 508

CREDIBILITY.

1. The Jury, and not the Court, are exclusively judges of credibility.
Harrison v. Brock, 20

*CREDITOR.

1. The creditor of an insolvent prisoner, who has the liberty of the rules, is bound to give security for the prison fees: but the sheriff cannot legally discharge him, unless he be actually insolvent, and being so, the plaintiff, having notice thereof, refuse to pay his fees, or to give bond for the payment thereof.

Meredith's Adm'r v. Duval, 76
2. If the prisoner depart from the rules by an illegal discharge from the sheriff, the creditor, having an assignment of the bond, has his election to bring suit upon it, or to sue the sheriff. Ib.

3. In an action on such bond, the plaintiff is only required to shew a departure from the rules; the burden of proof then devolves on the defendant to shew that the prisoner was discharged by due course of law. Ib.

4. See Paper Money, No. 2.
Day v. Murdoch, 460
5. See Debtor, No. 2.
Dangerfield v. Rootes, 529

DAMAGES.

1. What circumstances ought not to be received in evidence, by way of mitigation of damages on a joint plea of "not guilty," in trespass vi et armis, against two defendants for breaking the plaintiff's close, and beating his slaves.

Brown and Boisseau v. May, 288

DEBT.

1. In debt on a bond, if the defendant crave oyer, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond: and, though the plaintiff declare against one of several obligors, without stating that they were severally bound, yet, if the bond appear to be joint and several, it is sufficient.

Meredith's Adm'r v. Duval, 76
2. In debt on a bond, the judgment is always entered for the penalty, to be discharged by the principal and interest: and, if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty.

Atwell's Adm'r v. Towles, 175
3. The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor. Ib.

4. Prior to the 1st of May, 1804, the Courts of Chancery, on debts not bearing interest in terms, could not grant interest subsequent to the date of the decree.

Dilliard v. Tomlinson, &c., 188

DEBTOR.

1. A debtor within the prison rules is still a true prisoner in the eye of the law; and, as such, should be transferred by the sheriff to his successor in office.

Meredith's Adm'r v. Duval, 76
2. See Paper Money, No. 2.
Day v. Murdoch, 460

3. A debtor ought not to be allowed a set-off (even in equity) for unliquidated and disputed claims

against his creditor, purchased by him after suit brought by the creditor against him.

Dangerfield v. Rootes, Adm'r of Baylor, 529

DECLARATION.

1. In debt on a bond, if the defendant crave oyer, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond: and, though the plaintiff declare against one of several obligors, without stating that they were severally bound, yet, if the bond appear to be joint and several, it is sufficient.

Meredith's Adm'r v. Duval, 76

2. If a judgment of a County Court be declared upon as of a quarterly term, and the transcript produced be of a judgment at rules, (which ought to have been entered as of such quarterly term,) the variance is immaterial.

Diggs's Ex'r v. Dunn's Ex'r, 56

3. The plaintiff in ejectment may recover less land than the quantity stated in his declaration.

Clay v. White, 163

4. Quære, whether a declaration against the administrator of one of two joint obligors, averring that neither the defendant, nor the other obligor, nor any representative of his, had paid the debt: (without stating that such other obligor was dead, or that the defendant's intestate had survived him;) and alleging, in assigning the breach, that right of action had accrued, under the premises, against the defendant's intestate, (without setting forth in what manner,) be good after verdict?

Atwell's Adm'r v. Towles, 175

5. In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term.

Hunter v. Fairfax's Devisee, 318

6. See Covenant, No. 4.
Austin's Adm'r v. Whitlock's Ex'rs, 487

DECREE.

1. An administrator, to whom a credit, for a sum of money paid by him to the guardian of one of the distributees, has been allowed by a final decree in Chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian; though the latter was no party to the decree.

Hooper and Wife v. Royster and Wife, 119

2. On an appeal from an interlocutory decree, if proper parties to the suit appear to be wanting, the Court of Appeals will not leave it to the Chancellor, but will itself direct such parties to be made. Ib.

3. In what case interest ought to be charged against an executor from the date of the decree only.

Fitzgerald, Ex'r of Jones, v. Jones, 150

4. On a settlement of accounts in a Court of Equity, a decree will be rendered, against a plaintiff for a balance of account appearing due to a defendant.

Fitzgerald, Ex'r of Jones, v. Jones, 150

5. Prior to the 1st of May, 1804, the Courts of Chancery, on debts not bearing interest in terms, could not grant interest subsequent to the date of the decree.

Dilliard v. Tomlinson, &c., 188

6. A decree, dismissing so much of a bill as claims one of two separate subjects in controversy, and, as to the other, determining also the rights of the parties, but directing an account to be taken, is not final in any respect, between the parties retained in Court, and their legal representatives; but subject to revision and alteration in every part, at any time before a final decree; without the necessity of a bill of review.

Templeman v. Steptoe, 339

7. Quære, in such case, whether any subsequent decree could affect the rights of bona fide purchasers of property as to which the bill was dismissed. Ib.

8. A decree against devisees, holding by several and distinct devises, ought not to be joint, but pro rata.

Mason's Devisees v. Peter's Adm'r's, 457

9. See Equity, No. 28. Ib.

10. See Appeal, No. 5, & 6.

Day v. Murdoch, 460

11. See Injunction, No. 2.

Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs, 500

12. See Equity, No. 43.

Moon v. Campbell, 604

DEED.

1. Notice of a lien or encumbrance on property binds the purchaser, if received by him at any time before the execution of the conveyance.

Blair v. Owles, 88

2. In a suit in equity by the claimant of an encum-

brance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party.

3. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever.

4. A person out of possession cannot convey by bargain and sale such a title as will enable the bargainee to recover in ejectment.

5. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question.

6. If land be listed by the commissioner of the revenue to a wrong person, sold by the sheriff as the property of such person, and conveyed by deed to the purchaser; it seems, that the proper resort of the rightful owner for relief is to a Court of Equity, by which the deed may be cancelled, and a release or reconveyance of the land decreed.

7. See *Infant, No. 9.*

8. See *Scroll, No. 1.*

9. See *Austin's Adm'r v. Whitlock's Ex'rs.*

10. See *Vendor and Vendee, No. 10, 11, 12, 13.*

11. See *Humphrey's Adm'r v. M'Clenachan's Adm'rs and Heirs.*

12. A deed from a husband and wife without her privy examination and relinquishment, is utterly void as to her, and furnishes no consideration to support a subsequent conveyance.

13. See *Harvey and Wife v. Pecks.*

14. What are badges of fraud in obtaining a deed.

15. Under what circumstances, a deed, obtained from a man of weak understanding, (though not an idiot or lunatic,) may be set aside in equity.

16. See *Whitehorn and Wife v. Hines and others.*

17. See *Fraud, No. 4.*

18. See *Purchaser, No. 20, 21.*

DEFAULT.

1. In reviewing a judgment by default, on a forthcoming bond, the appellate Court will compare it with the execution on which it was taken.

2. See *Glascoc's Adm'r v. Dawson.*

DEFENDANT.

1. Where two defendants have appeared and pleaded, an entry in the record that "the parties came, &c. and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous.

2. See *Ward v. Johnston.*

3. In reversing the judgment for that error, the Court ought to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other.

4. In an action on a prison-bonds bond, the plaintiff is only required to shew a departure from the rules: the burden of proof then devolves on the defendant to shew that the prisoner was discharged by due course of law.

5. See *Meredith's Adm'r v. Duval.*

6. On a settlement of accounts in a Court of Equity, a decree will be rendered, against a plaintiff, for a balance of account appearing due to a defendant.

7. See *Fitzgerald, Ex'r of Jones, v. Jones.*

8. An appeal from, or supersedeas to, an order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only.

9. See *Bullitt's Ex'rs v. Winstons.*

10. A defendant, against whom an execution issued, may move to quash it, though not levied on his property, but on that of a co-defendant only.

11. See *Note to Answer, No. 2.*

12. See *Paynes v. Coles.*

13. See *Evidence, No. 17, and 18.*

14. See *Chapmans v. Chapman.*

15. See *Injunction, No. 1.*

16. See *Todd v. Bowyer.*

17. See **10. See Ejectment, No. 5, & Clay v. Ransome.*

18. General Rule of the Court of Appeals, relative to errors operating to the injury of a defendant in error.

19. See *Day v. Murdoch.*

DEFICIENCY.

1. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not binding the obligors to convey any other specific lands to make good a deficiency; the only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable.

2. See *Chinn v. Heale.*

3. What relief a Court of Equity will give where the suit is for a conveyance of a specific tract of land, and of other lands to make up a deficiency of quantity, but the plaintiff appears entitled to compensation in money, and not in lands.

4. Though land be sold in gross, for so much, be it more or less; yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a Court of Equity will give relief for a deficiency.

5. See *Hull v. Cunningham's Ex'r.*

6. What is the measure of relief in such case, if the purchaser do not lose the land he expected to get, but make an entry and obtain a patent.

7. Upon a special agreement to take the risk upon himself, the purchaser is entitled to no relief.

8. See note to the same case.

9. In what case compensation shall be made for a deficiency resulting from a previous contract to allow the locator one third of the land.

10. See *Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs.*

11. What decree a Court of Equity may make on a bill of injunction exhibited by the administrator of the purchaser against the administrator and heirs of the vendor claiming compensation for a deficiency, credits for payments and a conveyance.

12. In case of a deficiency in lands sold, the value at the time of the contract is the measure of compensation; of which value the purchase-money is the standard, where it does not appear that the actual value was different.

13. See *Same case.*

DEMURRER TO EVIDENCE.

1. Although, upon a demurrer to evidence, the testimony adduced on both sides ought regularly to be stated, yet, if it be parol and contradictory, the party tendering the demurrer cannot, after exhibiting his testimony, compel the other party to join in demurrer; for this, in effect, would be to enable the demurrant to confer credibility on his own witnesses, or at least to carry their credibility to be adjudged by an improper tribunal; the Jury and not the Court being exclusively judges of credibility.

2. See *Harrison v. Brock.*

3. A judgment ought not to be reversed on the ground that the Court, at the instance of the party against whom it was rendered, erroneously compelled the other party to join in a demurrer to evidence.

DEPOSITIONS.

1. An order of Court granting leave to take a deposition in the city of Philadelphia, being, "by consent of parties that a commission issue to any four aldermen of the said city and W. K." and a subsequent order (also by consent) granting "new commissions to take depositions;" a commission issuing afterwards "to R. K. alderman of the city of Philadelphia, and four other persons by name," not said to be aldermen, (and omitting W. K.) "any three of whom to act, if the whole cannot," should be presumed to have been directed to persons agreed upon by the parties, but whose names were omitted by the clerk in entering the last order; no objection having been made in the Court below, on account of any real or supposed variance between the first and second orders, and the commission.

2. See *Marshall v. Frisbie.*

3. A commission directed to five persons, ("any three of whom to act,") cannot be executed by one only: and a return, by one, that three others were present when the deposition was taken, is not sufficient. It should be certified by three, at least, who were present.

4. A deposition taken at a time and place not mentioned in the notice, may be read as evidence; an agent, of the party to whom the notice was given, duly authorized to attend to the taking of such deposition, having appeared at the time, and place appointed, and consented to a postponement to such other time and place. And if, in other respects, the commission be regularly executed and returned, the Court will presume from circum-

stances that the person who gave the consent was the authorized agent of the party. Ib.
4. Quære, whether commissioners appointed to take depositions can, "by their own mere authority, adjourn the taking thereof to any other convenient time and place. In the event that the business cannot readily be finished on the day, and at the place, to which the notice applies;" no intended adjournment, from day to day until the business be finished, being expressed in such notice? Ib.

DEPRECIATION.

1. Money received, by a guardian for a ward, during the paper money times, ought to be reduced by the scale of depreciation: to be applied as on the last day of the year in which it was received.
Hooper and Wife v. Royster and Wife, 119
2. If money was received, by a guardian for a ward, within six months previous to the 1st of January, 1777. (when the scale of depreciation commenced.) It should be reduced according 642
*to the scale, as at the end of six months from the time when received.
Hooper and Wife v. Royster and Wife, 119

DESCENTS.

1. See Distribution, No. 1, 2, 3.
2. The profits of the estate of an infant dying intestate accruing in his or her life-time, but not applied to his or her use, or otherwise lawfully disposed of, ought to go to the person, or persons, inheriting such estate generally.
Dillard v. Tomlinson, &c., 188
3. See Treaty, No. 1.
Hunter v. Fairfax's Devisee, 218
4. Construction of the 6th, 8th, and 7th sections of the act "to reduce into one the several acts directing the course of descents."
Templeman v. Steptoe, 390
5. Where an infant, having title to a real estate of inheritance derived by purchase or descent immediately from the father, dies without issue, and with no brother or sister, or descendant of either; the father being dead, but the mother living, the right of inheritance is not in abeyance, but goes in parcenary to the brothers and sisters of the father, or their lineal descendants. Ib.
6. And, vice versa, such estate being derived immediately from the mother; and she being dead, but the father living; it goes in parcenary to her brothers and sisters, or their lineal descendants. Ib.
7. The law was the same as to personal estate, between the 1st of October, 1793, and the 23d of January, 1802. Ib.

DEVASTAVIT.

1. Must be established by means of a second suit, (after a judgment against an executor or administrator as such,) before an action can be maintained on the administration bond.
Gordon's Adm'r v. The Justices of Frederick, 1

DEVIATION.

1. What is such a deviation, from the voyage, as will prevent the person insured from being entitled to a return of premium, on a marine insurance. "at and from Norfolk to Curracoa, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond."
Marine Insurance Company of Alexandria v. Stras, 408

DEVISE.

1. A patentee of land, without personally entering upon it, has such seisin as may be transferred and continued by devise.
Clay v. White, 162
2. Quære, as to the effect of a devise to a British subject between the 4th of July, 1776, and the date of the treaty of 1783?
Hunter v. Fairfax's Devisee, 218
3. Quære, whether a Court of Equity ought, under any circumstances, to assist, to the prejudice of a posthumous child, the claim of devisees under a will, made before the 1st of January, 1787, by a testator who had no child living, and was ignorant that his wife was in a state of pregnancy?
Paynes v. Coles, 878
4. See Assets, No. 1.
Mason's Devisees v. Peter's Adm'r, 487
5. A judgment against the executor is no evidence against the heirs or devisees of the real estate. Ib.
6. A decree against devisees, holding by several distinct devises, ought not to be joint, but pro rata. Ib.
7. See Equity, No. 28.
8. See Wills, No. 4, 5, 6, 7.
Wyatt v. Sadler's Heirs, 587
Johnson and others v. Johnson's Widow and Heirs, 549

DISCOVERY.

1. See Relief, No. 1.
Chlun v. Heale, 68
2. In cases where it is proper and necessary to go into equity for a discovery, the Court (having possession of the subject) will proceed to decide the cause, without turning the parties round to a Court of Law, notwithstanding (if such discovery had not been necessary) relief might originally have been had at law.
Chichester's Ex'r v. Vass's Adm'r, 98

DISTRESS.

1. A landlord is not entitled to the summary remedy by motion, on a three months' replevin bond; unless it appear that such bond was taken by a sheriff, or other officer legally authorized to make distress, and sell the distrained effects.
Smiths v. Ambler, 506
2. A landlord, in person, or by a private agent, may levy a distress: but cannot sell the distrained effects, which, in such case, are only to be held as a pledge, to compel the tenant to pay the rent. Ib.

DISTRIBUTEES.

1. An administrator, to whom a credit, for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian; though the latter was no party to the decree.
Hooper and Wife v. Royster and Wife, 119
2. In a suit for contribution against legatees or distributees, the executor or administrator, or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party; unless it appear that the account of such executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees. Ib.

DISTRIBUTION.

1. It is now settled, that the mother of an infant who died intestate, between the 1st of October, 1793, (when the suspended acts of 1792 took effect,) and the 23d of January, 1802, (when the act "concerning the distribution of unbequeathed, personal estate," was passed,) or any of her issue by a person other than the father, was not entitled to any part of such infant's personal estate derived immediately from the father.
Dillard v. Tomlinson, &c., 188
2. But the law was otherwise relative to the property of an infant who died intestate, between the 1st of January, 1787, (when the acts of 1786, took effect,) and the 1st of October, 1793; the distribution during that interval being regulated by the acts of 1786, c. 61, and c. 60. Ib.
3. Neither was the mother, or her issue, as above mentioned, excluded, where the property was derived, not immediately, but by intervening succession from the father. Ib.
4. The profits of the estate of an infant dying intestate, (including the increase of slaves,) accruing to such infant in his or her life-time, but not applied to his or her use, or otherwise lawfully disposed of, ought to go to the person or persons, inheriting such estate generally. Ib.

DOWER.

1. It seems, that a joint suit in Chancery may be maintained in behalf of a widow, and heirs or devisees, to recover land in which the widow has a right to dower, on a bill stating a case, in other respects, proper for a Court of Law.
See note to 554
2. In such case, it seems, the jurisdiction of the Court of Equity will be sustained, although the bill do not specially claim dower, or pray that it may be assigned, but merely a decree for the land, concluding with a prayer for general relief. The Court, having jurisdiction as to the right of dower, will entertain it for the whole subject in controversy; and, after decreeing the land to the plaintiffs, will go on to decree assignment of dower to the widow, partition among the other plaintiffs, and rents and profits against the defendants. Ib.

DUELLING.

1. An attorney at law is not bound, as a requisite to his admission to the bar of any Court, to take the oath prescribed by the 8d section of the act to suppress duelling.
Leigh's case, 468

EDUCATION AND MAINTENANCE.

1. See Guardian and Ward, No. 3.
Hooper and Wife v. Royster and Wife, 119
2. See Legatees, No. 4.
Fitzgerald, Ex'r of Jones, v. Jones, 150

EJECTMENT.

1. An illegal and void patent is not to be received as evidence of title on the general issue in ejectment.

Alexander v. Greenup, 184

2. It is not necessary for a patentee of waste and unappropriated land, to make a personal entry thereon, to enable him to maintain ejectment; for the patent ipso facto confers seisin.

Clay v. White, 168

3. Such seisin may be transferred and continued by deed of bargain and sale, or by devise: but a person, whose seisin is interrupted by the actual entry and adverse possession of another, cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment.

Ib.

4. The plaintiff in ejectment may recover less land than the quantity stated in his declaration. But, if the Jury find a special verdict, shewing the plaintiff entitled to a certain number of acres, part of the tract sued for; and do not specify the boundaries of such part, with so much precision as that possession thereof may with certainty be delivered; a venire de novo ought to be awarded.

Ib.

5. In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term.

Hunter v. Fairfax's Devisee, 218

6. A defendant in ejectment is protected by 20 years' possession before the action brought; but the five years and 174 days, excluded by the act of Assembly, are not to be counted in his favour.

Clay v. Ransome, 454

7. If, therefore, upon a special verdict in ejectment, it be uncertain whether the defendant, or those under whom he claims, had 20 years' possession, exclusive of the said 5 years and 174 days, a venire de novo ought to be awarded.

Ib.

ELECTION.

1. A purchaser, with notice of an annual encumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, in the full value.

Blair v. Owles, 48

2. In such case, the purchaser or the property, may be made liable, in the first instance, at the election of the plaintiff.

Ib.

3. If a prisoner depart from the prison rules by an illegal discharge from the sheriff, the creditor, having an assignment of the bond for keeping the rules, has his election, to bring suit upon it, or to sue the sheriff.

Meredith's Adm'r v. Duval, 76

4. See Contract, No. 5.

Chichester's Ex'r v. Vass's Adm'r, 98

5. See Penalty, No. 2.

ENTRIES AND SURVEYS.

1. See Patent for Land, No. 1.

2. Escheated lands are not to be granted upon entries and surveys, (as waste and unappropriated lands,) but upon sales by the escheators.

Alexander v. Greenup, 184

3. Quære, whether an entry, for a certain number of acres, "on the waters of Glade Creek, joining the lines of J. H.'s land, and the locator's "own land on W.'s run," be sufficiently certain?

Depew v. Howard and Wife, 208

4. See Purchaser, No. 9, 10.

Hull v. Cunningham's Ex'r, 380

ENTRY.

1. It is not necessary for a patentee of waste and unappropriated land to make a personal entry thereon, to enable him to maintain ejectment.

Clay v. White, 168

2. A person, whose seisin is interrupted by the actual entry and adverse possession of another, cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment.

Ib.

EQUITY.

1. A purchaser with notice of an annual encumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value.

Blair v. Owles, 38

2. In such case, the purchaser, or the property, may be made liable, in the first instance, at the election of the plaintiff.

Ib.

3. In a suit in equity, by the claimant of an encumbrance, against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party.

Ib.

4. Quære, whether a security is exonerated by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution, by an agreement to which the security was not a party? and if he be exonerated, whether it is at law, or in equity?

Ward v. Johnston, 45

5. See Answer, No. 1.

Chinn v. Heale, 68

6. See Chancery, No. 4.

Ib.

7. In cases where it is proper and necessary to go into equity for a discovery, the court (having possession of the subject) will proceed to decide the cause, without turning the parties round to a Court of Law, notwithstanding (if such discovery had not been necessary) relief might originally have been had at law.

Chichester's Ex'r v. Vass's Adm'r, 98

8. See Evidence, No. 7 and 8.

Hooper and Wife v. Royster and Wife, 119

9. See Appeal, No. 1.

Ib.

10. See Chancery, No. 9.

11. In what case interest ought to be charged against an executor from the date of the decree only.

Fitzgerald, Ex'r of Jones, v. Jones, 150

12. See Legates, No. 4.

Ib.

13. On a settlement of accounts in a Court of Equity, a decree will be rendered against a plaintiff for a balance of account appearing due to a defendant.

Ib.

14. Prior to the 1st of May, 1804, the Courts of Chancery, on debts not bearing interest in terms, could not grant interest subsequent to the date of the decree.

Dillard v. Tomlinson, &c., 183

15. In cases in which the regular remedy is by caveat, a Court of Equity may entertain jurisdiction, under circumstances which render its interposition just and proper; but such circumstances must be made to appear to the satisfaction of the Court.

Depew v. Howard and Wife, 298

16. A legal title to land ought not to be disturbed in favour of a party not having a superior right in equity to the identical land in question.

Ib.

17. See Contracts, No. 8.

Lewis v. Madisons, 308

18. In a suit in Chancery to recover a tract of land against a vendee, on the ground that the vendor had previously agreed to convey the same land in a certain event, to the plaintiff, it seems, that the vendor, or his legal representatives, ought to be parties.

Ib.

19. See Purchaser, No. 9, 10, 11, 12.

Hull v. Cunningham's Ex'r, 380, 386, 388

20. See Decree, No. 8, 9.

Templeman v. Steptoe, 330

21. See Answer, No. 2, 3.

Paynes v. Coles, 378

22. The aid of a Court of Equity ought not to be afforded to set up a marriage promise, when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage.

Ib.

23. Quære, whether a Court of Equity ought, under any circumstances, to assist, to the prejudice of a posthumous child, the claim of devisees under a will (made before the 1st of January, 1787,) by a testator who had no child living, and was ignorant that his wife was in a state of pregnancy?

Ib.

24. If land be listed by the commissioner of the revenue to a wrong person, sold by the sheriff as the property of such person, and conveyed by deed to the purchaser; it seems that the proper resort of the rightful owner for relief is to a Court of Equity, by which the deed may be cancelled, and a release, or reconveyance of the land decreed.

Yancey v. Hopkins, 419

25. See Infant, No. 9.

Ib.

26. A simple contract creditor, having obtained a judgment by default against an executor, cannot maintain a suit in equity, for marshalling assets, against devisees of the landed property, until he has fully prosecuted his claim at law, against the executor and his securities.

Mason's Devisees v. Peter's Adm'r's, 437

27. A decree against devisees, holding by several and distinct devisees, ought not to be joint, but pro rata.

Ib.

28. Quære, whether, and under what circumstances, a Court of Equity can decree a sale of land descended or devised, (without any specific lien, or any charge, either general or special, by a conveyance or will of the ancestor or devisor,) to satisfy a bond, or a simple contract creditor, claiming on the principle of marshalling assets? Especially, can such decree be made, in any such case, where the rents and profits of the land are sufficient to keep down the interest accruing on the debt?

Ib.

39. On a bill of injunction to a judgment at law, if it appear, on the final hearing, that the judgment ought not to be enjoined, and that the plaintiff in equity has had credit for a sum to which he is not entitled, the Court should not only dissolve the injunction, and dismiss the bill, but should moreover decree that the plaintiff pay that sum to the defendant.

645 *Todd v. Bowyer*, 447

30. During the pendency of a suit in Chancery, a settlement of accounts between the parties having been made, and reported to the Court; but, afterwards, by mutual consent, a new order of reference being made: the commissioner was not precluded from examining the accounts generally, and correcting any error therein; especially, as it appeared that the party who was benefited by such error, had torn his own signature, and that of the other party, from the settlement.

31. See *Mortgage*, No. 1.

32. *Green v. Price*, 449

33. See *Purchase*, No. 1.

34. *Day v. Murdoch*, 480

35. See *Appeal*, No. 5, & 4b.

36. See *Injunction*, No. 2.

Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs, 498

37. See *Vendor and Vendee*, No. 12, 13.

Same case, 500

38. See *Debtor*, No. 2.

Dangerfield v. Rootes, 589

37. Although the assignee of a bond, with, or without notice, takes it subject to all the equity of the obligor, yet such equity must be clearly and manifestly established by proof, before it shall affect an assignee without notice; especially, if the obligor, after the assignment, promise payment of the full amount of the bond to the assignee.

Mayo v. Giles's Adm'r, 583

38. See *Dower*, No. 1, 2.

Note to, 554, 555

39. Under what circumstances, a deed obtained from a man of weak understanding (though not an idiot or lunatic) may be set aside in equity.

Whitehorn and Wife v. Hines and others, 587

40. Fraud, it seems, may be presumed in equity, from strong circumstances; such as gross inadequacy of consideration; breach of trust and confidence; undue influence exerted; (especially, over a young and weak person by a near relation;) over diligence and assiduity in guarding against objections, and the like.

41. It seems, that a bona fide purchaser, without notice of fraud, having received a deed from two persons, (one of whom fraudulently induced the other to join therein,) is not responsible in equity; but the loss ought to fall on the fraudulent vendor.

But *quære*, whether this should be the rule, in case the estate of the fraudulent vendor were not sufficient to make good the loss?

42. In such case, the circumstance that the person defrauded was of weak understanding, but not an idiot or lunatic, is not sufficient to affect the right of the bona fide purchaser.

43. In a Court of Equity, a plaintiff may be decreed to execute a release, and to procure a third person (under whom he claims) to join him therein; without making such person a party to the suit.

Moon v. Campbell, 604

ERROR.

1. A judgment ought not to be reversed on the ground that the Court, at the instance of the party against whom it was rendered, admitted improper evidence, or erroneously compelled the other party to join in a demurrer to evidence.

Harrison v. Brock, 23

2. Where two defendants have appeared and pleaded, an entry in the record "that the parties came, &c. and the defendant L. acknowledge the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous.

Ward v. Johnston, 45

3. In reversing the judgment for that error, the Court ought to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other.

4. In such case, the plaintiff having, after the judgment, moved for permission to proceed against the security; and it appearing, by a bill of exceptions on this motion, that the judgment had been confessed by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal; the Court, in reversing the judgment, ought to have given the security leave to plead *puls darrein continuance*, all the proceedings having been brought by a writ of *superseas*.

5. Several judgments and orders, relating to each other, may be brought up by one writ of *superseas*: provided the whole be sufficiently described, as intended to be comprehended therein.

6. What degree of uncertainty and inaccuracy of language is sufficient to set aside the finding of a jury in a mill case.

Eppey v. Craile, 258

7. On a petition for leave to add to the height of a mill dam, the only proper subject of inquiry is, what damages will be occasioned by the proposed addition. It is error, therefore, to direct the jury to assess such other damages, accruing from the dam already erected, as were not contemplated by the original jury.

8. But an error in this respect should be regarded as surplusage, (the petition for the writ of *ad quod damnum* having prayed only for such inquiry as the law authorizes,) if the jury assessed such erroneous damages separately, and the Court did not direct the same to be paid, but only the damages properly assessed.

9. Upon an appeal from a decree in Chancery, an error to the injury of the appellee ought to be corrected, although he did not appeal.

Day v. Murdoch, 460

10. General Rule of the Court of Appeals as to the correction of errors operating to the injury of the appellee or defendant in error.

11. If a Court give a right judgment for a wrong reason, it ought, nevertheless, to be affirmed.

Newell v. Wood, 555

12. See *Execution*, No. 12, 14.

Glascok's Adm'r v. Dawson, 605

ERROR, WRIT OF.

See *Error*.

ESCAPE.

1. In an action against the sheriff for an escape, a verdict, in general terms, for the plaintiff, is not sufficient to authorise a judgment; notwithstanding the charge in the declaration be, that the sheriff took a defective prison-bonds bond, and thereupon voluntarily permitted the prisoner to escape; and issue be joined on the plea of not guilty. An express finding by the Jury, according to the act of 1792 concerning escapes, is absolutely necessary.

Hooe v. Tebbs and Wife, 501

ESCHEAT.

1. A patent from the Commonwealth, containing a recital "that the land was escheated from a certain I. M., deceased;" and granting the same, "by virtue of an entry made in the office of the late Lord Proprietor of the Northern Neck, and in consideration of the ancient composition of 11. 5s. sterling paid by the grantee into the treasury;" is illegal and void, and not to be received as evidence of title on the general issue in ejectment.

Alexander v. Greenup, 184

2. The Commonwealth, under the existing laws, cannot grant escheated lands, without a previous inquest of office, and then not (as waste and unappropriated lands) upon entries and surveys; but upon sales by the escheators.

3. Under the Act of May session, 1779, "concerning, escheats and forfeitures from British subjects," lands held by the factor of a British mercantile company, on their behalf, by virtue of such a title as was equitable only, escheated to the Commonwealth; subject to the payment of so much of the purchase money remaining due, as did not exceed the net amount for which the land was sold by the escheator, reduced to present current money, according to the 3d section of that act. See *Purchase*, No. 1.

Day v. Murdoch, 460

ESTATE.

See *Real Estate*.

EVICITION.

1. In case of eviction, after a conveyance made with warranty, the value of the land lost, as at the time of the eviction, gives the rule by which the vendee is to be remunerated; but, when the contract is executory, a Court of Equity will adjust it, upon principles of equity according to the circumstances.

Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs, 500

EVIDENCE.

1. A party tendering a demurrer to evidence, if it be parol and contradictory, cannot, after exhibiting the testimony on his side, compel the other party to join in demurrer.

Harrison v. Brock, 22

2. The Jury and not the Court are Judges of the credibility of witnesses. **1b.**
3. An award, made pendente lite, cannot be given in evidence upon the plea of non assumpsit. **1b.**
4. A judgment ought not to be reversed on the ground that the Court, at the instance of the party against whom it was rendered, admitted improper evidence, or erroneously compelled the other party to join in a demurrer to evidence.
- Harrison v. Brock, **23**
5. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever; for the vendor himself may be purchasing agent for the vendee by his appointment; and the vendee, by constituting him his agent, makes him a competent witness to prove the notice. **38**
- Blair v. Owles, **38**
6. In an action on a prison-bonds bond, the plaintiff is only required to shew a departure from the rules: the burden of proof then devolves on the defendant to shew that the prisoner was discharged by due course of law.
- Meredith's Adm'r v. Duval, **76**
7. In a suit in Chancery, the bill having referred to the proceedings in another suit, "as now remaining of record in the same Court;" and the answer having admitted that such a suit was brought, and such a decree as stated in the bill, existed; the Court of Appeals will award a writ of certiorari for a transcript of the record referred to, and receive it as evidence, so far as admitted by the answer.
- Hooper and Wife v. Royster and Wife, **119**
8. An administrator, to whom a credit for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in Chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian; though the latter was no party to the decree. **1b.**
9. Proof of the parol declarations of a guardian that she did not intend to charge her ward for board is admissible to repel a charge, for board in her life-time, exhibited by her representatives after her death. **1b.**
10. A patent appearing on its face to be illegal and void is not to be received as evidence of title on the general issue in ejectment.
- Alexander v. Greenup, **134**
11. Under peculiar circumstances, it was held unreasonable rigour to exact vouchers for many items in an executor's account which appeared probably just, though not supported by proof.
- Fitzgerald, Ex'r of Jones, v. Jones, **150**
12. By virtue of the 24th section of the District Court law of 1792, the copies therein allowed are good evidence in suits brought since that act took effect.
- Atwell's Adm'r v. Towles, **175**
13. Parol evidence is admissible to prove that a *fi. fa.* was levied, though no return was made upon it.
- Bullitt's Ex'r v. Winstons, **260**
14. On a joint plea of "not guilty," in trespass vi et armis, against two defendants, for breaking the plaintiff's close and beating his slaves, the defendants ought not to be permitted to give in evidence, by way of mitigation of damages, a license from the plaintiff, to one of them, to visit his negro quarters, and chastise any of his slaves who might be found acting improperly; the battery being committed *by the other defendant; and no proof appearing that the slaves who were beaten had acted improperly.
- Brown and Boisseau v. May, **288**
15. Illegal, or improper evidence ought never to be confided to the Jury, however unimportant it may be to the cause. **1b.**
16. A record of one suit cannot be read as evidence in another, unless both the parties, or those under whom they claim, were parties to both suits: it being a rule that a document cannot be used against a party who could not avail himself of it, in case it made in his favour.
- Paynes v. Coles, **373**
17. A record of one suit cannot be read as evidence in another, on the ground that the defendant and one of the plaintiffs in the latter suit were parties to the former, and that the same point was in controversy in both: another plaintiff, and the person under whom both the said plaintiffs jointly claim, not having been parties to such former suit.
- Chapmans v. Chapman, **398**
18. In such case, the circumstance that the "writings and evidences" in the former suit were read at the hearing of the latter, without any exception taken at that time appearing on the record, is no proof that this was done by consent of parties, and does not preclude the objection from being taken in the Appellate Court; the defendant in his answer having objected to the admission of the verdict and other proceedings in the former suit, but offered to agree that the depositions only might be read; to which offer no assent appeared on the part of the plaintiff. **1b.**
19. An answer in Chancery (though, in form, responsive to a question put in the bill) is not evidence, where it asserts a right affirmatively in opposition to the plaintiff's demand; but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill.
- Paynes v. Coles, **373**
20. An issue out of Chancery ought not to be directed to try a claim altogether unsupported by testimony, or a title not alleged in the bill, but suggested in the answer, without proof. Neither is this rule to be varied by the circumstance that infants are interested. **1b.**
21. Under what circumstances a protest before a notary public by the master of a vessel is no evidence.
- Marine Insurance Company of Alexandria v. Strass, **408**
22. A judgment against the executor is no evidence against the heirs or devisees of the real estate.
- Mason's Devises v. Peter's Adm'r, **437**
23. What is sufficient evidence to establish a nuncupative will. See Wills, No. 3.
- Mason v. Dunman, **456**
24. Parol evidence, of subsequent declarations and acknowledgments by the parties, is not sufficient to support an agreement, between a purchaser of land and a third person, that such third person should be admitted as a partner in the purchase.
- Henderson v. Hudson, **510**
25. The proof must be clear and manifest to affect an assignee by an equity of which he had no notice; especially, if the obligor, after the assignment, promise payment of the full amount of the bond to the assignee.
- Mayo v. Gilles's Adm'r, **533**
26. What circumstances are evidence of fraud in a Court of Equity. See Fraud, No. 3, 4.
- Harvey and Wife v. Pecks, **518**
- Whitehorn and Wife v. Hines and others, **557**
27. A vendor of land, according to certain lines, must be presumed interested, and therefore incompetent, as a witness, to establish those lines; unless it appear that he did not warrant the title.
- Moon v. Campbell, **600**

EXAMINATION. (PRIVY.)

1. See Deed, No. 10.
- Harvey and Wife v. Pecks, **518**

EXECUTION.

1. An execution against the goods of a decedent in the hands of his executor or administrator, with a return of nulla bona, is not sufficient to ground an action on the administration bond.
- Gordon's Adm'r v. The Justices of Frederick, **1**
2. If a judgment be confessed by a principal, by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal; the security (in case of further proceedings against him) ought to be permitted to plead such matter *pau darrein continuance*.
- Ward v. Johnston, **45**
3. Quære, whether such plea, if demurred to, would be good in law to bar the plaintiff's claim as against the security? **1b.**
4. The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor.
- Atwell's Adm'r v. Towles, **175**
5. A writ of fieri facias may be levied, without touching or removing the property: provided it be in the immediate power of the sheriff, and admitted by him to have been taken to satisfy the debt.
- Bullitt's Ex'r v. Winstons, **260**
6. The sheriff's permitting the property to remain in the possession of a third person, or of the defendant, under a verbal engagement to produce it on the day of sale, does not prevent the *fi. fa.* from having been levied in contemplation of law: the sheriff being responsible to the plaintiff, in such case, if the property be not produced. **1b.**
7. Parol evidence is admissible to prove that a *fi. fa.* was levied, though no return was made upon it. **1b.**
8. A sheriff may be permitted, by order of court, to make a return upon an execution, or to amend it, according to the truth of the case, at any time after the return day. **1b.**
9. A plaintiff, by directing the sheriff to put off the sale of property taken in execution, to a day after the return day, and to suffer it to remain in the

possession of the principal defendant, or his securities, releases the securities altogether from 648 that or any subsequent "execution; such direction being given without their concurrence.

Bullitt's Ex'r v. Winstons. 369

10. In such case, the plaintiff's adding to the direction the words "holding the property subject to the said execution," cannot prevent the release from operating. Ib.

11. An appeal from, or supersedeas to, an order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only. Ib.

12. A defendant, against whom an execution issued, may move to quash it, though not listed on his property, but on that of a co-defendant only.

Note to 224

13. A writ of fieri facias against an administratrix, "to be levied, as to certain damages and costs, of the goods and chattels of her intestate, and, as to other damages and costs, of her own goods and chattels," was returned "executed on certain slaves the property of the administratrix, and a forthcoming bond taken," &c. The bond being given by the administratrix, eo nomine, but expressing that the *fi. fa.* was against the goods and chattels of the said administratrix, was decided to be variant from the *fi. fa.* and therefore quashed.

Glascok's Adm'r v. Dawson. 605

14. In reviewing a judgment by default on a forthcoming bond, the appellate Court will compare it with the execution on which it was taken. Ib.

EXECUTORS AND ADMINISTRATORS.

1. It is necessary, after a judgment against an executor or administrator, as such, to establish a devastavit, by means of a second suit, before an action can be maintained on the administration bond.

Gordon's Adm'r v. The Justices of Frederick. 1

2. An answer filed in the name of one of three executors (the decree being in favour of the plaintiff) is not to be taken as their joint answer; notwithstanding the clerk in the transcript of the record says that they appeared by counsel, and filed their answer, and no steps were taken to compel a further answer from them.

Chinn v. Heale. 68

3. A husband surviving his wife (or, in case of his death afterwards, his executor or administrator) may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate.

Chilchester's Ex'r v. Vass's Adm'r. 98

4. An administrator to whom a credit for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in Chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian; though the latter was no party to the decree.

Hooper and Wife v. Royster and Wife. 119

5. Proof of the parol declarations of a guardian, that she did not intend to charge her ward for board, is admissible to repel a charge, for board in her life-time, exhibited by her executor or administrator after her death.

Hooper and Wife v. Royster and Wife. 119

6. In a suit for contribution against legatees or distributees, the executor or administrator, or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party; unless it appear that the account of such executorship or administration has been regularly made up, and the estate delivered over to the legatees or distributees. Ib.

7. An executor having delivered up the estate generally and the management thereof to one of his residuary legatees for his benefit and that of his co-legatee; nine years and ten months having afterwards elapsed before he was summoned to render an account; the greater part of his executorship having moreover been during the revolutionary war; and the settlement taking place after his death: it was held unreasonable rigour to exact vouchers for many items in his account which appeared probably just, though not supported by proof.

Fitzgerald, Ex'r of Jones, v. Jones. 150

8. Where the failure to bring an executor to a settlement appears to have proceeded from neglect of his residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree; neither in such case, ought interest to be allowed him on payments to the legatees before the decree; though made in bonds high carried interest. Ib.

9. Under circumstances a commission of 7½ per cent. may be allowed an executor on all his receipts

and disbursements; the real and personal estate having, in obedience to the directions of the will, been kept together and managed by him. Ib.

10. An executor or administrator, hiring slaves belonging to the estate of his testator or intestate, ought not to be charged with interest on such hire from the day it became due; (no proof appearing that it was then collected, or that interest from that day was received upon it;) but a reasonable time to collect and apply the money should be allowed before the commencement of interest.

Dilliard v. Tomlinson, &c. 188

11. In such case, no interest ought to be charged where the right to the slaves was in dispute, and it was doubtful to whom the money, when collected, should be paid; no proof appearing that the executor or administrator received any interest, or made any profit. Ib.

12. A simple contract creditor, having obtained a judgment by default against an executor, cannot maintain a suit in equity, for marshalling assets, against devisees of the landed property until he has fully prosecuted his claim at law, against the executor and his securities.

Mason's Devisees v. Peter's Adm'r's. 437

13. A judgment by default, against an executor, is prima facie admission of assets. Ib.

14. A judgment against the executor is no evidence "against the heirs or devisees of the real estate." 649

Mason's Devisees v. Peter's Adm'r's. 437

15. What decree may be made on a bill of injunction exhibited by the administrator of the purchaser of a tract of land, against the administrator and heirs of the vendor, claiming compensation for a deficiency, credits for payments, and a conveyance.

Humphrey's Adm'r v. McLenachan's Adm'r and Heirs. 498

16. See Execution, No. 13.

Glascok's Adm'r v. Dawson. 605

FAIRFAX. (LORD.)

See Northern Neck of Virginia.

FIERI FACIAS.

See Execution.

FIRE COMPANY.

See Mutual Assurance Society.

FORFEITURE.

1. An authority given by law to any officer, whereby the estates or interests of other persons may be forfeited or lost, must be strictly pursued in every instance.

Yancey v. Hopkins. 419

2. See Infant, No. 9.

3. See Escheat, No. 3; Purchase, No. 1.

Day v. Murdoch. 460

FORTHCOMING BOND.

1. A writ of fieri facias against an administratrix, "to be levied, as to certain damages and costs, of the goods and chattels of her intestate, and, as to other damages and costs, of her own goods and chattels," was returned "executed on certain slaves the property of the administratrix, and a forthcoming bond taken," &c. The bond being given by the administratrix, eo nomine, but expressing that the *fi. fa.* was against the goods and chattels of the said administratrix, was decided to be variant from the *fi. fa.* and therefore quashed.

Glascok's Adm'r v. Dawson. 605

2. In reviewing a judgment by default on a forthcoming bond, the appellate Court will compare it with the execution on which it was taken. Ib.

FRAUD.

1. A mortgagee, without notice, shall be protected against a prior equitable title; if the person, having such title, either encouraged him to take the mortgage, or, knowing of his intention to take it, stood by, and made no objection.

Green v. Price. 449

2. The statute, "to prevent frauds and perjuries," applies to an agreement, between a purchaser of land, and a third person, that such third person should be admitted as a partner in the purchase; the proof of such agreement being only parol evidence of subsequent declarations and acknowledgments of the parties.

Henderson v. Hudson. 510

3. What are badges of fraud in obtaining a deed.

Harvey and Wife v. Pecks. 518

4. Fraud, it seems, may be presumed in equity from strong circumstances; such as gross inadequacy of consideration; breach of trust and confidence; undue influence exerted; (especially, over a young and weak person by a near relation;) over-

diligence and assiduity in guarding against objections; and the like.

Whitehorn and Wife v. Hines and others, 587
5. See Purchaser, No. 20, 21. Ib.

GRANT.

See Patent for Land.

GUARDIAN AND WARD.

1. An administrator, to whom a credit, for a sum of money paid by him to the guardian of one of the distributees, has been allowed by a final decree in Chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian; though the latter was no party to the decree.

Hooper and Wife v. Royster and Wife, 119

2. Proof of the parol declarations of a guardian that she did not intend to charge her ward for board is admissible to repel a charge, for board in her lifetime, exhibited by her representatives after her death. But, in such case, she ought not to be charged with interest on a sum of money received for the ward, unless such interest would exceed the amount of a reasonable compensation for board. Ib.

3. A guardian may be allowed for moneys paid and advanced, for the clothes, schooling and other necessary expenses of the ward, out of the principal of such ward's estate; if it appear that, from extraordinary circumstances, such disbursements were unavoidable without culpable neglect on the part of such guardian; otherwise, such allowance ought to be made out of the profits only. Ib.

4. Money received, by a guardian for a ward, during the paper money times, ought to be reduced by the scale of depreciation; to be applied as on the last day of the year in which it was received. Ib.

5. A reasonable time ought to be allowed a guardian to put the money of a ward out at interest; and, in this case, six months were considered as such reasonable time. Ib.

6. If money was received, by a guardian for a ward, within six months previous to the 1st of January, 1777, (when the scale of depreciation commenced,) it should be reduced according 650 *to the scale, as at the end of six months from the time when received.

Hooper and Wife v. Royster and Wife, 119

HEIRS.

1. A judgment against the executor is no evidence against the heirs or devisees of the real estate.

Mason's devisees v. Peter's Adm'rs, 487

2. What decree may be made on a bill of injunction exhibited by the administrator of the purchaser of a tract of land, against the administrator and heirs of the vendor claiming compensation for a deficiency, credits for payments and a conveyance.

Humphrey's Adm'r v. McClenachan's Adm'r and Heirs, 498

HIRE.

1. See Slaves, No. 1, 2.

2. See Interest, No. 10.

HUSBAND AND WIFE.

1. If A. promise B. that if he and A.'s daughter marry, "he will endeavour to do her equal justice with the rest of his daughters as fast as it is in his power with convenience," and the marriage be afterwards had with his consent: the promise is sufficiently certain and obligatory.

Chichester's Ex'x v. Vass's Adm'r, 98

2. In such case, A. has not his life-time to perform it in; but, in a reasonable time after the marriage, (taking into consideration his property and other circumstances,) is bound to make an advancement to B. and wife, equal to the largest made to his other daughters. Ib.

3. A promise in the above-mentioned terms enures to the joint benefit of the husband and wife; and is not to be satisfied by a conveyance of lands to the wife. The husband (to whom the promise was made) has his election to consider it a personal contract; and, if he survive the wife, may sue in his own right to recover damages for a breach. Ib.

4. A husband, surviving his wife, (or, in case of his death afterwards, his executor or administrator,) may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate. Ib.

5. The aid of a Court of Equity ought not to be afforded to set up a marriage-promise, when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage.

Paynes v. Coles, 373

6. See Relief, No. 8. Ib.

7. A deed from a husband and wife, without her privy examination and relinquishment, is utterly

void as to her, and furnishes no consideration to support a subsequent conveyance.

Harvey and Wife v. Pecks, 518

IDIOIT.

1. Under what circumstances, a deed, obtained from a man of weak understanding, (though not an idiot or lunatic,) may be set aside in equity

Whitehorn and Wife v. Hines and others, 557
2. See Equity, No. 41, 42. Ib.

IMBECILITY OF UNDERSTANDING.

See Idiot.

INADEQUACY OF CONSIDERATION.

See Consideration

INCREASE.

1. See Infant, No. 4.

INCUMBRANCE.

1. Notice of a lien or encumbrance on property binds the purchaser, if received by him at any time before the execution of the conveyance.

Blair v. Owles, 38

2. A purchaser with notice of an annual encumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value. Ib.

3. In such case, the purchaser, or the property, may be made liable, in the first instance, at the election of the plaintiff. Ib.

4. In a suit in equity by the claimant of an encumbrance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party. Ib.

5. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever; for the vendor himself may be purchasing agent for the vendee by his appointment; and the vendee, by constituting him his agent, makes him a competent witness to prove the notice. Ib.

INFANT.

1. It is now settled, that the mother of an infant who died intestate, between the first of October, 1798, (when the suspended acts of 1798 took effect,) and the 23d of January, 1802, (when the act, "concerning the distribution of unbequeathed personal estate," was passed,) or any of her issue, by a person other than the father, was not entitled to any part of such infant's personal estate derived immediately from the father.

Dillard v. Tomlinson, &c., 183

2. But the law was otherwise relative to the property of an infant who died intestate, between the 1st of January, 1797, (when the acts of 651 *1788 took effect, and the 1st of October, 1798; the distribution during that interval, being regulated by the acts of 1785, c. 61, and c. 60.

Dillard v. Tomlinson, &c., 183

3. Neither was the mother, or her issue, as above mentioned, excluded, where the property was derived, not immediately, but by intervening succession, from the father. Ib.

4. The profits of the estate of an infant dying intestate, (including the increase of slaves,) accruing to such infant in his or her life-time, but not applied to his or her use, or otherwise lawfully disposed of, ought to go to the person, or persons, inheriting such estate generally. Ib.

5. Where an infant, having title to a real estate of inheritance derived by purchase or descent immediately from the father, dies without issue, and with no brother or sister, or descendant of either; the father being dead, but the mother living; the right of inheritance is not in abeyance, but goes in parcenary to the brothers and sisters of the father, or their lineal descendants; and, vice versa, such estate being derived immediately from the mother; and she being dead, but the father living; it goes in parcenary to her brothers and sisters, or their lineal descendants.

Templeman v. Steptoe, 339

6. The law was the same, as to personal estate, between the 1st of October, 1798, and the 23d of January, 1802. Ib.

7. See Issue Out of Chancery, No. 1.

Paynes v. Coles, 373

8. See Equity, No. 23. Ib.

9. The land of an infant being, by mistake, listed by the Commissioner of revenue as the property of another person, and sold as such for taxes, in December, 1786; being bought by the deputy sheriff who sold it; conveyed to him by the high sheriff in February, 1795; and afterwards sold again by the

deputy sheriff; the right of the infant was established against the last purchaser; (who bought with full notice of all the circumstances;) notwithstanding the suit was not brought until six years after the plaintiff attained his full age.

Yancey v. Hopkins,

419

INHERITANCE.

1. See Infant, No. 4.

Dillard v. Tomlinson, &c.,

183

2. See Infant, No. 5 & 6.

Templeman v. Steptoe,

339

INJUNCTION.

1. On a bill of injunction to a judgment at law, if it appear, on the final hearing, that the judgment ought not to be enjoined, and that the plaintiff in equity has had credit for a sum to which he is not entitled; the Court should not only dissolve the injunction and dismiss the bill, but should moreover decree that the plaintiff pay that sum to the defendant.

Todd v. Bowyer,

447

2. On a bill of injunction exhibited by the administrator of the purchaser of a tract of land, against the administrator and heirs of the vendor, (in whom the legal title remains,) claiming compensation for a deficiency credits for payments and a conveyance; the Court, on allowing the compensation and the credits, may decree that the defendants shall convey their title to certain trustees to be by them conveyed to the heirs of the purchaser, (though not parties to the suit,) if the balance of the purchase-money be paid on or before a certain day; and, if not, with power to sell as much of the land as may be sufficient to pay such balance, and to convey the residue, if any, to the said heirs.

Humphrey's Adm'r v. McClenachan's Adm'r and Heirs,

493

INQUEST OF OFFICE.

1. The Commonwealth, under the existing laws, cannot grant escheated lands, without a previous inquest of office.

Alexander v. Greenup,

134

2. Quære, were the several acts of assembly, respecting the mode of acquiring titles to waste and unappropriated lands in the Northern Neck, equivalent to an inquest of office, and sufficient to authorize grants of the said lands by the commonwealth?

Hunter v. Fairfax's Devisee,

218

INQUISITION.

See Mills.

INSOLVENCY.

1. The creditor of an insolvent prisoner, who has the liberty of the rules, is bound to give security for the prison fees; but the sheriff cannot legally discharge him, unless he be actually insolvent, and, being so, the plaintiff, having notice thereof, refuse to pay his fees, or to give bond for the payment thereof.

Meredith's Adm'r v. Duval,

76

INSURANCE.

1. See Marine Insurance, No. 1, 2, 3.

2. See Mutual Assurance Society, No. 1, 2.

INTENTION.

1. See Wills, No. 4, 5.

Wyatt v. Sadler's Heirs,

537

2. See Wills, No. 6, 7.

Johnson and others v. Johnson's Widow and Heirs,

549

INTEREST.

1. When it appears that a guardian boarded her ward in her own house, and intended to make no charge for it, she ought not to be charged with interest on a sum of money received for the ward, unless such interest would exceed the amount of a reasonable compensation for board.

652

Hooper and Wife v. Royster and Wife,

119

2. A reasonable time ought to be allowed a guardian to put the money of a ward out at interest; and, in this case, six months were considered as such reasonable time.

Ib.

3. Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree; neither, in such case, ought interest to be allowed him on payments to the legatees before the decree; though made in bonds which carried interest.

Fitzgerald, Ex'r of Jones, v. Jones,

150

4. See Bond, No. 13.

Atwell's Adm'r's v. Towles,

175

5. See Penalty, No. 2.

Ib.

6. Interest on costs could not properly be allowed, under the act of 1803, 2 Rev. Code, p. 30, c. 20, s. 5. So decided in

M'Rea v. Brown, in note to

179

7. An executor or administrator, hiring slaves belonging to the estate of his testator or intestate, ought not to be charged with interest on such hire from the day it became due; (no proof appearing that it was then collected, or that interest from that day was received upon it;) but a reasonable time to collect and apply the money, should be allowed before the commencement of interest.

Dillard v. Tomlinson, &c.,

183

8. In such case, no interest ought to be charged where the right to the slaves was in dispute, and it was doubtful to whom the money, when collected, should be paid, no proof appearing that the executor or administrator received any interest, or made any profit.

Ib.

9. Prior to the 1st of May, 1804, (when the act, "concerning the proceedings in the Courts of Chancery, and for other purposes," took effect; see 2 Rev. Code, p. 30,) the Courts of Chancery, on debts not bearing interest in terms, could not grant interest subsequent to the date of the decree.

Ib.

10. Interest on the hire of slaves disallowed as in Dillard v. Tomlinson, ante, p. 183.

Whitehorn v. Hines and Wife,

557

INTERLOCUTORY DECREE.

1. See Decree, No. 2.

Hooper and Wife v. Royster and Wife,

119

INTESTATES' ESTATES.

1. See Infant, No. 1, 2, 3, 4.

Dillard v. Tomlinson, &c.,

183

2. See Infant, No. 5, 6.

Templeman v. Steptoe,

339

ISSUE OUT OF CHANCERY.

1. An issue out of Chancery ought not to be directed to try a claim altogether unsupported by testimony, or a title not alleged in the bill, but suggested in the answer, without proof. Neither is this rule to be varied by the circumstance that infants are interested.

Paynes v. Coles,

373

ISSUE OF MARRIAGE.

1. The act of a Court of Equity ought not to be afforded to set up a marriage promise, when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage.

Paynes v. Coles,

373

2. See Relief, No. 8.

Ib.

JEOPAILS.

1. A judgment at rules in the clerk's office of a County Court ought to be entered as of the last day of the succeeding quarterly term; but, if it be entered as at rules only, it is merely a clerical misprision, and therefore amendable.

Digges's Ex'r v. Dunn's Ex'r,

56

2. In such case, if the judgment be declared upon as of a quarterly term, and the transcript produced be of a judgment at rules, (which ought to have been entered as of such quarterly term,) the variance is immaterial.

Ib.

3. See Declaration, No. 4.

4. See Ejectment, No. 4.

5. What defects in a declaration for covenant broken are not cured by the act of Jeopails.

Austin's Adm'r v. Whitlock's Ex'r,

487

JUDGMENT.

1. A judgment against an executor or administrator as such, with an execution, and return of nulla bona, are not sufficient to authorize an action on the administration bond; but a devastavit must first be established by a second suit.

Gordon's Adm'r's v. The Justices of Frederick,

1

2. A judgment ought not to be reversed on the ground that the Court, at the instance of the party against whom it was rendered, admitted improper evidence, or erroneously compelled the other party to join in a demurrer to evidence.

Harrison v. Brock,

22

3. Where two defendants have appeared and pleaded, an entry in the record "that the parties came, &c. and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous.

Ward v. Johnston,

45

4. In reversing the judgment for that error, the Court ought to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other. *Ib.*
5. In such case, the plaintiff having, after the judgment, moved for permission to proceed against the security; and it appearing, by a bill of exceptions on this motion, that the judgment had been confessed by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal; the Court, in reversing the judgment, ought to have given the security leave to plead *pais darrein continuance*; as the proceedings having been brought up by a writ of *supersedeas*.
Ward v. Johnston. 45
6. Several judgments and orders, relating to each other, may be brought up by one writ of *supersedeas*; provided the whole be sufficiently described, as intended to be comprehended therein. *Ib.*
7. Quære, whether a security is exonerated at law, or in equity, by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution by an agreement to which the security was not a party? *Ib.*
8. A judgment at rules in the clerk's office of a County Court ought to be entered as of the last day of the succeeding quarterly term; but, if it be entered as at rules only, it is merely a clerical mispison, and therefore amendable.
Digges's Ex'r v. Dunn's Ex'r, 56
9. In such case, if the judgment be declared upon as of a quarterly term, and the transcript produced be of a judgment at rules, (which ought to have been entered as of such quarterly term,) the variance is immaterial. *Ib.*
10. See Bond, No. 13.
11. In an action of debt on a bond, the judgment is always entered for the penalty, to be discharged by the principal and interest; and, if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty.
Atwell's Adm'r's v. Towles, 175
12. A plea in abatement ought not to be received to set aside an office judgment; unless it be of matter which arose *pais darrein continuance*.
Bradley v. Welch, 564
13. See Assets, No. 1.
14. A judgment by default, against an executor, is *prima facie* admission of assets. *Ib.*
15. A judgment against the executor is no evidence against the heirs or devisees of the real estate. *Ib.*
16. General rule of the Court of Appeals, relative to correction of errors in judgments and decrees.
Day v. Murdoch, in note, 460
17. If, in a suit upon a prison-bonds bond, a Court or competent jurisdiction, adjudge the bond void; the plaintiff may sue the sheriff without appealing from the judgment, though erroneous.
Hooe v. Tebbbs and Wife, 501
18. In such case the sheriff, though not a party to the suit on the bond, is bound by the judgment, unless he can prove it was obtained by collusion. *Ib.*
19. See Escape, No. 1. *Ib.*
20. The Court of Appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law.
Newell v. Wood, 555
21. If a Court give a right judgment for a wrong reason, it ought, nevertheless, to be affirmed.
Newell v. Wood, 555
22. In reviewing a judgment by default on a forthcoming bond, the appellate Court will compare it with the execution on which it was taken.
Glascock's Adm'r v. Dawson, 605

JURISDICTION.

1. In cases where it is proper and necessary to go into equity for a discovery, the Court (having possession of the subject) will proceed to decide the cause, without turning the parties round to a Court of Law, notwithstanding (if such discovery had not been necessary) relief might originally have been at Law.
Chichester's Ex'r v. Vass's Adm'r, 98
2. Neither consent, nor long acquiescence of parties can give the Court of Appeals jurisdiction.
Clarke v. Conn, 160
3. In cases in which the regular remedy is by caveat, a Court of Equity may entertain jurisdiction, under circumstances which render its interposition just and proper; but such circumstances must be made to appear to the satisfaction of the Court.
Depew v. Howard and Wife, 293
4. In what case a Court of Equity, having jurisdiction

as to part of a subject in controversy, will entertain it for the whole.

See Dower, No. 1, 2.

Note to

5. The Court of Appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law.
Newell v. Wood, 555

JURY.

1. The Jury and not the Court, are judges of the credibility of witnesses.
Harrison v. Brock, 22
2. Illegal, or improper evidence ought never to be confided to the Jury; however unimportant it may be to the cause.
Brown and Boisseau v. May, 388

LANDLORD AND TENANT.

1. A landlord is not entitled to the summary remedy by motion, on a three months' replevin bond; unless it appear that such bond was taken by a sheriff, or other officer legally authorized to make distress, and to sell the distrained effects.
Smith's v. Ambler, 596
2. A landlord, in person, or by a private agent, may levy a distress; but cannot sell the distrained effects, which, in such case, are only to be held as a pledge, to compel the tenant to pay the rent. *Ib.*

LANDS.

1. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not binding the obligors to convey any other specific lands to make good a deficiency; the only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable.
Chinn v. Heale, 63
2. Where a plaintiff sues in chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency of quantity; (relating to which deficiency he prays a discovery;) but, according to the contract, appears entitled to compensation in money, and not in lands; the Court, after decreeing the first mentioned conveyance, (the deficiency, and the sum to be allowed for it being ascertained,) will go on to decree the compensation, without turning over the party to a Court of Law. *Ib.*
3. A patent from the commonwealth, containing a recital "that the land was escheated from a certain J. M. deceased;" and granting the same, "by virtue of an entry made in the office of the late lord proprietor of the Northern Neck; and in consideration of the ancient composition of 11. 5s. sterling paid by the grantee into the treasury;" is illegal and void, and not to be received as evidence of title on the general issue in ejectment.
Alexander v. Greenup, 134
4. The commonwealth, under the existing laws, cannot grant escheated lands, without a previous inquest of office, and then not (as waste and unappropriated lands) upon entries and surveys; but upon sales by the escheators. *Ib.*
5. A patent may be declared void, for defects apparent on its face; without the necessity of resorting to a *scire facias* to repeal it. *Ib.*
6. Quære, whether, and from what Court, a *scire facias* to repeal a patent can issue in Virginia? *Ib.*
7. It is not necessary for a patentee of waste and unappropriated land to make a personal entry thereon, to enable him to maintain ejectment; for the patent *ipso facto* confers seisin.
Clay v. White, 163
8. Such seisin may be transferred and continued by deed of bargain and sale, or by devise; but a person, whose seisin is interrupted by the actual entry and adverse possession of another, cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment. *Ib.*
9. The plaintiff in ejectment may recover less land than the quantity stated in his declaration. But, if the jury find a special verdict, shewing the plaintiff entitled to a certain number of acres, part of the tract sued for; and do not specify the boundaries of such part with so much precision as that possession thereof may with certainty be delivered; a *venire de novo* ought to be awarded. *Ib.*
10. By the act of compromise, passed the 10th of December, 1796, the title of Denny Fairfax, and of those who claim under him, to such of the lands in the Northern Neck as were waste and unappropriated at the time of the death of Lord Fairfax was clearly extinguished.
Hunter v. Fairfax's Devisee, 318
11. Quære, were the several acts of assembly, respecting the mode of acquiring titles to waste

- and unappropriated lands in the Northern Neck, equivalent to an inquest of office, and sufficient to authorize grants of the said lands by the commonwealth, independently of the said act of compromise?
- Hunter v. Fairfax's Devisee.** 218
12. *Quære*, whether, by virtue of the treaty of 1783, persons born in Great Britain, and residing there on the 4th of July, 1776, could, without ever there-after becoming citizens of Virginia, or of any one of the United States of America, take and hold lands in Virginia, by descent, or devise, accruing between that day and the date of the said treaty? 1b.
13. See Attorney in Fact, No. 1, 2, 3. 238
- Betts v. Cralle.** 238
14. See Jurisdiction, No. 3.
- Depew v. Howard and Wife.** 298
15. A legal title to land ought not to be disturbed in favour of a party not having a superior right in equity to the identical land in question. 1b.
16. *Quære*, whether an entry for a certain number of acres "on the waters of Glade Creek, joining the lines of J. H.'s land, and the locator's own land on W.'s run," be sufficiently certain? 1b.
17. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question. 308
- Lewis v. Madisons.** 308
18. See Parties, No. 5.
- Lewis v. Madisons.** 1b.
19. Though land be sold in gross, for so much, be it more or less, yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a Court of Equity will give relief for a deficiency.
- Hull v. Cunningham's Ex'r.** 330
20. But if the purchaser do not (by eviction or otherwise) lose the land he expected to get; but make an entry for it as vacant, and obtain a patent; the proper measure of relief is only the amount of his expenditures in procuring the patent, with a reasonable allowance for trouble therein, and actual costs of suit. 1b.
21. A purchaser who buys a tract of land as containing so many acres, more or less, and agrees to take upon himself the risk, as to lines, or quantity, (appearing also better acquainted with the land than the vendor, against whom there is no proof of fraud,) is not entitled to any relief in equity, for a loss relating to the risk undertaken. 1b. 336
22. See note to the same case. 338
23. Assumpsit for the use and occupation of land by permission of the plaintiff lies on an implied as well as express promise. 407
- Sutton v. Mandeville.** 407
24. If lands be listed by the commissioner of the revenue to a wrong person, sold by the sheriff as the property of such person, and conveyed by deed to the purchaser: it seems that the proper resort of the rightful owner for relief is to a Court of Equity, by which the deed may *be cancelled, and a release, or reconveyance of the land decreed. 466
- Yancey v. Hopkins.** 914
25. The land of an infant being, by mistake, listed by the commissioner of revenue as the property of another person, and sold, as such, for taxes, in December, 1786; being bought by the deputy sheriff, who sold it; conveyed to him by the high sheriff in February, 1795; and afterwards sold again by the deputy sheriff: the right of the infant was established against the last purchaser; (who bought with full notice of all the circumstances;) notwithstanding the suit was not brought until six years after the plaintiff attained his full age. 1b.
26. See Assets, No. 1.
- Mason's Devisees v. Peter's Adm'rs.** 487
27. A judgment against the executor is no evidence against the heirs or devisees of the real estate. 1b.
28. A decree against devisees holding by several and distinct devises ought not to be joint, but pro rata. 1b.
29. *Quære*, whether, and under what circumstances, a Court of Equity can decree a sale of land descended or devised, to satisfy a bond or simple contract creditor? 1b.
30. See Purchase, No. 1.
- Dav v. Murdoch.** 460
31. See Covenant, No. 4.
- Austin's Adm'r v. Whitlock's Ex'rs.** 487
32. If, by a sealed instrument, a vendor declare that he has sold to the vendee all his right to certain land warrants, for which the surveyor's receipt has been taken; that, if patents have issued in his name, he will transfer the same by deed; and, if not, desires that they may issue to the vendee; agreeing to pay, or deduct from the purchase-money, all expenses which have accrued; he is bound to make a deduction for a deficiency resulting from a previous contract, by his agent, to allow the locator one third of the land; though such contract was not known to him at the time of his bargain with the vendee, to whom it was equally unknown.
- Humphrey's Adm'r v. McClenachan's Adm'r and Heirs.** 493
33. On a bill of injunction exhibited by the administrator of the purchaser of a tract of land, against the administrator and heirs of the vendor, (in whom the legal title remains,) claiming compensation for a deficiency, credits for payments, and a conveyance, the Court, on allowing the compensation and the credits, may decree that the defendants shall convey their title to certain trustees, to be by them conveyed to the heirs of the purchaser, (though not parties to the suit.) If the balance of the purchase-money be paid on or before a certain day; and, if not, with power to sell as much of the land as may be sufficient to pay such balance, and to convey the residue, if any, to the said heirs. 1b.
34. In case of eviction after a conveyance made with warranty, the value of the lost land, as at the time of the eviction, gives the rules by which the vendee is to be remunerated; but, when the contract is executory, a Court of Equity will adjust it, upon principles of equity according to the circumstances.
- Same case. 500
35. In case of a deficiency, the value at the time of the contract gives the rule; of which the purchase-money is the standard, where it does not appear that the actual value was different. 1b.
36. The statute of frauds applies to an agreement, between a purchaser of land and a third person, that such person should be admitted as a partner in the purchase, the proof of such agreement being only parol evidence of subsequent declarations and acknowledgments by the parties.
- Henderson v. Hudson.** 510
37. See Wills, No. 5.
- Wyatt v. Sadler's Heirs.** 537
38. A fee-simple estate in lands might pass by a will (even before the act of 1785, c. 63.) without words of perpetuity, or any words equivalent; provided it appeared, from the whole will taken together, that such was the intention of the testator.
- Johnson and others v. Johnson's Widow and Heirs.** 549
39. Where an illiterate testator uses the same words in disposing of his real, as in disposing of his personal property, and in the same clause of the will, it is fair to infer that he intended to give them the same effect as to both kinds of property. 1b.
40. See Dower, No. 1, 2.
- Note to
41. See Mutual Assurance Society, No. 1, 2. 554, 556
- Greenhow v. Barton.** 590
42. See Landlord and Tenant, No. 1, 2.
- Smiths v. Ambler.** 596
43. A vendor of land according to certain lines must be presumed interested, and therefore incompetent as a witness, to establish those lines; unless it appear that he did not warrant the title.
- Moon v. Campbell.** 600
- LAW.
1. The practice of law is not an office or place, under the commonwealth.
- Leigh's case.** 498
2. See Attorney at Law, No. 2. 1b.
- LEGATEES.
1. In a suit for contribution against legatees or distributees, the executor or administrator when to be a party; and when not.
- Hooker and Wife v. Royster and Wife.** 119
2. See Executors and Administrators, No. 7.
3. Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree; neither, in such case, ought interest to be allowed him on payments to the legatees before the decree; though made in bonds which carried interest.
- Fitzgerald, Ex'r of Jones, v. Jones.** 150
4. A wealthy testator having bequeathed pecuniary legacies to three of his daughters, to be paid them, "if the money could be raised by *his estate by the time that either of them should marry, or come of age;" (without saying any thing about their maintenance or education:) it was held that they were entitled (notwithstanding their legacies) to maintenance and education out of the estate; at least while the legacies were not sufficiently productive.
- Fitzgerald, Ex'r of Jones, v. Jones.** 150

LIEN.

1. Notice of a lien or encumbrance on property binds the purchaser if received by him any time before the execution of the conveyance.

Blair v. Owles, 88

2. A purchaser with notice of an annual encumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value. Ib.

3. In such case, the purchaser, or the property, may be made liable, in the first instance, at the election of the plaintiff. Ib.

4. In a suit in equity, by the claimant of an encumbrance, against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party. Ib.

5. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever. Ib.

6. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question.

Lewis v. Madison, 308

LIMITATION OF TIME.

1. A defendant in ejectment is protected by 20 years' possession before the action brought; but the 5 years and 174 days, excluded by the act of Assembly, are not to be counted in his favour.

Clay v. Ransome, 454

2. If, therefore, upon a special verdict in ejectment, it be uncertain whether the defendant, or those under whom he claims, had 20 years' possession, exclusive of the said 5 years and 174 days, a venire de novo ought to be awarded. Ib.

LOCATION.

1. In what case a vendor is bound to make compensation to the vendee for a deficiency resulting from a previous contract to allow the locator one third of the land.

Humphrey's Adm'r v. McClenachan's Adm'r and Heirs, 408

LUNATIC.

See Idiot.

MAINTENANCE AND EDUCATION.

1. See Guardian and Ward, No. 3.

Hooper and Wife v. Royster and Wife, 119

2. See Legatees, No. 4.

Fitzgerald, Ex'r of Jones, v. Jones, 150

MARINE INSURANCE.

1. A marine insurance, "at and from Norfolk to Curracoa, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond," must be understood as an insurance "at and from Norfolk to Curracoa, in the first place, with liberty of going from Curracoa to any other island," &c.

Marine Insurance Company of Alexandria v.

Stras, 408

2. If, therefore, the vessel put into the island of St. Thomas, and thence return to Norfolk, without ever going to Curracoa, it is a deviation from the voyage; and there being no proof that such deviation was occasioned by stress of weather or other unavoidable accident, the person insured is entitled to no return of premium; such being the terms of the policy. Ib.

3. A protest before a notary public, by the master of the vessel, after his return to Virginia, is no evidence in such case; and, quære, would such a protest, made at St. Thomas's, have been any evidence; the person who made it being alive, and no impediment to prevent his deposition from being regularly taken? Ib.

MARSHALLING ASSETS.

See Assets.

MARRIAGE.

1. If A. promise B. that, if he and A.'s daughter marry, "he will endeavour to do her equal justice with the rest of his daughters, as far as it is in his power with convenience; and the marriage be afterwards had with his consent; the promise is sufficiently certain and obligatory.

Chichester's Ex'r v. Vass's Adm'r, 95

2. In such case, A. has not his life-time to perform it in; but, in a reasonable time after the marriage, (taking into consideration his property and other circumstances,) is bound to make an advancement, to B. and wife, equal to the largest made to his other daughters. Ib.

3. A promise in the above-mentioned terms enures to the joint benefit of the husband and wife, and is not to be satisfied by a conveyance of lands to the wife. The husband (to whom the promise was made) has his election to consider it a personal contract; and, if he survives the wife, may sue in his own right to recover damages for a breach. Ib.

4. A husband, surviving his wife, (or, in case of his death afterwards, his executor or administrator,) may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate.

Chichester's Ex'r v. Vass's Adm'r, 98

5. The aid of a Court of Equity ought not to be afforded to set up a marriage promise, when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage.

Paynes v. Coles, 378

6. See Deed, No. 10.

Harvey and Wife v. Pecks, 518

MAXIMS.

1. It is a rule of evidence that a document cannot be used against a party who could not avail himself of it, in case it made in his favour. See Evidence, No. 16.

Paynes v. Coles, 373

2. An authority given by law to any officer, whereby the estates or interests of other persons may be forfeited or lost, must be strictly pursued in every instance.

Yancey v. Hopkins, 419

MILLS.

1. What degree of uncertainty and inaccuracy of language is sufficient to set aside the finding of a Jury in a mill case.

Eppes v. Cralle, 258

2. On a petition for leave to add to the height of a mill-dam, the only proper subject of inquiry is, what damages will be occasioned by the proposed addition. It is error, therefore, to direct the Jury to assess such other damages, accruing from the dam already erected, as were not contemplated by the original Jury. Ib.

3. But an error in this respect should be regarded as surplusage, (the petition for the writ of ad quod damnum having prayed only for such inquiry as the law authorizes,) if the Jury assessed such erroneous damages separately, and the Court did not direct the same to be paid, but only the damages properly assessed. Ib.

4. On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the Court of Error; though the Court determined on viewing the record only, and therefore did not examine the witnesses. Ib.

5. The finding of a Jury, in a mill case, that "probably the health of certain families who live near the pond will be annoyed by the stagnation of the water," is conclusive against the petitioner.

Mayo v. Turner, 405

MISTAKE.

1. Under what circumstances an attorney in fact is not responsible for a mistake in having a survey made of lands not belonging to his employer.

Betts v. Cralle, 238

2. Though land be sold in gross, for so much, be it more or less; yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a Court of Equity will give relief for a deficiency.

Hull v. Cunningham's Ex'r, 330

3. See Purchase, No. 10, 11, 12.

4. See Equity, No. 24.

Yancey v. Hopkins, 419

5. See Infant, No. 9. Ib.

MORTGAGE.

1. A mortgagee without notice shall be protected against a prior equitable title; if the person, having such title, either encouraged him to take the mortgage, or, knowing his intention to take it, stood by, and made no objection.

Green v. Price, 449

MOTION IN A SUMMARY WAY.

1. See Mutual Assurance Society, No. 1.

Greenhow v. Barton, 500

2. See Landlord and Tenant, No. 1.

Smiths v. Ambler, 506.

MUTUAL ASSURANCE SOCIETY.

1. Quære, whether the purchaser of property, for which a declaration in the Mutual Assurance Society against fire on buildings, has been made by the

vendor, be liable for the premium; no policy of insurance having been issued, and no notice of such declaration given, until after payment of the purchase-money? And, if he be liable, is the proper remedy against him by motion in a summary way, or by action at common law?

Greenhow v. Barton, 590
2. Quære, also: is the property declared for liable, in the possession of the purchaser, who bought and paid for it, without notice of such declaration? Ib.

NORTHERN NECK OF VIRGINIA.

1. A patent from the Commonwealth, containing a recital "that the land was escheated from a certain I. M. deceased;" and granting the same, "by virtue of an entry made in the office of the late Lord Proprietor of the Northern Neck, and in consideration of the ancient composition of 11. 5s. sterling paid by the grantee into the treasury;" is illegal and void.

Alexander v. Greenup, 184
2. By the act of compromise, passed the 10th of December, 1796, the title of Denny Fairfax, and of those who claim under him, to such of the lands, in the Northern Neck of Virginia, as were waste and unappropriated at the time of the death of Lord Fairfax, was clearly extinguished.

Hunter v. Fairfax's Devisee, 218
3. Quære, were these several acts of Assembly, respecting the mode of acquiring titles to waste and unappropriated lands in the Northern Neck, equivalent to an inquest of office, and sufficient to authorize grants of the said lands by the Commonwealth, independently of the said act of compromise?

Hunter v. Fairfax's Devisees, 218

NOTICE.

1. Of a lien or incumbrance on property binds the purchaser, if received by him at any time before the execution of the conveyance.

Blair v. Owles, 88
2. A purchaser, with notice of an annual encumbrance having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value. Ib.

3. In such case, the purchaser, or the property, may be made liable, in the first instance, at the election of the plaintiff. Ib.

4. In a suit in equity by the claimant of an encumbrance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party. Ib.

5. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance: notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever; for the vendor himself may be purchasing agent for the vendee by his appointment; and the vendee, by constituting him his agent, makes him a competent witness to prove the notice. Ib.

6. Under what circumstances a deposition taken at a time and place not mentioned in the notice may be read as evidence. See Depositions, No. 3.

Marshall v. Frisbie, 247
7. Quære, whether commissioners appointed to take depositions can, by their own mere authority, adjourn the taking thereof to any other convenient time and place, in the event that the business cannot readily be finished on the day, and at the place, to which the notice applies: no intended adjournment, from day to day until the business be finished, being expressed in such notice? Ib.

8. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question.

Lewis v. Madisons, 308

9. See Infant, No. 9.

Yancey v. Hopkins, 419

10. See Mortgage, No. 1.

Green v. Price, 449

11. An assignee of a bond, without notice, ought not to be affected by an equity, unless the proof of such equity be clear and manifest.

Mayo v. Giles's Adm'r, 538

12. It seems, that a bona fide purchaser, without notice of fraud, having received a deed from two persons, (one of whom fraudulently induced the other to join therein,) is not responsible in equity; but the loss ought to fall on the fraudulent vendor. But quære, in case the estate of the fraudulent vendor be not sufficient to make good the loss.

Whitehorn v. Hines, 557

13. In such case, the circumstance that the person defrauded was of weak understanding, but not an

idiot or lunatic, is not sufficient to affect the right of the bona fide purchaser. Ib.

14. See Mutual Assurance Society, No. 1, 2.
Greenhow v. Barton, 590

NULLA BONA.

1. A return of nulla bona, upon an execution against an executor or administrator, as such, does not sufficiently establish a devastavit. A second suit is necessary before an action can be maintained on the administration bond.

Gordon's Adm'r's v. The Justices of Frederick, 1

NUNCUPATIVE WILL.

See Wills.

OATHS.

1. An attorney at law is not bound, as a requisite to his admission to the bar of any Court, to take the oath prescribed by the 3d section of the act to suppress duelling.

Leigh's case, 468

OBLIGATION.

See Bond.

OFFICE.

1. The practice of Law is not an office, or place, under the Commonwealth.

Leigh's case, 468

OFFICER.

1. What officer may sell distrained effects. See Smiths v. Ambler, 596

OFFICE JUDGMENT.

See Judgment.

ONUS PROBANDI.

1. In an action on a prison-bonds bond, the plaintiff is only required to shew a departure from the rules: the burden of proof then devolves on the defendant to shew that the prisoner was discharged by due course of law.

Meredith's Adm'r v. Duval, 76

2. If a vendor of land according to certain lines, be offered as a witness to establish those lines, it is incumbent on the party introducing him, to prove that he is not interested.

Moon v. Campbell, 600

OYER.

1. In debt on bond, if the defendant crave oyer, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond.

Meredith's Adm'r v. Duval, 76

PAPER MONEY.

1. Money received, by a guardian for a ward, during the paper money times, ought to be reduced by the scale of depreciation; to be applied as on the last day of the year in which it was received.

Hooper and Wife v. Royster and Wife, 119

2. If money was received, by a guardian for a ward, within six months previous to the 1st of January, 1777, (when the scale of depreciation commenced,) it should be reduced according to the scale, as at the end of six months from the time when received. Ib.

3. A payment in paper money, by a British debtor to an American creditor, operated a full discharge, to its nominal amount, of a current money debt contracted in specie; notwithstanding the creditor made objections to receiving the paper money, and observed, at the time, that he would keep it safe for the debtor but did not consider it as a payment, though intended as such by the debtor; and notwithstanding the receipt contained a reservation that, since the creditor had demanded the debt when the rate of exchange was 15 per cent., he therefore claimed so much as might be allowed him, on that account, by arbitrators afterwards to have been (but who never were) appointed.

Day v. Murdoch, 460

4. See Purchase, No. 1. Ib.

PARTIES.

1. In a suit in equity by the claimant of an encumbrance against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party.

Blair v. Owles, 88

2. An administrator to whom a credit for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in Chancery, is a competent witness, in behalf of the ward, to prove the payment of the money to her guardian: though such guardian was no party to the decree.

Hooper and Wife v. Royster and Wife, 119

3. On an appeal from an interlocutory decree, if

proper parties to the suit appear to be wanting, the Court of Appeals will not leave it to the Chancellor, but will itself direct such parties to be made. *Ib.*

4. In a suit for contribution against legatees or distributees, the executor or administrator, or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party; unless it appear that the account of such executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees. *Ib.*

5. In a suit in Chancery to recover a tract of land against a vendee, on the ground that the vendor had previously agreed to convey the same land in a certain event, to the plaintiff, it seems, that the vendor, or his legal representatives, ought to be parties.

Lewis v. Madisons, 303

6. See Evidence, No. 1d.

Paynes v. Coles, 376

7. See Evidence, No. 17, 18.

Chapmans v. Chapman, 398

8. In a Court of Equity, a plaintiff may be decreed to execute a release, and to procure a third person (under whom he claims) to join him therein, without making such person a party to the suit.

Moon v. Campbell, 604

PARTNERSHIP.

1. The statute to prevent frauds and perjuries applies to an agreement between a purchaser of land, and a third person, that such third person should be admitted as a partner in the purchase; the proof of such agreement being only parol evidence of subsequent declarations and acknowledgments by the parties.

Henderson v. Hudson, 510

PATENT FOR LAND.

1. A patent from the Commonwealth, containing a recital "that the land was not escheated from a certain I. M., deceased;" and granting the same, "by virtue of an entry made in the office of the late Lord Proprietor of the Northern Neck, and in consideration of the ancient composition of 11.5s. sterling paid by the grantee into the treasury;" is illegal and void, and not to be received as evidence of title on the general issue in ejectment.

Alexander v. Greenup, 134

2. The Commonwealth, under the existing laws, cannot grant escheated lands, without a previous inquest of office, and then not (as waste and unappropriated lands) upon entries and surveys; but upon sales by the escheators. *Ib.*

3. A patent may be declared void, for defects apparent on its face; without the necessity of resorting to a scire facias to repeal it. *Ib.*

4. Quære, whether, and from what Court, a scire facias to repeal a patent can issue in Virginia? *Ib.*

5. It is not necessary for a patentee of waste and unappropriated land, to make a personal entry thereon, to enable him to maintain ejectment; for the patent ipso facto confers seisin.

Clay v. White, 162

6. Such seisin may be transferred and continued by deed of bargain and sale, or by devise; but a person, whose seisin is interrupted by the actual entry and adverse possession of another cannot, while out of possession, convey by bargain and sale such a title as will enable the bargainee to recover in ejectment. *Ib.*

7. Quære, were the several acts of Assembly, respecting the mode of acquiring titles to waste and unappropriated lands in the Northern Neck, equivalent to an inquest of office, and sufficient to authorize grants of the said lands

600 "by the Commonwealth?"

Hunter v. Fairfax's Devisee, 218

8. See Purchaser, No. 9, 10.

Hull v. Cunningham's Ex'r, 330

PAYMENT.

1. See Paper Money, No. 1, 2.

Hooper and Wife v. Royster and Wife, 119

2. See Do., No. 3, 4.

Day v. Murdoch, 460

3. See Purchase, No. 1. *Ib.*

PENALTY.

1. In an action of covenant on a bond with collateral condition, if there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failing to pay the penalty.

Ward v. Johnston, 45

2. In an action of debt on a bond, the judgment is always entered for the penalty, to be discharged by the principal and interest; and, if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty.

Atwell's Adm'rs v. Towles, 175

3. The Court of Appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law.

Newell v. Wood, 555

PENDENTE LITE.

1. An award made pendente lite cannot be given in evidence upon the plea of non assumpsit.

Harrison v. Brock, 22

PERFORMANCE.

1. In what case an attorney in fact, undertaking to have a survey made, is not bound to have it done at all events; but only to a faithful performance, according to the best information he can obtain.

Betts v. Cralle, 388

PERSONAL ESTATE.

1. See Infant, No. 1, 2, 3, 4.

Dillard v. Tomlinson, &c., 183

2. See Infant, No. 5, 6.

Templeman v. Steptoe, 339

PLAINTIFF.

1. On a settlement of accounts in a Court of Equity, a decree will be rendered against a plaintiff for a balance of account appearing due to a defendant.

Fitzgerald, Ex'r of Jones, v. Jones, 150

2. See Evidence, No. 17, 18.

Chapmans v. Chapman, 398

3. See Injunction, No. 1.

Todd v. Bowyer, 447

4. See Escape, No. 1.

Hooe v. Tebbes and Wife, 501

5. It seems, that a prison-bonds bond, taken payable to the plaintiff, is good at common law, and an action may be maintained upon it.

6. Quære, whether it be not also good under the act of Assembly?

Hooe v. Tebbes and Wife, 501

7. In a Court of Equity, a plaintiff may be decreed to execute a release, and to procure a third person (under whom he claims) to join him therein; without making such third person a party to the suit.

Moon v. Campbell, 604

PLEADING.

1. An award made pendente lite cannot be given in evidence upon the plea of non assumpsit.

Harrison v. Brock, 22

2. The plea "arbitrament and award" (in so many words) is a mere nullity, and no evidence should be received to support it, notwithstanding the plaintiff replied generally. *Ib.*

3. Where two defendants have appeared and pleaded, an entry in the record that "the parties came, &c. and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous.

Ward v. Johnston, 45

4. In such case, after confession of judgment by the principal, if further proceedings be taken against the security, the latter ought to be permitted to plead *pais darrein continuance*, that the judgment had been confessed by virtue of an agreement (to which the security was not a party) that stay of execution should be allowed the principal.

5. Quære, whether such plea, if demurred to, would be good in law to exonerate the security? *Ib.*

6. In debt on a bond, if the defendant crave over, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond. See Declaration, No. 1.

Meredith's Adm'x v. Duval, 76

7. A plea in abatement ought not to be received to set aside an office judgment; unless it be of matter which arose *pais darrein continuance*.

Bradley v. Welch, 284

8. What circumstances ought not to be admitted as evidence by way of mitigation of damages on a joint plea of "not guilty," in trespass *vi et armis* against two defendants for breaking the plaintiff's close and beating his slaves.

Brown and Boisseau v. May, 288

PLEDGE.

1. See Landlord, No. 1, 2.

Smiths v. Ambler, 596

POLICY OF INSURANCE.

1. How a policy of insurance, "at and from Norfolk to Curacao, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond" is to be construed. See Marine Insurance, No. 1, 2.

Marine Insurance Company of Alexandria v. Stras, 480

661 2. See Mutual Assurance Society, No. 1, 2.
Greenhow v. Barton. 590

POSSESSION.

1. A person out of possession cannot convey by bargain and sale such a title as will enable the bargainee to recover in ejectment.

Clay v. White, 163
2. A defendant in ejectment is protected by 20 years' possession before the action brought; but the five years and 174 days excluded by the act of assembly are not to be counted in his favour.

Clay v. Ransome, 544
3. See Ejectment, No. 7. Ib.
4. See Purchase, No. 1.
Day v. Murdoch, 460

POWER.

1. An authority given by law to any officer, whereby the estates or interests of other persons may be forfeited or lost, must be strictly pursued in every instance.

Yancey v. Hopkins, 419

PRACTICE.

1. It is necessary, after a judgment against an executor or administrator, as such, to establish a devastavit, by means of a second suit, before an action can be maintained on the administration bond.

Gordon's Adm'r v. The Justices of Frederick, 1
2. Although, upon a demurrer to evidence, the testimony adduced on both sides ought regularly to be stated, yet, if it be parol and contradictory, the party tendering the demurrer cannot, after exhibiting his testimony, compel the other party to join in demurrer.

Harrison v. Brock, 22
3. An award, made pendente lite, cannot be given in evidence upon the plea of non assumpsit. Ib.

4. The plea of "arbitrament and award," (in so many words,) is a mere nullity; and no evidence should be received to support it, notwithstanding the plaintiff replied generally. Ib.

5. In an action of covenant on a bond with a collateral condition, if there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failing to pay the penalty; but where such stipulation is either expressed or implied, the failing to perform the condition may be assigned as the breach.

Ward v. Johnston, 45
6. Where two defendants have appeared and pleaded an entry in the record that "the parties came, &c., and the defendant L. acknowledged the plaintiff's action, and therefore judgment against the said defendants," must be understood as a judgment against both on the confession of one, and therefore erroneous. Ib.

7. In reversing the judgment for that error, the Court ought to direct the proper judgment to be entered against the defendant who confessed, as well as further proceedings against the other. Ib.

8. In such case, the plaintiff having, after the judgment, moved for permission to proceed against the security; and it appearing, by a bill of exceptions on this motion, that the judgment had been confessed by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal; the Court, in reversing the judgment, ought to have given the security leave to plead *puls darrein continuance*; all the proceedings having been brought up by a writ of *supersedeas*.

Ward v. Johnston, 45
9. Several judgments and orders, relating to each other, may be brought up by one writ of *superedeas*; provided the whole be sufficiently described, as intended to be comprehended therein. Ib.

10. A judgment at rules in the clerk's office of a County Court ought to be entered as of the last day of the succeeding quarterly term; but, if it be entered as at rules only, it is merely a clerical mispison, and therefore amendable.

Digges's Ex'r v. Dunn's Ex'r, 56
11. In such case, if the judgment be declared upon as of a quarterly term, and the transcript produced be of a judgment at rules, (which ought to have been entered as of such quarterly term,) the variance is immaterial. Ib.

12. See Discovery, No. 2.

Chichester's Ex'r v. Vass's Adm'r, 98
13. On an appeal from an interlocutory decree, if proper parties to the suit appear to be wanting the Court of Appeals will not leave it to the Chancellor, but will itself direct such parties to be made.

Hooper and Wife v. Royster and Wife, 119
14. In a suit for contribution against legatees or distributees, the executor or administrator when to be made a party; and when not. Ib.

15. On a settlement of accounts in a Court of Equity, a decree will be rendered, against a plaintiff,

for a balance of account appearing due to a defendant.

Fitzgerald, Ex'r of Jones, v. Jones, 150
16. In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term.

Hunter v. Fairfax's Devisee, 218
17. Upon an appeal from a decree in Chancery, an error to the injury of the appellee ought to be corrected, although he did not appeal.

Day v. Murdoch, 460
18. General Rule of the Court of Appeals relative to correction of errors operating to the injury of the appellee or defendant in error. Ib. in note

19. See Injunction, No. 2.
Humphreys's Adm'r v. M'Clenachan's Adm'r and Heirs, 550

20. In a Court of Equity, a plaintiff may be decreed to execute a release, and to procure a third person (under whom he claims) to join him therein; without making such person a party to the suit.

Moon v. Campbell, 604

PREMIUM.

1. What is such a deviation, from a voyage, as will prevent the person insured from being entitled to a return of premium, on a marine insurance, "at and from Norfolk to Curacao, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond."

Marine Insurance Company of Alexandria v. Strass, 408

2. Quære, whether the purchaser of property, for which a declaration, in the mutual assurance society against fire on buildings, has been made by the vendor, be liable for the premium; no policy of insurance having been issued, and no notice of such declaration given, until after payment of the purchase-money? And, if he be liable, is the proper remedy against him by motion in a summary way, or by action at common law?

Greenhow v. Barton, 590

3. Quære, also, is the property declared for liable in the possession of the purchaser who bought and paid for it without notice of such declaration. Ib.

PRESUMPTION.

1. In what case a commission to take depositions should be presumed to have been directed to persons agreed upon by the parties, but whose names were omitted by the clerk in entering the order. See Depositions, No. 1.

Marshall v. Frisbie, 247

2. Under what circumstances a person who consented to postpone the taking a deposition to another time and place may be presumed to have been the authorized agent of the party. See Depositions, No. 2. Ib.

PRESUMPTION OF FRAUD.

See Fraud.

PRESUMPTION OF INTEREST.

1. See Witness, No. 3.

Moon v. Campbell, 600

PRINCIPAL AND SECURITY.

1. Quære, whether a security is exonerated at law, or in equity, by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution by an agreement to which the security was not a party?

Ward v. Johnston, 45

2. See Securities, No. 6, 7.

Bullitt's Ex'r v. Winstons, 269

PRINCIPAL SUM OF MONEY.

1. A guardian may be allowed for moneys paid and advanced for the clothes, schooling and other necessary expenses of the ward, out of the principal of such ward's estate; if it appear that from extraordinary circumstances, such disbursements were unavoidable without culpable neglect on the part of such guardian; otherwise such allowance ought to be made out of the profits only.

Hooper and Wife v. Royster and Wife, 119

PRISONER.

See Prison Rules.

PRISON RULES.

1. A debtor within the prison rules is still a true prisoner in the eye of the law; and, as such, should be transferred by the sheriff to his successor in office.

Meredith's Adm'r v. Duval, 76

2. A bond for keeping the prison rules should be taken to the sheriff for the time being and his successors in office; not his executors, administrators or assigns. Ib.

8. But such bond, though taken to the sheriff, as such, and to his "executors, administrators or assigns," may be assigned by him to the creditor; and a suit may be maintained upon it. Ib.

4. Quære, can such a bond, so taken, be assigned to the creditor by the succeeding sheriff? Ib.

5. The creditor of an insolvent prisoner, who has the liberty of the rules, is bound to give security for the prison fees; but the sheriff cannot legally discharge him, unless he be actually insolvent, and being so, the plaintiff, having notice thereof, refuse to pay his fees, or to give bond for the payment thereof. Ib.

6. If a prisoner depart from the rules by an illegal discharge from the sheriff, the creditor, having an assignment of the bond, has his election to bring suit upon it, or to sue the sheriff. Ib.

7. In an action on such bond, the plaintiff is only required to shew a departure from the rules; the burden of proof then devolves on the defendant to show that the prisoner was discharged by due course of law. Ib.

8. If, in a suit upon a prison-bonds bond, a Court possessing competent jurisdiction adjudge the bond void; the plaintiff may sue the sheriff, without appealing from the judgment, though erroneous. Ib.

Hooce v. Tebbs and Wife, 501

9. In such case, the sheriff, though not a party to the suit on the bond, is bound by the judgment; unless he can prove it was obtained by collusion. Ib.

10. In an action against the sheriff for an escape, a verdict in general terms, for the plaintiff is not sufficient to authorize a judgment; notwithstanding the charge in the declaration, be that the sheriff took a defective prison-bonds bond, and thereupon voluntarily permitted the prisoner to escape; and issue be joined on the plea of not guilty. An express finding by the Jury according to the act of 1792 concerning escapes, is absolutely necessary. Ib.

11. It seems, that a prison-bonds bond, taken payable to the plaintiff, is good at common law, and an action may be maintained upon it. Ib.

12. Quære, whether it be not also good under the act of Assembly? Ib.

PROBATE.

1. What a sufficient evidence for the probate of a nuncupative will. See Wills, No. 3.

Mason v. Dunman, 456

663 *PROFITS.

1. In general a ward's expenses ought to be paid out of the profits only of his estate; but, under extraordinary circumstances, a guardian may be allowed for moneys paid and advanced for the clothes, schooling and other necessary expenses of the ward out of the principal of such estate.

Hooper and Wife v. Royster and Wife, 119

2. The profits of the estate of an infant dying intestate, (including the increase of slaves,) accruing to such infant in his or her life-time, but not applied to his or her use, or otherwise lawfully disposed of, ought to go to the person, or persons, inheriting such estate generally.

Dillard v. Tomlinson, &c., 183

3. Interest on the hire of slaves disallowed. Ib.

And Whitehorn v. Hines, 567

PROMISE.

1. If A. promise B. that, if he and A.'s daughter marry, "he will endeavour to do her equal justice with the rest of his daughters, as fast as it is in his power with convenience;" and the marriage be afterwards had with his consent; the promise is sufficiently certain and obligatory.

Chichester's Ex'r v. Vass's Adm'r, 98

2. In such case, A. has not his life-time to perform it in; but in a reasonable time after the marriage, (taking into consideration his property and other circumstances,) is bound to make an advancement to B. and wife, equal to the largest made to his other daughters. Ib.

3. A promise in the above-mentioned terms enures to the joint benefit of the husband and wife; and is not to be satisfied by a conveyance of lands to the wife. The husband (to whom the promise was made) has his election to consider it a personal contract; and, if he survive the wife, may sue in his own right to recover damages for a breach. Ib.

4. The aid of a Court of Equity ought not to be afforded to set up a marriage promise, when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage.

Paynes v. Coles, 373

5. Assumpsit for use and occupation of land, by permission of the plaintiff, lies on an implied, as well as express promise.

Sutton v. Mandeville, 407

6. A promise, by an obligor, after being informed of the assignment of his bond, to pay the full amount thereof to the assignee, is a strong circumstance to prevent the assignee from being affected by an equity of which he had no notice.

Mayo v. Giles's Adm'r, 588

PROTEST.

1. Under what circumstances, a protest before a notary public, by the master of a vessel, is no evidence.

Marine Insurance Company of Alexandria v. Stras, 408

PURCHASE.

See Purchaser.

1. A factor and agent for a company of British merchants having, in the year 1771, purchased, on their behalf, a tract of land in Virginia, for a sum of money payable on demand, and then received possession thereof for their use; and a credit for the money having been entered in their books; the equitable title to, and possession of, such land was thereby completely vested in the company; and under the act of May session, 1779, "concerning escheats and forfeitures from British subjects," the same escheated to the Commonwealth, which, on inquest found, became entitled, in the same manner the company were entitled; but subject to the payment of so much only of the purchase-money, remaining due, as did not exceed the net amount for which the land was sold by the escheator reduced to present current money, according to the 2d section of that act; the said British company being still liable for the residue of the said purchase-money.

Day v. Murdoch, 480

2. See Vendor and Vendee, No. 10, 11, 12, 13.

Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs, 498, 500

3. The statute, "to prevent frauds and perjuries," applies to an agreement, between a purchaser of land, and a third person, that such third person should be admitted as a partner in the purchase; the proof of such agreement being only parol evidence of subsequent declarations and acknowledgments of the parties.

Henderson v. Hudson, 510

PURCHASE MONEY.

1. See Lands, No. 32, 33, 34, 35.

Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs, 498, 500

PURCHASER.

1. Notice of a lien or encumbrance on property binds the purchaser, if received by him at any time before the execution of the conveyance.

Blair v. Owles, 38

2. A purchaser with notice of an annual encumbrance, having prevented the lawful claimant from enjoying the benefit thereof, is personally liable, in equity, to the full value. Ib.

3. In such case, the purchaser, or the property, may be made liable, in the first instance, at the election of the plaintiff. Ib.

4. In a suit in equity by the claimant of an encumbrance against a purchaser having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party. Ib.

5. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever;

664 "for the vendor himself may be purchasing agent for the vendee by his appointment; and the vendee, by constituting him his agent, makes him a competent witness to prove the notice.

Blair v. Owles, 38

6. A purchaser having taken a bond for a title to a certain number of acres of land, but not binding to the obligors to convey any other specific lands to make good a deficiency; his only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable.

Chinn v. Heale, 69

7. The rule, that a purchaser is bound by notice at any time before he receives a conveyance, does not apply to a lien claimed under a written contract so vague and indefinite as not to designate with any certainty the particular land in question.

Lewis v. Madisons, 303

8. See Equity, No. 18. Ib.

9. Though land be sold in gross, for so much, be it more or less; yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to

take the risk upon himself, a Court of Equity will give relief for a deficiency.

Hull v. Cunningham's Ex'r. 380
10. But if the purchaser do not (by eviction or otherwise) lose the land he expected to get; but make an entry for it as vacant, and obtain a patent; the proper measure of relief is only the amount of his expenditures in procuring the patent, with a reasonable allowance for trouble therein, and actual costs of suit. *Ib.*

11. A purchaser who buys a tract of land as containing so many acres, more or less, and agrees to take upon himself the risk, as to lines, or quantity, (appearing also better acquainted with the land than the vendor, against whom there is no proof of fraud,) is not entitled to any relief in equity, for a loss relating to the risk undertaken. *Ib.*, 386

12. See note to the same case. 388

13. Where, by a decree in Chancery, so much of the bill as claims one of two separate subjects in controversy is dismissed, and, as to the other, the rights of the parties are determined, but an account is directed to be taken, and therefore the decree is not final: *quære*, whether any subsequent decree could affect the rights of bona fide purchasers of property as to which the bill was dismissed?

Templeman v. Steptoe. 330

14. See *Equity*, No. 24.

Yancey v. Hopkins. 419

15. See *Infant*, No. 9.

16. See *Mortgage*, No. 1.

Green v. Price. 449

17. See *Purchase*, No. 1.

Day v. Murdock. 460

18. See *Vendor and Vendee*, No. 10, 11, 12, 13.
Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs. 498, 500

19. See *Purchase*, No. 2.

Henderson v. Hudson. 510

20. It seems, that a bona fide purchaser, without notice of fraud, having received a deed from two persons (one of whom fraudulently induced the other to join therein,) is not responsible in equity; but the loss ought to fall on the fraudulent vendor.

Whitehorn and Wife v. Hines and others. 567
But *quære*, in case the estate of the fraudulent vendor be not sufficient to make good the loss? *Ib.*

21. In such case, the circumstance that the person defrauded was of weak understanding, but not an idiot or lunatic, is not sufficient to affect the right of the bona fide purchaser. *Ib.*

22. *Quære* whether a purchaser, without notice, of property not insured, but only declared for by the vendor in the Mutual Assurance Society against fire on buildings, be liable for the premium? See *Mutual Assurance Society*, No. 1, & 2.

Greenbow v. Barton. 590

REAL ESTATE.

See Lands.

1. A fee simple estate in lands might pass by a will (even before the act of 1788, c. 62.) without words of perpetuity, or any words equivalent thereto; provided it appeared, from the whole will taken together, that such was the intention of the testator.

Johnson and others v. Johnson's Widow and Heirs. 549

2. Where an illiterate testator uses the same words in disposing of his real, as in disposing of his personal property, and in the same clause of the will, it is fair to infer that he intended to give them the same effect as to both kinds of property. *Ib.*

RECORD.

1. In a suit in Chancery, the bill having referred to the proceedings in another suit, "as now remaining of record in the same Court;" and the answer having admitted that such a suit was brought, and such a decree as stated in the bill existed; the Court of Appeals will award a writ of certiorari for a transcript of the record referred to, and receive it as evidence, so far as admitted by the answer.

Hooper and Wife v. Royster and Wife. 119

2. On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the Court of Error: though the Court determined on viewing the record only.

Eppes v. Cralle. 258

3. A record of one suit cannot be read as evidence in another, unless both the parties, or those under whom they claim, were parties to both suits: it being a rule that a document cannot be used against a party who could not avail himself of it, in case it made in his favour.

Paynes v. Coles and others. 373

4. A record of one suit cannot be read as evidence in another, on the ground that the defendant and one of the plaintiffs in the lat-

ter suit were parties to the former, and that the same point was in controversy in both, another plaintiff, and the person under whom both the said plaintiffs jointly claim, not having been parties to such former suit.

Chapman v. Chapman. 898

5. In such case, the circumstance, that the "writings and evidence" in the former suit were read at the hearing of the latter, without any exception taken at the time appearing on the record, is no proof that this was done by consent of parties, and does not preclude the objection from being taken in the appellate Court; the defendant in his answer having objected to the admission of the verdict and other proceedings in the former suit, but offered to agree that the depositions only might be read: to which offer no assent appeared on the part of the plaintiff. *Ib.*

RELATOR.

1. A writ of supersedeas, to a judgment obtained in the name of the governor, for the benefit of a relator, ought to be served on such relator, and not on the governor.

Newell v. Wood. 555

RELEASE.

1. A plaintiff, by directing the sheriff to put off the sale of property taken in execution, to a day after the return day, and to suffer it to remain in the possession of the principal defendant, or his securities, releases the securities altogether from that, or any subsequent execution; such direction being given without their concurrence.

Bullitt's Ex'rs v. Winstons. 260

2. In such case, the plaintiff's adding to the direction the words "holding the property subject to the said execution," cannot prevent the release from operating. *Ib.*

3. See *Equity*, No. 24.

Yancey v. Hopkins. 419

4. In a Court of Equity, a plaintiff may be decreed to execute a release, and to procure a third person (under whom he claims) to join him therein, without making such person a party to the suit.

Moon v. Campbell. 604

RELIEF.

1. Where a plaintiff sues in Chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency of quantity; (relating to which deficiency he prays a discovery;) but, according to the contract, appears entitled to compensation in money, and not in lands: the Court, after decreeing the first mentioned conveyance, (the deficiency and the sum to be allowed for it, being ascertained,) will go on to decree the compensation, without turning over the party to a Court of law.

Chinn v. Heale. 63

2. See *Discovery*, No. 2.

Chichester's Ex'x v. Vass's Adm'r. 98

3. See *Purchaser*, No. 9.

Hill v. Cunningham's Ex'r. 330

4. What is the measure of relief in equity, for a deficiency in land sold, if the purchaser do not (by eviction, or otherwise) lose the land he expected to get, but make an entry for it as vacant, and obtain a patent. See *Purchaser*, No. 10.

Hull v. Cunningham's Ex'r. 390

5. In what case a purchaser is entitled to no relief for a loss. See *Purchaser*, No. 11. *Ib.*, 386

6. See note to the same case. 388

7. The aid of a Court of Equity ought not to be afforded to set up a marriage-promise, when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage.

Paynes v. Coles. 373

8. *Quære*, whether a Court of Equity ought, under any circumstances, to assist, to the prejudice of a posthumous child, the claim of devisees under a will (made before the 1st of January, 1787) by a testator who had no child living, and was ignorant that his wife was in a state of pregnancy? *Ib.*

9. See *Equity*, No. 24.

Yancey v. Hopkins. 419

10. See *Infant*, No. 9.

11. See *Injunction*, No. 2.

Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs. 498

12. What is the measure of relief in case of eviction after a conveyance made with warranty. *Ib.*

13. And in case of a deficiency in land purchased. *Ib.*
14. In a suit in Chancery brought by a widow and devisees to recover a tract of land, in which the widow is entitled to dower, the Court, under the prayer for general relief, will decree assignment of dower to the widow, partition of the land among the devisees, and rents and profits against the defendants.
Note to 554

15. Under the prayer for general relief, the plaintiff may have any particular relief, not inconsistent with the case made by his bill.

Same note.

555

RELINQUISHMENT.

1. A deed from a husband and wife, without her privy examination and relinquishment, is utterly void as to her.

Harvey and Wife v. Pecks.

518

RENTS.

1. A landlord is not entitled to the summary remedy by motion, on a three months' replevin bond; unless it appear that such bond was taken by a sheriff, or other officer legally authorized to make distress, and sell the distrained effects.

Smith v. Ambler,

506

2. A landlord, in person, or by a private agent, may levy a distress; but cannot sell the distrained effects, which, in such case, are only to be held as a pledge, to compel the tenant to pay the rent.

Ib.

REPLEVIN.

See Rents.

666 *REPLICATION.

1. The plaintiff's replying generally to the plea of "arbitrament and award" (in so many words) does not authorize evidence to be received in support of such plea, which is a mere nullity.

Harrison v. Brock,

22

RETURN.

1. A commission directed to five persons, ("any three of whom to act") cannot be executed by one only; and a return by one, that three others were present when the deposition was taken, is not sufficient. It should be certified by three, at least, who was present.

Marshall v. Frisbie,

247

2. Parol evidence is admissible to prove that a f. fa. was levied, though no return was made upon it.

Bullitt's Ex'rs v. Winstons,

269

3. A sheriff may be permitted by order of Court, to make a return upon an execution, or to amend it, according to the truth of the case, at any time after the return day.

Ib.

4. See Execution, No. 9, 10.

Ib.

REVENUE.

See Commissioners of Revenue.

REVIEW.

1. See Bill in Chancery, No. 1.
Templeman v. Steptoe.

339

REVIVOR.

1. An appeal from, or superadeas to, and order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only.

Bullitt's Ex'rs v. Winstons,

269

RULES IN CLERK'S OFFICE.

1. Where appearance bail is required, the defendant cannot appear at the rules, without giving special bail.

Bradley v. Welch,

284

SALE.

See Vendor and Vendee.

1. Quære, under what circumstances can a Court of Equity decree a sale, of land descended or devised, without any specific lien, or charge either general or special, by conveyance or will?

Mason's Devises v. Peter's Adm'rs,

487

2. See Injunction, No. 2.

Humphrey's Adm'r v. McClenachan's Adm'r
and Heirs,

493

SATISFACTION.

1. The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor.

Atwell's Adm'rs v. Towles,

175

SCIRE FACIAS.

1. A patent may be declared void, for defects apparent on its face, without the necessity of resorting to a scire facias to repeal it.

Alexander v. Greenup,

184

2. Quære, whether, and from what Court, a scire facias to repeal a patent can issue in Virginia?

Ib.

SCROLL.

1. A scroll annexed to a signature is not sufficient to make a sealed instrument, unless it appear, from some expression in the body of the instrument, that it was intended as such.

Austin's Adm'x v. Whitlock's Ex'rs,

487

SEAL.

See Scroll.

SECURITIES.

1. An action cannot be maintained against the securities of an executor or administrator until a devastavit has been established by means of a second suit, after a judgment against the executor or administrator as such.

Gordon's Adm'rs v. The Justices of Frederick,

1

2. A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition: the words being "if the above bound L. and W. his security, shall, &c. then this obligation to be void," &c.

Ward v. Johnston,

45

3. After a confession of judgment by the principal, further proceedings may be had against the security.

Ib.

4. In such case, if the judgment was confessed, by virtue of an agreement (to which the security was not a party) that a stay of execution should be allowed the principal, the security ought to be permitted to plead that circumstance puls darrein continuance.

Ib.

5. Quære, whether a security is exonerated at law, or in equity, by the plaintiff's accepting a confession of judgment from the principal, and granting him a stay of execution by an agreement to which the security was not a party?

Ib.

6. A plaintiff, by directing the sheriff to put off the sale of property taken in execution, to a day after the return day, and to suffer it to remain in the possession of the principal defendant, or his securities, releases the securities altogether from that or any subsequent execution; such direction being given without their concurrence.

Bullitt's Ex'rs v. Winstons,

269

7. In such case, the plaintiff's adding to the direction the words, "holding the property subject to the said execution," cannot prevent the release from operating.

Bullitt's Ex'rs v. Winstons,

269

8. At the foot of a bond, with a penalty and condition in the usual form, signed and sealed by I. S. a writing is signed and sealed by T. A. in the following words: "I, T. A. join in the above obligation with I. S. and am his security for the above sum of —" (mentioning the sum specified in the condition.) this, it seems, is a joint obligation; and judgment may be rendered against T. A. for the penalty, to be discharged by the sum in the condition, with interest.

Atwell's Adm'rs v. Towles,

175

9. An assignment of such an instrument, by the words, "I assign the within obligation," is a good assignment of the claim upon T. A. as well as I. S.

Ib.

10. The taking in execution the body of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor.

Ib.

SEISIN.

1. A patent for land ipso facto confers seisin.

Clay v. White,

162

2. Such seisin may be transferred and continued by deed of bargain and sale, or by devise; but may be interrupted by actual entry and adverse possession.

Ib.

SET-OFF.

1. A debtor ought not to be allowed a set-off (even in equity) for unliquidated and disputed claims against his creditor, purchased by him after suit brought by the creditor against him.

Dangerfield v. Rootes, Adm'r of Baylor,

529

SHERIFF.

1. The sheriff ought to transfer the debtors within the prison rules to his successor in office.

Mereditth's Adm'x v. Duval,

76

2. A bond for keeping the prison rules should be taken to the sheriff for the time being, and his successors in office, not to his "executors, administrators or assigns."

Ib.

3. But such bond, though taken to the sheriff, as such, and to "his executors, administrators or assigns," may be assigned by him to the creditor; and a suit may be maintained upon it.

Ib.

4. Quære, can such a bond, so taken, be assigned to the creditor by the succeeding sheriff?

Ib.

5. The sheriff cannot legally discharge a prisoner from the rules unless he be actually insolvent, and, being so, the plaintiff, having notice thereof, refuse to pay his fees, or to give bond for the payment thereof.

Ib.

6. If the prisoner depart from the rules by an illegal discharge from the sheriff, the creditor,

having an assignment of the bond, has his election to bring suit upon it, or to sue the sheriff. Ib.
 7. In what manner a sheriff may levy a fieri facias. See Execution, No. 5, 6.
 Bullitt's Ex'rs v. Winstons. 209
 8. In what case the sheriff is responsible to the plaintiff if the property be not produced on the day of sale. Ib.
 9. Parol evidence is admissible to prove that a fi. fa. was levied, though no return was made upon it. Ib.
 10. A sheriff may be permitted, by order of Court, to make a return upon an execution, or to amend it, according to the truth of the case, at any time after the return day. Ib.
 11. See Execution, No. 9, 10. Ib.
 12. See Equity, No. 24.
 Yancey v. Hopkins. 419
 13. See Infant, No. 9. Ib.
 14. If, in a suit upon a prison-bonds bond, a Court, possessing competent jurisdiction, adjudge the bond void: the plaintiff may sue the sheriff without appealing from the judgment, though erroneous. 501
 Hooe v. Tebbe and Wife. 501
 15. In such case the sheriff, though not a party to the suit on the bond, is bound by the judgment, unless he can prove it was obtained by collusion. Ib.
 16. See Escape, No. 1. Ib.
 17. See Rents, No. 1, 2.
 Smiths v. Ambler, 596

SIGNATURE.

See Scroll.

SLAVES.

1. An executor or administrator, hiring slaves belonging to the estate of his testator or intestate, ought not to be charged with interest on such hire from the day it became due; (no proof appearing that it was then collected, or that interest from that day was received upon it;) but a reasonable time to collect and apply the money should be allowed before the commencement of interest. 183
 Dillard v. Tomlinson, &c., 183
 2. In such case, no interest ought to be charged where the right to the slaves was in dispute, and it was doubtful to whom the money, when collected, should be paid, no proof appearing that the executor or administrator received any interest, or made any profit. Ib.
 3. See Infant, No. 4. Ib.
 4. On a joint plea of "not guilty," in trespass vi et armis against two defendants, for breaking the plaintiff's close, and beating his slaves, the defendants ought not to be permitted to give in evidence, by way of mitigation of damages, a license from the plaintiff to one of them, to visit his negro quarters, and chastise any of his slaves who might be found acting improperly: the battery being committed by the other defendant; and no proof appearing that the slaves who were beaten had acted improperly. 268
 Brown and Boisseau v. May, 268
 5. Interest on the hire of slave disallowed. 557
 Whitehorn v. Hines, 557

SPECIALTY.

See Scroll.

668

*SPECIFIC PERFORMANCE.

1. Where a plaintiff sues in Chancery for a conveyance of a specific tract of land, and also for a conveyance of other lands to make up a deficiency of quantity; (relating to which deficiency he prays a discovery;) but, according to the contract, appears entitled to compensation in money, and not in lands; the Court, after decreeing the first mentioned conveyance, (the deficiency, and the sum to be allowed for it being ascertained,) will go on to decree the compensation, without turning over the party to a Court of Law. 68
 Chinn v. Heale, 68
 2. It seems that a contract, under seal, between two brothers, by which one of them, for a fair and valuable consideration, agrees, that, when he shall obtain possession of a tract of land expected to be devised to him by their father, he will convey it to the other, is not contra bonos mores, and may support an action of covenant at law, or be enforced specifically in a Court of Equity. 308
 Lewis v. Madisons, 308
 3. See Injunction, No. 2.
 Humphrey's Adm'r v. Mc'Clenachan's Adm'r and Heirs, 493

STIPULATIONS.

1. In an action of covenant on a bond with collateral condition, if there be no stipulation, by articles, or in the condition itself, that it shall be

performed, the breach assigned should be the failing to pay the penalty; but, where such stipulation is either expressed or implied, the failing to perform the condition may be assigned as the breach. 45
 Ward v. Johnston, 45
 2. A co-obligor, in a joint and several bond, may (though described as a security) be considered as stipulating for the performance of the condition; the words being "If the above bound L. and W. his security, shall, &c., then this obligation to be void," &c. Ib.

SUPERSEDEAS.

1. Several judgments and orders, relating to each other, may be brought up by one writ of superseadeas; provided the whole be sufficiently described, as intended to be comprehended therein. 45
 Ward v. Johnston, 45
 2. See Appeal, No. 4.
 Bullitt's Ex'rs v. Winstons, 209
 3. See General Rule, in note to 400
 4. A writ of superseadeas, to a judgment obtained in the name of the Governor, for the benefit of a relator, ought to be served on such relator, and not on the Governor. 555
 Newell v. Wood, 555

SURETIES.

See Securities.

SURPLUSAGE.

1. If a Jury in a mill case erroneously assess other damages, besides those which properly ought to be assessed, but find them separately, and the Court do not direct such erroneous damages to be paid; it should be regarded as surplusage; the petition for the writ of ad quod damnum having prayed for such inquiry only as the law authorizes. 288
 Eppes v. Cralle, 288

SURVEY.

1. See Entries and Surveys.
 2. What degree of diligence is required of an attorney in fact undertaking to have a tract of land (with the situation of which he does not profess himself personally acquainted) surveyed for a part thereof, and upon terms "in case the land cannot be found, to have a proportional part of the damages which may be recovered, by his employer of the person of whom he bought, and a proportional part of his expenses paid. 228
 Betts v. Cralle, 228
 3. In this case the attorney in fact being imposed upon by the County Surveyor, and, in consequence of such imposition, having a survey made of land not purchased by his employer, was held not responsible for his mistake, and not thereby barred of his claims under the contract. Ib.

TAXES.

1. The land of an infant being, by mistake, listed by the Commissioner of the revenue as the property of another person, and sold as such for taxes, in December, 1786; being bought by the deputy sheriff who sold it; conveyed to him by the high sheriff in February, 1795; and afterwards sold again by the deputy sheriff; the right of the infant was established against the last purchaser; (who bought with full notice of all the circumstances;) notwithstanding the suit was not brought until six years after the plaintiff attained his full age. 419
 Yancey v. Hopkins, 419

TENANT.

See Landlord and Tenant.

TRANSFER OF PRISONERS.

1. A debtor within the prison rules is still a true prisoner in the eye of the law; and, as such, should be transferred by the sheriff to his successor in office. 76
 Meredith's Adm'r v. Duval, 76

TREATY.

1. Quære, whether, by virtue of the treaty of 1783, persons born in Great Britain, and residing there on the 4th of July, 1776, could, without ever 669 thereafter becoming citizens of *Virginia, or of any one of the United States of America, take and hold lands in Virginia, by descent, or devise, accruing between that day and the date of the said treaty? 218
 Hunter v. Fairfax's Devisee, 218

TRESPASS.

1. See Attorney in Fact, No. 1, 2, 3.
 Betts v. Cralle, 228
 2. On a joint plea of "not guilty," in trespass vi et armis against two defendants, for breaking the plaintiff's close, and beating his slaves, the defendants ought not to be permitted to give in evidence,

by way of mitigation of damages, a licensee from the plaintiff to one of them, to visit his negro quarters, and chastise any of his slaves who might be found acting improperly; the battery being committed by the other defendant; and no proof appearing that the slaves who were beaten had acted improperly.

Brown and Boisseau v. May, 228

TRUST AND CONFIDENCE.

1. Breach of, is a circumstance from which fraud may be presumed in a Court of Equity.

Whitehorn and Wife v. Hines and others, 557

USE AND OCCUPATION.

1. Assumpsit, for use and occupation of land by permission of the plaintiff, lies on an implied, as well as express promise.

Sutton v. Mandeville, 407

VARIANCE.

1. In debt on a bond, if the defendant craves oyer, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond; and, though the plaintiff declare against one of several obligors, without stating that they were severally bound, yet, if the bond appear to be joint and several, it is sufficient.

Meredith's Adm'x v. Duval, 76

2. If a judgment of a County Court be declared upon as of a quarterly term, and the transcript produced be a judgment at rules, (which ought to have been entered as of such quarterly term,) the variance is immaterial.

Diggs's Ex'r v. Dunn's Ex'r, 56

3. A writ of fieri facias against an administratrix, "to be levied, as to certain damages and costs, of the goods and chattels of her intestate, and, as to other damages and costs, of her own goods and chattels," was returned "executed on certain slaves the property of the administratrix, and a forthcoming bond taken," &c. The bond being given by the administratrix, eo nomine, but expressing that the fi. fa. was against the goods and chattels of the said administratrix, was decided to be variant from the fi. fa. and therefore quashed.

Glascoc's Adm'x v. Dawson, 606

4. In reviewing a judgment by default on a forthcoming bond, the appellate Court will compare it with the execution on which it was taken. Ib.

VENDOR AND VENDEE.

See Purchaser.

1. In a suit in equity by the claimant of an encumbrance, against a vendee having notice, a person who joined the vendor in the deed, for the purpose of relinquishing a collateral claim, need not be a party.

Blair v. Owles, 88

2. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever: for the vendor himself may be purchasing agent for the vendee by his appointment; and the vendee, by constituting him his agent, makes him a competent witness to prove the notice. Ib.

3. A bond being given to make a title to a particular tract of land, "to contain a certain number of acres, but not binding the obligors to convey any other specific lands to make good a deficiency: the only remedy for such deficiency is a proportional compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable.

Chinn v. Heale, 68

4. In a suit in Chancery to recover a tract of land against a vendee, on the ground that the vendor had previously agreed to convey the same land, in a certain event, to the plaintiff, it seems, that the vendor, or his legal representatives, ought to be parties.

Lewis v. Madisons, 808

5. Though land be sold in gross, for so much, be it more or less; yet, if it be evident that both parties were mistaken in a material point, as to the lines by which the vendor held, and there was no express agreement on the part of the purchaser to take the risk upon himself, a Court of Equity will give relief for a deficiency.

Hull v. Cunningham's Ex'r, 330

6. But, if the purchaser do not (by eviction or otherwise) lose the land he expected to get; but make an entry for it as vacant, and obtain a patent; the proper measure of relief is only the amount of his expenditures in procuring the patent, with a reasonable allowance for trouble therein, and actual costs of suit. Ib.

7. Quære, whether, in this case, an action at law could have been maintained upon the title bond? Ib.

8. A purchaser who buys a tract of land as containing so many acres, more or less, and agrees to take upon himself the risk, as to lines, or quantity, (appearing, also, better acquainted with the land than the vendor, against whom there is no proof of fraud,) is not entitled to any relief in equity, for a loss relating to the risk undertaken.

Hull v. Cunningham's Ex'r, 336

9. See note to same case, 338

10. If, by a sealed instrument, a vendor declare that he has sold to the vendee all his right to certain land warrants, for which the surveyor's receipt has been taken; that, if patents have issued in his name, he will transfer the same by deed; and, if not, desires that they may issue to the vendee; agreeing to pay, or deduct from the purchase-money, all expenses which have accrued; he is bound to make a deduction for a deficiency resulting from a previous contract, by his agent, to allow the locator one third of the land; though such contract was not known to him at the time of his bargain with the vendee, to whom it was equally unknown.

Humphrey's Adm'r v. M'Clenachan's Adm'r and Heirs, 493

11. On a bill of injunction exhibited by the administrator of the purchaser of a tract of land, against the administrator and heirs of the vendor, (in whom the legal title remains,) claiming compensation for a deficiency, credits for payments and a conveyance; the Court, on allowing the compensation and the credits, may decree that the defendants shall convey their title to certain trustees to be by them conveyed to the heirs of the purchaser, (though not parties to the suit,) if the balance of the purchase-money be paid on or before a certain day; and, if not, with power to sell as much of the land as may be sufficient to pay such balance, and to convey the residue, if any, to the said heirs. Ib.

12. In case of eviction after a conveyance made with warranty, the value of the lost land, as at the time of the eviction, gives the rule by which the vendee is to be remunerated; but, when the contract is executory, a Court of Equity will adjust it, upon principles of equity, according to the circumstances.

Same case, 500

13. In case of a deficiency, the value at the time of the contract gives the rule; of which the purchase-money is the standard, where it does not appear that the actual value was different. Ib.

14. See Purchase, No. 3.

Henderson v. Hudson, 510

15. See Purchase, No. 20, 21.

Whitehorn v. Hines, 557

16. See Deed, No. 10, 11.

Harvey and Wife v. Pecks, 518

17. See Fraud, No. 4.

Whitehorn v. Hines, 557

18. A vendor of land, according to certain lines, must be presumed interested, and therefore incompetent, as a witness, to establish those lines; unless it appear that he did not warrant the title.

Moon v. Campbell, Executor of M'Donald, 600

VENIRE DE NOVO.

See Verdict.

VERDICT.

1. In ejectment, if the jury find a special verdict shewing the plaintiff entitled to a certain number of acres, part of the tract sued for; and do not specify the boundaries of such part with so much precision as that possession thereof may with certainty be delivered; a venire de novo ought to be awarded.

Clay v. White, 163

2. What degree of uncertainty and inaccuracy of language is sufficient to set aside the finding of a jury in a mill case.

Eppes v. Cralle, 258

3. On a petition for leave to add to the height of a mill dam, the only proper subject of inquiry is, what damages will be occasioned by the proposed addition. It is error, therefore, to direct the jury to assess such other damages, accruing from the dam already erected, as were not contemplated by the original jury. Ib.

4. But an error in this respect should be regarded as surplusage, (the petition for the writ of ad quod damnum having prayed only for such inquiry as the law authorizes,) if the jury assessed such erroneous damages separately, and the Court did not direct the same to be paid, but only the damages properly assessed. Ib.

5. The finding of a Jury, in a mill case, that "probably the health of certain families who live near

the pond will be annoyed by the stagnation of the water," is conclusive against the petitioner.

Mayo v. Turner. 405

6. If, upon a special verdict in ejectment, it be uncertain whether the defendant, or those under whom he claims, had 20 years' possession, exclusive of the said 5 years and 174 days, a venire de novo ought to be awarded.

Clay v. Ransome. 454

7. In an action against the sheriff for an escape, a verdict, in general terms, for the plaintiff, is not sufficient to authorize a judgment. An express finding by the Jury according to the act of 1792, concerning escapes, is absolutely necessary.

Hooe v. Tebbis and Wife. 501

VOUCHERS.

1. See Evidence, No. 11.

Fitzgerald, Ex'r of Jones, v. Jones, 150

VOYAGE.

See Deviations.

WARRANTY.

1. What is the measure of relief in case of eviction *from land purchased with warranty. Humphrey's Adm'r v. McClenachan's Adm'r and Heirs. 500

2. And in case of a deficiency. 1b.

WILLS.

1. A wealthy testator having bequeathed pecuniary legacies to three of his daughters, to be paid them, "if the money could be raised by his estate by the time that either of them should marry, or come of age;" (without saying any thing about their maintenance or education.) It was held that they were entitled (notwithstanding their legacies) to maintenance and education out of the estate; at least while the legacies were not sufficiently productive.

Fitzgerald, Ex'r of Jones, v. Jones, 150

2. Quære, whether a Court of Equity ought, under any circumstances, to assist, to the prejudice of a posthumous child, the claim of devisees under a will (made before the 1st of January, 1787) by a testator who had no child living, and was ignorant that his wife was in a state of pregnancy?

Paynes v. Coles. 373

3. A man on his death bed, at his own house, and in his proper senses, sent for a neighbour to make his will, who took notes thereof in his presence, and in that of another witness who was present all the time, and heard the sick man request the first witness to make his will, and direct each note to be taken. A third witness was not present when the first began to take notes, but was present afterwards, and heard some of the notes dictated. Two of the witnesses swore that the notes, or most of them, were read to the decedent, but were not positive that the whole were; nor did the sick man read them himself; but he was then in his proper senses. After the first witness had made a draught of a will from the notes, the decedent was incapable of reading, or hearing it read; being at that time delirious. The notes taken as aforesaid were established as a good nuncupative will.

Mason v. Dunman. 456

4. In construing wills, the cardinal rule is to collect the intention of the testator from the whole will taken together, without regard to any thing

technical, or any particular form of words; and, if such intention be lawful, (as not creating perpetuities, or the like, full effect ought to be given to it by the Courts.

Wyatt v. Sadler's Heirs. 587

5. A testator (who died in the year 1766) expressed himself, in the introductory part of his will, thus: "and as to what worldly goods it hath pleased God to give me, I leave and bequeath as followeth." In the next clause he "wills and desires that his wife should enjoy all his land during her life, and after her decease gives and bequeaths to his two sons, all his land, to be equally divided between them; his still, likewise, to be between them, to distil for their own use, and, after, to his eldest son. A fee-simple estate in his share of the land passed to the younger son."

Wyatt v. Sadler's Heirs. 587

6. A fee-simple estate, in lands, might pass by a will (even before the act of 1786, c. 63,) without words of perpetuity, or any words equivalent; provided it appeared, from the whole will taken together, that such was the intention of the testator. Johnson and others v. Johnson's Widow and Heirs. 549

7. Where an illiterate testator uses the same words in disposing of his real, as in disposing of his personal property, and in the same clause of the will, it is fair to infer that he intended to give them the same effect as to both kinds of property. 1b.

WITNESS.

1. A purchasing agent is a competent witness to prove that his principal had notice of an encumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever; for the vendor himself may be purchasing agent for the vendee, by his appointment, and the vendee, by constituting him his agent, makes him a competent witness to prove the notice.

Blair v. Owles. 38

2. On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the Court of Error; though the Court determined on viewing the record only, and therefore did not examine the witnesses.

Eppes v. Cralle. 258

3. A vendor of land according to certain lines, must be presumed interested, and therefore incompetent, as a witness, to establish those lines; unless it appear that he did not warrant the title.

Moon v. Campbell. 600

WITNESSES.

See Evidence.

1. The Jury, and not the Court, are exclusively judges of the credibility of witnesses.

Harrison v. Brock. 23

WRITS.

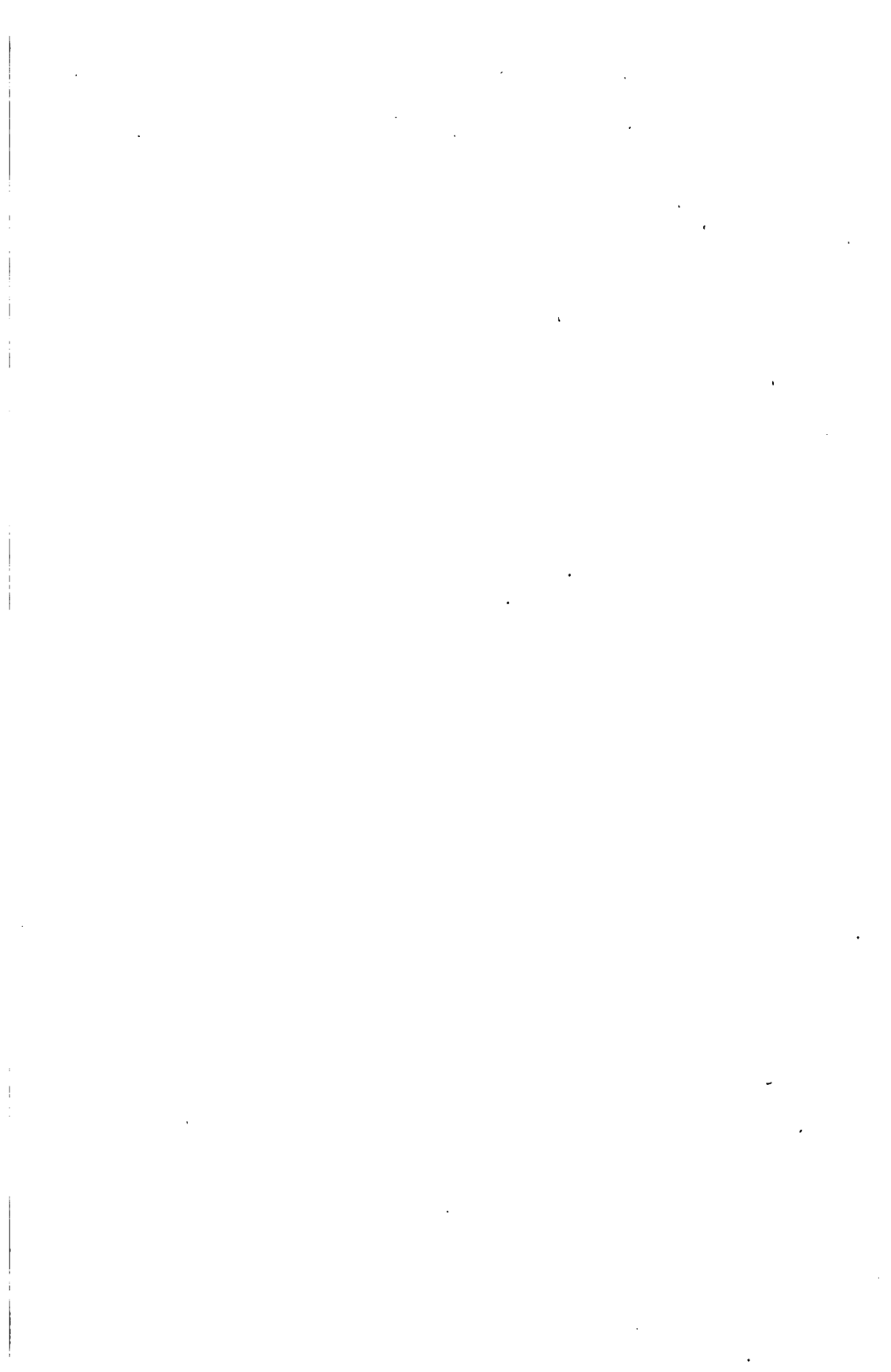
1. Several judgments and orders, relating to each other, may be brought up by one writ of supersedeas; provided the whole be sufficiently described, as intended to be comprehended therein.

Ward v. Johnston. 45

2. See Error, and note to

3. A writ of supersedeas to a judgment obtained in the name of the Governor for the benefit of a relator, ought to be served on such relator, and not on the Governor.

Newell v. Wood, 555



REPORTS OF CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME II.

BY WILLIAM MUNFORD.

District of New York, ss.

BE IT REMEMBERED, That on the twenty-first day of January, in the thirty-eighth year of the Independence of the United States of America, Lewis Morel, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

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TABLE OF CASES REPORTED.

Addison & Wife v. Core's Adm'r.....	279-280	Henry's Ex'r v. Elean, also v. Pickett, Pol-	541-542
Aicklin, Walker's Ex'r v.....	357-363	lard & Johnson.....	525-526
Alexander v. Deneale.....	341-342	Hill v. Harvey.....	49-59
Alexandria (Mayor and Commonalty of) v.		Hilyard, Braxton's Adm'r v.....	154-163
Hunter.....	228-229	Hite's Ex'r v. Paul's Heirs.....	316-321
Alexandria Bank (The President and Direct-		Holladay, Ex'r of Littlepage, v. Littlepage..	539-541
ors of the), Winchester v.....	336-340	Holladay & Wife v. Littlepage.....	162-166
Arnold, Lovell v.....	167-179	Holliday & Wife v. Coleman & Wife.....	379-387
Ashley v. Cornwell.....	268-271	Hook v. Nanny Pagee and her children..	326-329
Auditor v. Nicholas.....	31-33	Hopkirk v. Dennis and others.....	209-227
Baker, Wallace and others v.....	334-336	Hughes v. Hughes's Ex'r.....	148-151
Baylor, Hansbrough v.....	36-40	Hunt, Richardson's Ex'r v.....	228-229
Beattie v. Tabb's Adm'r.....	254-256	Hunter, The Mayor and Commonalty of	
Bell, Mackey, Ex'r of Fuqua, v.....	525-527	Alexandria v.....	200-204
Bingham, Bowles v.....	442-448	Hyer v. Shobe.....	272-276
Blair, Surviving Ex'r of Mitchell, Buckner &		Isom v. Johns.....	53-57
Wife v.....	336-337	Jameson, Hadfield v.....	242-244
Bowles v. Bingham.....	443-448	Jameson, Triplett's Ex'r's v.....	272-276
Braxton's Adm'r v. Hilyard.....	49-53	Johns, Isom v.....	304
v. Lipscomb.....	232-233	Johnson v. Johnson's Adm'r	
Bronaughts v. Freeman's Ex'r.....	266-268	and others, White's Ex'r's v.....	285-288
Brooks v. Scott's Ex'r.....	344-349	Johnson's Ex'r's, Winston v.....	305-310
Brown, M'Rea v.....	46-48	Jones v. Robertson.....	187-197
Buckner & Wife v. Blair, Surviving Ex'r of		Keewood and others, Ross v.....	141-148
Mitchell.....	336-337	Kincaid v. Cunningham.....	1-10
Callicott, M'Cargo, Ex'r of Callicott, v.....	501-506	King v. Newman.....	40-43
Callis v. Waddy.....	511-513	Kirtley v. Deck.....	10-24
Camm & Wife, Norvell v.....	257-263	Lambert v. Nanny.....	196-199
Carnagy & Wife v. Woodcock & Mackey,		Leak, Royster and others v.....	280-281
Ex'r's of Martin.....	234-240	Ledbetter and others, Williamson, Executor	
Carter's Ex'r's, Catlett v.....	24-30	of Mayes, v.....	521-522
Carter v. Cockrill & Rogers.....	448-450	Lipscomb, Braxton's Adm'r v.....	282-283
Waugh v.....	333	Defarges v.....	451
Catlett v. Carter's Ex'r's.....	24-30	Littlepage, Holladay, Ex'r of Littlepage v.....	316-321
Cave v. Shelor & Wife.....	193-195	Littlepage, Holladay & Wife v.....	539-541
Childers, Garnett v.....	277-278	Lovell v. Arnold.....	167-179
Claughton and others v. Macnaughton.....	513-518	M'Cargo, Ex'r of Callicott, v. Callicott.....	501-505
Clay v. Williams's Ex'r.....	105-129	M'Carty, Murray v.....	393-406
Coleman & Wife, Holliday & Wife v.....	162-166	Mackey, Ex'r of Fuqua, v. Bell.....	523-525
Colley, Eppes's Ex'r's v.....	523	M'Murdo & Fisher, Fenwick v.....	244-254
Cooke v. Piles.....	151-154	Macnaughton, Claughton and others v.....	513-518
Core's Adm'r, Addison & Wife v.....	279-280	M'Rea v. Brown.....	46-48
Cornwell, Ashley v.....	268-271	Mangum v. Flowers.....	305-209
v. Truss.....	196-196	Manson, Hardaway v.....	230-234
Coutts and others v. Greenhow.....	363-378	Marks v. Morris.....	407-411
Crews & Higginbotham v. Garland.....	491-492	Marshall v. Thompson.....	412-413
Crowdhill, Wilson v.....	302	Martin's Ex'r's, Carnagy & Wife v.....	234-240
Cunningham, Kincaid v.....	1-10	Marye, Mooberry and others v.....	453-468
Davison v. Waite.....	527-534	Maye's Ex'r v. Ledbetter and others.....	521-523
Deck, Kirtley v.....	10-24	Mayo v. Haines & Coutts.....	423
Defarges v. Lipscomb.....	451	Melson v. Melson's Adm'r.....	542
Deneale, Alexander v.....	341-342	Miller and others, Goodwin and others v.....	42-43
Dennis and others, Hopkirk v.....	326-329	Miller and others, Heffner v.....	43-46
Donnelly & Jones, Edgar v.....	387-393	Minnis, Stratton v.....	339-330
Dorsey, Snickers v.....	505-510	Monroe (Governor) v. Redman and others..	240-242
Drummond's Adm'r's v. Richards.....	377-379	Mooberry and others v. Marye.....	453-468
Dulany, Green v.....	518-520	Moore's Ex'r v. Ferguson and others.....	421-423
Dunlop, Pollock & Co., Scott & Co. v.....	349-357	Morris, Marks v.....	407-411
Dunton v. Robins.....	341	Moseley, Gay v.....	513-547
Duvals v. Ross.....	290-296	Murray v. M'Carty.....	393-406
Edgar v. Donnelly & Jones.....	387-393	Nanny, Lambert v.....	196-199
Elcan, Henry's Ex'r v.....	541-542	Nanny Pagee and her children, Hook v.....	379-387
Ellett's Ex'r, Temple's Ex'r v.....	452-453	Nelson's Adm'r v. Taylor & Thornton.....	492-501
Ellis and others, Waller's Ex'r's v.....	88-105	Newman, King v.....	40-43
Eppes's Ex'r's v. Colley.....	523	Nicholas, The Auditor v.....	31-33
Eppes, Adm'r of Royall, Royall v.....	479-491	Norris v. Tomlin & Gray.....	386
Esbridge, Tuttle v.....	330-333	Norvell v. Camm & Wife.....	257-263
Fenwick v. M'Murdo & Fisher.....	244-254	Osborne's Ex'r, Scott's Ex'r v.....	413-421
Fenwick, Shanks & M'Rae v.....	478	Page, Adm'r of Nelson, v. Taylor & Thorn-	
Ferguson and others, Moore's Ex'r v.....	421-423	ton.....	493-501
Ferguson's Ex'r's v. Halcumb.....	34-35	Page's Ex'r v. Winston's Adm'r.....	298-302
Flowers, Mangum v.....	205-209	Pagee, Hook v.....	379-387
Freeman's Ex'r, Bronaughts v.....	266-268	Paul's Heirs, Hite's Ex'r v.....	154-162
Fuqua's Ex'r v. Bell.....	523-525	Payne & Fairfax v. Grim.....	297-298
Garland, Crews & Higginbotham v.....	491-492	Pickett, Pollard & Johnson, Henry's Ex'r v.....	541-543
Garnett v. Childers.....	277-278	Piles, Cooke v.....	151-154
Gay v. Moseley.....	543-547	Price, Trueheart v.....	468-477
Gibson v. Randolph.....	310-313	and others, Young v.....	534-539
Goodwin and others v. Miller and others.....	42-43	Quarles's Ex'r v. Quarles and others.....	321-325
Gordon, Ross v.....	286-290	Ramsey's Adm'r, Whitlock v.....	510-511
Grantland v. Wight.....	179-186	Randolph, Gibson v.....	310-313
Green v. Dulany.....	518-520	Redman and others, Monroe (Governor) v.....	240-242
Greenhow, Coutts and others v.....	363-378	Richards, Drummond's Adm'r's v.....	387-389
Grim, Payne & Fairfax v.....	297-298	Richardson's Ex'r v. Hunt.....	148-151
Hadfield v. Jameson.....	53-57	Robert's Widow & Heirs v. Stanton.....	129-140
Haines & Cout's, Mayo v.....	423	Robertson, Jones v.....	187-193
Halcumb, Fournoy's Ex'r's v.....	34-35	Robins, Dunton v.....	341
Hall, Scott v.....	229-230	Ross, Duvals v.....	290-296
Hansbrough v. Baylor.....	35-45	Ross v. Gordon.....	229-230
Hardaway v. Manson.....	230-234	and others, Keewood and others.....	141-148
Harvey, Hill v.....	525-526	Royal v. Eppes, Adm'r of Royall.....	479-491
Heffner v. Miller and others.....	43-46	Royster and others v. Leake.....	280-281

Scott v. Hall.....	229-230	Waddy, Callis v.....	511-512
& Co. v. Dunlop, Pollock & Co.....	349-357	Walte, Davison v.....	527-531
Scott's Ex'r. Brooks v.....	344-349	Walker's Ex'r v. Aicklin.....	357-361
v. Osborne's Ex'r.....	413-421	Wallace and others v. Baker.....	334-338
Shanks & M'Rae v. Fenwick.....	478	Waller's Ex'rs v. Ellis and others.....	88-116
Shelor & Wife, Cave v.....	193-195	Watkins v. Taylor & Mewburn.....	424-442
Shobe, Hyer v.....	200-204	Watson & Wife, Tunnell and Wife v.....	283-285
Snickers v. Dorsey.....	505-510	Waugh v. Carter.....	33
Stanton, Roberts's Widow & Heirs v.....	129-140	Wells's Heirs v. Winfree and others.....	342-344
Stone, Taylor v.....	314-315	White's Ex'rs v. Johnson and others.....	25-28
Stovall's Ex'r v. Woodson & Wife.....	308-304	Whitlock v. Ramsey's Adm'r.....	510-511
Stratton v. Minnis.....	329-330	Wight, Grantland v.....	179-186
Sydnor v. Sydnors.....	263-266	Williamson, Ex'r of Mayes v. Ledbetter.....	321-322
Tabb's Adm'rs. Beattie v.....	254-256	Williams's Ex'x and others, Clay v.....	105-115
Taylor & Mewburn, Watkins v.....	424-442	Wilson v. Crowdhill.....	302
Taylor & Thornton, Page, Adm'r of Nelson, v.....	492-501	Winchester and others v. the President and Directors of the Bank of Alexandria.....	339-340
Taylor v. Stone.....	314-315	Winfree and others, Wells's Heirs v.....	342-344
Temple's Ex'r v. Ellett's Ex'x.....	452-453	Winston v. Johnson's Ex'rs.....	305-310
Thompson, Marshall v.....	412-413	Winston's Adm'r. Page's Ex'r v.....	298-302
Tomlin & Gray, Norris v.....	386	Woodcock & Mackey, Ex'rs of Martin, Car-	
Triplett's Ex'rs v. Jameson.....	243-244	nagy & Wife v.....	224-241
Trueheart v. Price.....	405-477	Woodson and Wife, Stovall's Ex'r v.....	303-304
Truss, Cornwell v.....	195-196	Young v. Price and others.....	534-535
Tunnell & Wife v. Watson & Wife.....	283-285		
Tuttle v. Eskridge.....	330-332		

TABLE OF CASES CITED.

AMERICAN AUTHORITIES.

The cases *in italic* are such as are in manuscript, or have not been reported.

Adams, Pryor v.,	48	Call v. Ruffin,	30	Fairfax, The Commonwealth v.,	281
Aicklin, Walker's Ex'r v.,	472	Calloway, Wilcox v.,	148, 262	v. Muse's Ex'rs,	42
Alexander, Birch v.,	284, 285, 466	Campbell & Wife, Argenbright		Fisher, Eldridge v.,	498
v. Deneale,	525	v.,	196	Fisher's Ex'r v. Duncan &	
v. Greenup,	260	, Moon v.,	475	Turnbull,	230, 546
& Co., Stoit & Donald-		, Price and others v.,	436, 440	Ford v. Gardner,	287
son v.,	351	& Wheeler, Robertson		Fox v. Cosby,	343
. Watson v.,	139	v.,	40, 353	Frederick Justices, Gordon's	
Alexandria (Mayor and Com-		& Wife v. Winston and		Adm'rs v.,	27, 30
monalty of) v. Chapman,	228, 229	others,	287	Fristoe, Gibson v.,	494
Alexandria (Bank of), Young v.,	339	, Williams and others		Fulgham v. Lightfoot,	193, 541
(Marine Insurance Com-		v.,	241	Fulton, M'Kim v.,	55
pany v. Young,	495, 497	Carr's Ex'r v. Anderson,	170	Gardner Ford v.,	287
Allen v. Belsches and others,	42	Carr v. Gooch,	417	Gaskins, Eustace v.,	138, 139
Allens, Henderson v.,	283, 438	Carter v. Washington,	456	Georgia v. Brailsford and	
Ambler & Wife v. Norton,	502	, Waugh v.,	492	others,	255
v. Wyld,	60	Chapman v. Turner,	40	Gerard v. Basse and others,	354
Anderson v. Anderson and		, The Mayor and Com-		Gibbs, Musgrove v.,	36
others,	505	monalty of Alexan-		Gibson v. Fristoe,	424
, Carr's Ex'r v.,	170	dria v.,	228, 229	Jefferson & Skipwith v.,	436
, Banks v.,	523	Chichester v. Vass,	193, 495	Glascoc's Adm'x v. Dawson,	
Archer and others, Tabb and		Chichester's Ex'x v. Vass's		Glassell's Adm'r, De Lima v.,	207, 536
others v.,	364, 367, 369	Adm'r,	278, 417, 419	Gooch, Carr v.,	253
Argenbright v. Campbell &		Chinn, Ex'r of Downman,		Goodwin v. Miller,	417
Wife,	198	Downman v.,	366	Gordon, Brooke v.,	523
Atwell's Adm'rs v. Towles,	47, 48	v. Heale,	308	Gordon's Adm'rs v. Frederick	324, 335
Auditor, Moore's Ex'r v.,	313	Claiborne, Dangerfield v.,	298, 367	Justices,	27, 30
v. Nicholas,	294	Clay v. Ransome,	238	Grace, Calbraith v.,	86
Austin v. Winston,	117, 119, 131	v. White,	228, 456, 461	Graham v. Woodson,	334
Backhouse v. Tabb,	29	Clinch, Skipwith v.,	324	Granberry's Ex'r v. Gran-	
Braid & Co. v. Mattox,	511	Coburn, Stephens v.,	145, 147	berry,	288
Ballard v. Leavell,	206	Cogbill v. Cogbill,	234, 237	Gray, Waggoner v.,	30
Banks v. Anderson,	523	Coles, Paynes v.,	48	Green v. Dulany,	197
Baring v. Reader,	50, 51, 452, 474	Commonwealth v. Beaumar-		Green, Hyers v.,	536
Barnett & Woolfolk v. Watson		chais,	106	Green & Mosher v. Bealls,	303
& Urquhart,	307, 208	, Bristow v.,	288	Green, Sadler's Ex'rs v.,	841
Barr v. Barr's Adm'r,	431	, Dunlop v.,	243	Greenup, Alexander v.,	260
Barrett & Co. v. Tazewell,	171, 254	v. Fairfax,	381	Gregory, Young v.,	
Bass v. Bass,	390, 459	v. Newton, Ex'r of		12, 13, 14, 15, 20, 21, 24, 70, 78	
Basse and others, Gerard v.,	354	Tucker,	505	Griffin, Syme v.,	109
Bates v. Holman,	226	Cooke v. Piles,	541	Grim, Payne & Fairfax v.,	492, 536
Baylor, Kennedy v.,	138, 139	v. Wise,	324	Grymes, Sayre v.,	342, 243
Baylor's Devises, Pollard v.,	456	Crosby, Fox v.,	278	Guthrie v. Guthrie,	464
Beale, Shermer v.,	1, 8	v. Hite,	243	Hairston v. Hall,	487, 488
Beals, Green & Mosher v.,	352	Craddock v. Ellzey,	58	Hall, Hairston v.,	487, 488
Beatty v. Smith & Thompson,	43	Crenshaw, Wingfield v.,	181	Hall v. Hall,	203, 204
Beaumarials, The Common-		Croudson and others v. Leonard,	32	Hamilton, Granberry v.,	30
wealth v.,	103	Cuninghams Ex'r, Hull v.,	487	v. Russell,	233, 341
Bedford v. Hickman,	294	Cuningham, Kincaid v.,	367	Hammett v. Bullitt's Ex'rs,	306, 207
B-dinger, Hunt-r v.,	375	Cutchin v. Wilkinson,	303, 204	Hardaway v. Manson,	536
Bell, Hopkirk v.,	255, 256	Dangerfield v. Claiborne,	267, 536	Harmanson, Bentley, Ex'r of	
Belsches and others, Allen v.,	42	Davies v. Miller,	505	Ronald v.,	50, 52
, Brown v.,	307, 360	Dawson, Glascoc's Adm'x		Harrison v. Harrison,	198
Bentley, Ex'r of Ronald, v.,		v.,	28, 511	Hastie, Brewer v.,	286
Harmanson,	50, 52	Deans v. Scriba,	253	Heale, Chinn v.,	308
Berkeley, Blincoe v.,	126	Deck, Kirtley v.,	28, 511	Henderson v. Allens,	288, 488
, Leftwich v.,	281	De Lima v. Glassell's Adm'r,		Hendley, Mantz v.,	495
Beverley v. Fogg,	173	Dempsey, Assignee of Brown,	82, 85	Henry's Ex'r v. Elcan,	542
, Kinney v.,	456, 461, 465	v. The Insurance Company of		Hepburn v. Lewis,	154
Birch v. Alexander,	284, 285, 466	Pennsylvania,	525	Herbert's Ex'r, Keel & Rob-	
Blair, Buckner & Wife v.,	526	Deneale, Alexander v.,	145, 148	erts v.,	156, 320, 351
v. Owles,	156	Depeu v. Howard,	1, 253	Herndon's Ex'r, Murdock &	
Blincoe v. Berkeley,	123	Dick, Terrell v.,	272	others v.,	307, 208, 353, 353
Blow & Barksdale, Hubbard v.,	523	Dillard, Tomlinson v.,	526	Hickman, Bedford v.,	204
Bowyer, & v. Lewis,	323	v. Tomlinson,	304, 51	Hilgenbotham v. Rucker,	
Bradley v. Welch,	241, 292	Dishman, Hord's Ex'x v.,	196, 198, 199	Hill v. Burrow,	195, 496, 544
Brailsford and others, Georgia		Dixon, Kerr v.,	296	Hills and others v. Ross,	352, 356
v.,	526	Donnelly, Hoover v.,	526	Hilyard, Braxton's Adm'x v.,	536
Braxton's Adm'x v. Hilyard,	223	Downman v. Chinn, Ex'r of		Hines & Wife, Whitehorn v.,	323
Braxton, Less a.,	526	Downman,	492	Hite, Cosby v.,	207
Braxton's Adm'x v. Lipscomb,	433, 435	Dulauy, Green v.,	230, 546	Hite's Heirs v. Wilson & Dun-	
Bray, Dunn v.,	386	Dunbar & Vass v. Long's	243	lap,	283
Brewer v. Hastie,	386	Duncan & Turnbull, Fisher's		Hodgson and others, The Pres-	
Bristow v. The Commonwealth,	238	Ex'r,	230, 546	ident and Professors of	
Brock, Robinson's Adm'r v.,	383	Dunn v. Bray,	483	William and Mary College	
Brooke's v. Gordon,	334, 335	Ellcott v. Lyell,	271		42, 523
Brooke's Adm'r v. Shelly,	319	Ellis v. Thilman, 12, 13, 14, 20, 21, 24		Holcomb v. Purnall,	243
Brown v. Belsches,	307, 360	Ellzey, Craddock v.,	378	Holman, Bates v.,	326
, Johnson v.,	149	Ellzey, Lane's Ex'x v.,	43, 523	Hooe & Harrison v. Pierce's	
, Turberville v.,	234	Eppe's v. Randolph,	364, 366, 370, 372, 377, 378	Adm'r,	82, 315
Buckner & Wife v. Blair,	526	, Royall v.,	530	Hoover v. Donally, 196, 198, 199, 301	
Bullitt's Ex'rs, Hammett v.,	206, 207	Eustace v. Gaskins,	138, 139	Hopkins, Yancy v.,	160, 161
Burnley v. Lambert,	328			Hopkirk v. Bell,	256, 256
Burrow, Hill v.,	264, 483, 486			Hord's Ex'x v. Dishman,	526
Calbraith v. Gracie,	85, 86				
Calhoun v. The Insurance Com-					
pany of Pennsylvania,	86				

Hord, Kenner v.,	36, 436, 438, 440	Murchie, Rose v.,	351	Tabb and others v. Archer and others,	364, 367, 369
Howard, Depew v.,	146, 148	Murdoch and others v. Herndon's Ex'rs,	207, 208, 351, 353	Tabb, Backhouse v.,	29
Hoyle v. Young,	194, 195, 200	Murrell v. Johnson's Adm'r,	496, 497	Talbot v. Jansen,	402, 403, 404
Hubbard v. Blow & Barksdale,	334	Muse's Ex'rs, Fairfax v.,	42	Tallaferro, Watson v.,	503
v. Taylor,	386	Musgrove v. Gibbs,	36	Tally, Tate v.,	264, 486
Hudgins v. Wrights,	380, 388	Nelson v. Matthews,	290	Tapscot, Lee v.,	174
Hudson v. Johnson,	386	Newton, Ex'r of Tucker, The Commonwealth v.,	506	Tate v. Tally,	264, 486
Overton & Wife v.,	273	Newton v. Wilson,	324	Taylor, Hubbard v.,	267
Hull v. Cunningham's Ex'r,	181	Nicholas, The Auditor v.,	294	Taylor's Adm'r v. Nicholson,	1, 8
Jones and others v.,	266	Nicholson, Taylor's Adm'r v.,	1, 8	Taylor & Co. v. M'Clean,	351
Humphrey's Adm'r v. Clenachan's Adm'r,	181	Norton, Ambler & Wife v.,	502	v. Peyton,	96
Hunter v. Bedinger,	275	Norvell, Ross v.,	40	Tazewell, Barrett & Co. v.,	171, 254
v. Spotswood,	58	Nuttall's Ex'rs v. M'Dowall & Co.,	97	Templeman v. Steptoe,	280
Hyers v. Green,	203	Overton & Wife v. Hudson,	273	Terrell v. Dick,	1, 253
Hylton, Ware v.,	255	Owles, Blair v.,	196	Thilman, Ellis v., 1, 2, 13, 14, 20, 21, 24	
Insurance Company of Pennsylvania, Dempsey, Assignee of Brown v.,	83, 83	Page, Miller v.,	260	Thomas, Turpin, Adm'r of James v.,	1, 263
Insurance Company of Pennsylvania, Calhoun v.,	86	Page v. Pendleton,	255	Thompson, Johnson v., and others, Lewis v.,	136
Insurance Company (United), Vandenheuev v.,	53	Page's Ex'r v. Winston's Adm'r,	387	Tomlinson, Dillard v., 279, 325, 506	
Isabel, Pegram v.,	263	Patterson, Stone v.,	97, 102	v. Dillard,	278
Jansen, Talbot v.,	402, 403, 404	Payes v. Coles,	43	Towles, Atwell's Adm'r's v.,	47, 48
Jenney and others, Smith v.,	148	Payne & Fairfax v. Grim,	492, 529	Trents, Crump & Bates, Scott's Ex'rs v.,	1, 8
Johnson v. Brown,	148	Payne, Martin v.,	271	Tunnell & Wife v. Watson,	488
Hudson v.,	180	Peachy, M'Call v.,	523	Turberville, Brown v.,	224
v. Thomson,	180	Pegram v. Isabel,	283	v. Long, 170, 171, 172, 173, 176	
Johnson's Adm'r, Murrell v.,	496, 497	Pendleton, Page v.,	255	Turner, Chapman v.,	40
Jones and others v. Hull,	266	Perkins v. Saunders & Wade, Peter's Adm'r, Mason's Devises v.,	309	Turpin, Adm'r of James v. Thomas,	1, 2, 53
v. Williams,	250, 280, 287	Peyton, Taylor v.,	96, 100	Vance v. Walker,	357, 361, 362, 472
Keel & Roberts v. Herbert's Ex'rs,	176, 320, 351	Pierce's Adm'r, Hooe & Harrison v.,	32, 315	Vandenheuev v. The United Insurance Company,	53
Kennedy v. Baylor,	183, 189	Piles, Cooke v.,	541	Vass, Chichester v.,	193, 495
Kenner v. Hord,	36, 436, 438, 440	Pleasants v. Pleasants, Shore & Co. v. Ross,	491	Vass's Adm'r, Chichester's Ex'r v.,	273, 417, 419
Kennon v. M'Robert & Wife,	482	Pollard v. Baylor's Devises,	436, 440	Waggoner v. Gray,	198
Kerr v. Dixon,	304, 511	Pollock & Co, Shelton v.,	380, 380, 382, 449, 536	Walker's Ex'r v. Aicklin,	472
Kincaid v. Cunningham,	32	Price and others v. Campbell,	436	Walker, Smith v.,	526
Kinney v. Beverley,	456, 461, 468	Pryor v. Adams,	43	Vance v.,	357, 361, 362, 472
Kirtley v. Deck,	23, 511	Purnall, Holcomb v.,	243	Wallace v. Tallaferro,	503
Lambert, Burnley v.,	323	Randolph, Epps v.,	378	Warder, Ex'r of Parker, M'Guire v.,	436
Lane's Ex'r, Elizey v.,	43, 528	Ransome, Clay v.,	364, 368, 370, 372, 378	Ware v. Hylton,	255
Leavell, Ballard v.,	490	Reeder, Baring v.,	50, 51, 452, 474	Washington, Carter v., and others, Wroe v.,	176, 346
Lee, Stuart v.,	174	Robertson v. Campbell & Wheeler,	40, 358	Watson v. Alexander,	136
Lee v. Braxton,	181	Robinson's Adm'r v. Brock, Rootes, Wilcox v.,	219, 223, 234, 236	& Urquhart v. Barnett & Woolfolk,	207, 208
Leitwich v. Berkeley,	523	Rose v. Murchie,	351	Watson, Tunnel & Wife v.,	488
Leonard, Croudson and others v.,	154	Ross, Hills and others v.,	353, 356	Wagh v. Carter,	492
Lewis, Bowyer v.,	387	Morris, Overton and others v.,	1, 8, 35, 253	Welch, Bradley v.,	241, 297
Hepburn v.,	387	v. Norvell,	40	White, Clay v.,	233, 456, 461
v. Thompson and others,	387	Pleasants, Shore & Co. v.,	1, 8	Whitehorn v. Hines & Wife,	325
Lightfoot, Fulgham v.,	193, 541	Rowton v. Rowton,	419	Whiting, Maupin v.,	43
Lipscomb, Braxton's Adm'r v.,	526	Royal v. Eppes,	539	Wilcox v. Caloway,	148, 262
London, Scott v.,	401, 406	Rucker, Higginbotham v.,	195, 486, 540	v. Rootes,	219, 223, 234, 236
Long's Adm'r, Dunbar & Vass v.,	492	Ruffin, Call v.,	80	Wilkinson, Cutchin v.,	487
Long, Turberville v.,	170, 171, 172, 173, 176	Russell, Hamilton v.,	233, 341	William & Mary College (The President and Professors of) v. Hodgson and others,	42, 523
Longhead, Wycoff v.,	36	Sadler's Ex'rs & Legatees v. Green,	341	Williams and others v. Campbell,	241
Luttrell, Wood v.,	275	Saunders & Wade, Perkins v.,	286	Willis, M'Williams v.,	250, 260, 251
Lyell, Elliott v.,	271	Sayre v. Grymes,	242, 243	Wilson & Dunlap, Hite's Heirs v.,	246, 348
M'Call v. Peachy,	523	Scott, Call v.,	198	Newton v.,	263
M'Clean, Taylor & Co. v.,	351	Scott's Ex'rs v. Trents, Crump & Bates,	1, 8, 325	Wingfield v. Crenshaw,	243
M'Clenachan's Adm'r, Humphrey's Adm'r v.,	181	Scott v. London,	401, 406	Winston, Austin v.,	117, 119, 121
M'Dowall & Co., Nuttall's Ex'rs v.,	97	Scriba, Deans v.,	505	and others, Campbell & Wife v.,	287
M'Guire v. Warder, Ex'r of Parker,	436	Segar, Smith v.,	302	Winston's Adm'r, Page's Ex'r v.,	387
M'Kim v. Fulton,	55	Shelly, Brooke's Adm'r's v.,	319	Wise, Cooke v.,	334
M'Robert & Wife, Kennon v.,	482	Shelton v. Pollock & Co.,	330, 350, 352, 449, 526	Wood v. Luttrell,	275
M'Williams v. Willis,	346, 348	Shermer v. Beale,	1, 8	Woodson, Graham v.,	324
Manson, Hardaway v.,	526	Shipwith v. Clinch,	324	Wrights, Hudgins v.,	380, 386
Manz v. Hendley,	309	v. Gibson & Jefferson,	48	Wroe v. Washington and others,	176, 346
Marine Insurance Company of Alexandria v. Young,	495, 497	Smith & Thompson, Beatty v.,	48	Wycoff v. Longhead,	36
Martin v. Payne,	271	v. Jenny and others,	55	Yald, Ambler v.,	80
Mason's Devises v. Peter's Adm'r,	300	v. Segar,	526	Yancey v. Hopkins,	160, 161
Matthews, Nelson v.,	591	v. Walker,	58	Yerby v. Yerby,	219, 223, 224, 226
Mattox, Baird & Co. v.,	43	Spotswood, Hunter v.,	146, 147	Young v. The President & Directors of the Bank of Alexandria,	339
Maupin v. Whiting,	203, 204	Stephens v. Coburn,	280	Young, The Marine Insurance Company of Alexandria v.,	495, 497
Miller, Goodwin v.,	523	Steptoe, Templeman v.,	97, 102	Young v. Gregory,	12, 13, 14, 15, 20, 21, 24, 70, 78
Miller v. Page,	260	Stone v. Patterson,	351	Hoyle v.,	194, 195, 200
Montague, Syme v.,	1, 7, 253	Stott & Donaldson v. Alexander & Co.,	102		
Moon v. Campbell,	475	Stuart v. Lee,	102		
Moore's Ex'r v. The Auditor, Morris, Overton and others v. Ross,	312	Syme v. Griffin,	1, 7, 253		
Moss v. Moss's Adm'r,	335, 350				

BRITISH AUTHORITIES.

Abbott, Hobart v.,	361	Chapman, Brown v.,	19	Glover v. Strothoff,	488
Abel v. Sutton,	354	Chase, North v.,	488, 489	Goodright v. Forrester,	304
Acherley v. Wheeler & Ver-		Chancey and others v. Gray-	53	Harwood v.,	321
non,	323	don and others (3 Atk. 631),	487	v. Moss,	446
Agular, Geyer v.,	53	Chersterfield v. Janssen,	488, 487	v. Saul,	467
Anderson, Rudstone v.,	186	Christie v. Secretan,	53	Goodtitle v. Edmonds,	457
Annaudale v. Harris,	185	Claggett, Baring v.,	23	v. Otway,	217, 226
Anonymons (3 Atk. 644),	8	Cole, Portage v.,	362	v. Pegden,	488
(3 Salk. 586),	372	Compton, Right, Lessee of		Lessee of Fowler v.,	51
Ansel, Mercet v.,	472	Compton v.,	457	Welford,	51
Appleton v. Binks,	253	Conolly, The Countess of Buck-		Goodson, Leery v.,	274
Bird v.,	53	inghamshire v.,	191	Gray v. Mathias,	368
Argent v. Durrant,	206	Conolly v. Lord Howe,	191	Graydon, Chauncey v. (3 Atk.	
Aspinall, Rushton v.,	198, 486	Cooke v. Jones,	410	621),	487
Atkins, Story v.,	248	Coope and others v. Eyre (1 H.		Greenwood, Fotheringham v.,	184
Atkinson v. Hutchinson,	488, 485	Bl. 48),	66	Green, The Earl of Suffolk v.,	409
Attorney General v. Bailey,	483	Cornelius, Hughes v.,	53	Gregory v. Modesworth,	348
v. Hird,	16	Cotton, King v.,	164	Griffith, Roe v.,	217
Bagnall v. Knight,	16	Cox v. Wirral,	16, 18	Groenvelt v. Burrell (1 Ld.	15
Bagshaw v. Spencer,	214	Craddock, Lake v.,	301	Guntton and others, Skinner v.	
Bailey, The Attorney-General		Crashaw, Smith v.,	16	(1 Saund. 228, 230),	
v.,	483	Crickett v. Dolby,	324		
Baillie, Sheppard v.,	350	Cubitt, Brady v.,	224	Gwynn, Jones v. 12, 14, 15, 16, 17, 22	
Baker, Bent v.,	474	Darling, Farmer v. (4 Burr.	324	Glib. Rep. R. B. 185),	13, 14, 17
Ball v. Dunsterville,	96	1972),	12, 13, 19, 21	Halsey, Upwell v.,	484
Ballythorpe v. Turner,	314	Davy, Newdigate v.,	272	Hambling v. Lister,	224
Bamfield v. Popham,	185, 314	Dawes, Hoare and others v.		Hancock, Galton v.,	364
Barbot, Tilbury v.,	485	(Doug. 371),	66	Hankey, Powell v.,	423
Baring v. Claggett,	53	Death & Pollard, Mead v.,	372	Harben, Edwards v.,	233, 341
v. The Royal Exchange		Denham v. Stephenson,	94, 96	Hardcastle, Sparrow v.,	214, 215, 217
Assurance Company,	53	Deun, Lessee of Geering v.		Harwood v. Oglander,	217
Barrett and others, Johnson v.,	269, 260	Shenton,	264, 483	Harris, Annaudale v.,	185
Barzillai v. Lewis,	262, 338	Moore v. Mellor,	487	Harrison v. Jackson,	350
Baskerville, Sumfeld v.,	485	Derby (Earl of), Witham v. (1		Harrison & Co., The King v.,	351
Beachcroft v. Beachcroft,	485	Wils. 56),	488	Harwood v. Goodright,	321
Beaucleuk v. Dormer,	481, 483, 485	De Souza v. Ewer,	53	Hawes v. Hawes,	391
Bell, Pollard v.,	53	Diddlesford, Quennel v.,	94	Heaseman, Moore v.,	487
Price v.,	422	Dodd, Hine v. (3 Atk. 376),	136	Heath v. Perry,	323
Bennett, Thomas v.,	481, 483, 485	v. Kyffin,	205	Helstrom v. Rhodes,	58
Bensley, Bigge v.,	474	Doe, Lessee of Child v. Wright,	487	Henderson, Lothian v.,	58
Bent v. Baker,	53	Hitchings v. Lewis (1		Henriques v. The Dutch East-	
Bernardi v. Motteux,	53	Burr. 617),	419	India Company,	351, 354
Berry & Goodman's Case,	269, 260	Doe v. Pott (Doug. 732),	218, 219	Hertford (Lord & Lady), Lord	
Best and others, Regina v. (1		v. Richards,	457	Brooke v.,	248
Salk. 174, 2 Ld. Raym. 1167; 3	12, 16	v. Routledge,	324	Hewson, Mitchinson v. (7 T. R.	
Ld. Raym. 87),	474	Dolby, Crickett v.,	53	365),	500
Bevis, Whitchurch v.,	481, 483, 485	Donaldson v. Thompson,	274	Hill v. Spencer,	363
Bigge v. Bensley,	66	Dormer, Beaucleuk v.,	481, 483, 485	Hine v. Dodd (3 Atk. 376),	135
Biggs v. Lawrence,	253	Douglas, Israel v.,	274	Hird, The Attorney-General v.,	488
Binks, Appleton v.,	151	Dove, Bridgeman v.,	264	Hoare and others v. Dawes	
Birch, Sherrett v.,	58	Drew, Walter v.,	160	(Doug. 371),	66
Bird v. Appleton,	50	Drinkwater, Smyth v.,	360	Robert v. Abbott,	301
Birt and others v. Kershaw,	126	Dunsterville, Ball v.,	208	Holford, Cave v. (3 Vesey, jun.	
Blne v. Marshall,	53	Durrant, Argent v.,	208	694),	217
Bolton v. Gladstone,	262	Dutch East-India Company,	351, 354	Holliday, Frogmorton v.,	457
Boone v. Eyre,	70	Henriques v.,	351, 354	Hone v. Medcraft,	226
Bourdieu, Nutt v.,	53	Duchess of Chandos, Brydges	217, 223	Hooper, Lindon v.,	275
Boville, Calvert v.,	164	v. (3 Ves. jun. 480),	217, 223	Nichols v.,	483, 484
Oddy v.,	17	East-India Company, Hotham		Hotham v. The East-India	
Bowes, Strathmore v.,	264, 324	v.,	251	Company,	251
Box v. Taylor,	191	Edmonds, Goodtitle v.,	487	Howard, M'Lellan v. (4 T. R. 194),	97
Bradley, Porter v.,	324	Edwards v. Carter and others,	350	Howe (Lord), Conolly v.,	191
Brady v. Cubitt,	191	Floyer v.,	39, 490	Huband, Pollen v.,	117, 126
Brayfield, Wilkinson v.,	236	v. Harben,	333, 341	Hudson, Saunderson v.,	350
Woodhouse v.,	236	Jenkins v. (5 T. R. 97),	97	Hughes, Cornelius v.,	53
Bridgeman v. Dove,	252, 338	The Countess of War-		Morgan v.,	13, 19
wick v.,	250	Elkin, Pinbury v.,	483, 485, 490	Rann,	494
Briscoe v. King,	250	England, Quantock v.,	265, 256	v. Sayre,	483, 485
Bristow v. Wright,	343	Evelyn v. Templar (3 Bro. Ch.		Hunt v. Matthews,	164
Brooke (Lord) v. Lord & Lady	95	Cas. 148),	365	v. Puchmore,	99
Hertford,	369	Ewer, De Souza v.,	253	Hutchinson, Atkinson v.,	483, 485
Brookman, Read v.,	264, 265	Eyre, Boon v.,	363	Hyde v. Parratt,	494
Brown v. Carter (3 Ves. jun. 370),	191	Coope and others v.		Israel v. Douglas,	274
v. Chapman,	264, 265	(1 H. Bl. 48),	66	Jackson, Harrison v.,	350
Pells v.,	217, 223, 224	Farmer v. Darling (4 Burr.		Janssen, Chesterfield v.,	436, 437
Brydges v. The Duchess of		1972),	12, 13, 19, 21	Jeffery, Roe v.,	264, 265
Chandos (3 Ves. jun. 430),		Feltham v. Tyrell,	273	Jenkins v. Edwards (5 T. R. 97),	97
		Fenner v. Mears,	275	Jenks's Case,	93
Buckinghamshire (The Coun-		Fisher v. Ogle,	53	Johnson v. Barrett and others,	369
tyess of), Conolly v.,	191	Floyer v. Edwards,	39, 486	Palmer v.,	488
Bulkeley, Stafford v.,	483	Forrester, Goodright v.,	204	Saloucci v.,	53
Buller, Mashiter v.,	60	Forse & Hembling's Case,		Johnstone v. Sutton (1 T. R.	
Burrell, Groenvelt v. (1 Ld.	15	Forth v. Chapman,	483, 484	344),	13, 19, 20
Raym. 353),	224	v. Stanton,	484	Jolland v. Stainbridge,	135
Burtenshaw v. Gilbert,	53	Fotheringham v. Greenwood,	151	Jones, Campbell v.,	251
Calvert v. Boville,	540	Fowler v. Fowler,	422	Cooke v.,	410
Cameron v. Reynolds,	457	Kelly v.,	488	Jones v. Gwynn (10 Mod. 214,	
Campfield v. Gilbert,	351	Fraunces's Case,	214	Glib. Rep. K. B. 185),	13, 14, 17
Campbell v. Jones,	135	Freeman, Parsons v.,	217	Jones, Roe, on dem. of Perry	
Carlton, Lowther v. (3 Atk. 243),	360	Frogmorton v. Holliday,	457	v. Roe,	203
Carter, Brown v. (5 Ves. jun.	360	Galton v. Hancock,	364	Joseph v. Lord Mohun,	54
870),	483, 484	Garraels v. Kingston,	485	Juxton, Cecil v.,	422
and others, Edwards v.,	217	Gaunt, Target v.,	485	Kelly v. Fowler,	483, 484
Cave v. Holford (3 Ves. jun. 694),	422	Geyer v. Agular,	224	Kelly v. Powlet,	236
Cecil v. Juxon,	217	Gilbert, Burtenshaw v.,	457	Kennon, Taylor v.,	274
Champion v. Wenham (Amb.	245),	Campfield v.,	274, 276	Kenny, Longchamp v.,	274, 276
		Gladstone, Bolton v.,		Kershaw, Birt and others v.,	50

Killow v. Rowden,	63	Parsons v. Freeman,	214	Smith v. Crashaw,	14
Kinderslee v. Chase,	58	Perry v. Nevil,	151	Smyth v. Drinkwater,	14
King, Briscoe v.,	352,	Peacock v. Monk,	428	Sparrow v. Hardcastle,	214, 215, 217
v. Cotton,	164	Pegden, Goodtitle v.,	483	Spencer, Bagshaw v.,	214
The King v. Harrison & Co.,	58	Pella v. Brown,	264,	Hill v.,	214
Kingston, Garrels v.,	58	Pillans & Rose v. Van Mierop	322	Spiera v. Parker,	159
Kinnersly & Moore, Rex v. (1	12, 16	& Hopkins (3 Burr. 1671),	417	Spillet, Loyd v.,	217
Str. 198),	16	Pinbury v. Elkin,	483, 485,	Spraggs, Rex v. (3 Burr. 990),	14, 15
Knight, Bagnall v.,	12, 16	Pleydell v. Pleydell,	483,	Stafford v. Bulkeley,	483
Knox v. Symmonds (1 Ves.	8	Pointer, Rayner v.,	483,	Stainbridge, Jolland v.,	15
Jun. 370),	206	Pollard v. Bell,	96	Stanton, Forth v.,	15
Kymn, Dodd v.,	99	Pollen v. Huband,	117, 125	Stapilton v. Stapilton (1 Atk. 5),	364
Lacon, Sutton v.,	391	Popham, Bamfield v.,	185, 214	Stephenson, Denham v.,	24, 25
Lake v. Craddock,	60	Pordage v. Cole,	262	Stirling v. Lidyard,	24
Lawrence, Biggs v.,	274	Porter v. Bradley,	264, 265	Story v. Atkins,	16
Leery v. Goodson,	484,	v. Tournay,	236	Strathmore, Bowes v.,	16
Lessingham, Sheppard v.,	484,	Pott, Doe v. (Doug. 722),	218, 219	Stratton v. Rastall,	27
Lewis, Barzilal v.,	488	Poulterers' Case,	16	Strothoff, Glover v.,	27
Doe, Lessee of Hitch-	488	Powell v. Hankey,	16	Style, Slanning v.,	236
ings v. (1 Burr. 617),	422	Powlett, Kelly v.,	236	Subley v. Mott (1 Wils. 210),	15, 19
Lewis, Ridout v.,	228	Preston v. Tubbin (1 Vern.	236	Sumeld v. Baskerville,	232, 238
Lidyard, Stirling v.,	275	396),	135	Suffolk (Earl of) v. Green,	49
Lindon v. Hooper,	224	Price v. Bell,	58	Sutton, Abel v.,	24
Lister, Hambling v.,	497	Puchmore, Hunt v.,	99	Johnstone v. (1 T. R.	12, 13, 39
Marriott v.,	252),	Quantock v. England,	255, 256	544),	16
Lockyer v. Olney (1 T. R.	67, 68, 69	Queen v. The Mayor of Thet-	13	Sutton v. Lacon,	13
252),	274, 275	ford (6 Mod. 25),	13	Symmonds, Knox v. (1 Ves.	1
Longchamp v. Kenny,	217	Quennel v. Diddlesford,	494	Jun. 370),	1
Lord Lincoln's Case,	513	Rann v. Hughes,	494	Symonds v. Parmenter & Bar-	54
Lothian v. Henderson,	193	Rastall, Stratton v.,	378	row,	54
Lowfield v. Bancroft,	185	Rayley, Robinson v. (1 Burr. 331),	99	Target v. Guant,	483, 484, 485
Lowther v. Carlton (2 Atk.	242),	Read v. Brookman,	96	Tate v. Willings,	485, 487, 488
242),	217	Rebow v. Palmer,	96	Taylor, Box v.,	17
Loyd v. Spillet,	375	Regina v. Beat and others (1	95	v. Kennon,	274
Lyde v. Lyde,	484	Salk. 174; 3 Ld. Raym. 1167;	95	Templar, Evelyn v. (3 Bro. Ch.	35
M'Ferlan, Moses v.,	373, 374,	3 Ld. Raym. 37),	13, 16	Cas. 148),	35
M'Lellan v. Howard (4 T. R.	97	Rex v. Kinnersley & Moore	12, 16	Thetford (Mayor of), The	13
194),	497	(1 Str. 193),	12, 16	Queen v. (6 Mod. 25),	13
Marriott v. Lister,	363	v. Rispal,	19	Thomas v. Bennett,	2
Marsh (ex parte) (1 Atk. 159),	125	v. Spraggs (3 Burr.	19	Thompson, Donaldson v.,	3
Marshall, Blue v.,	69	993),	16, 19	Tilbury v. Barbut,	483
Mashiter v. Buller,	363	Reynolds, Cameron v.,	540	Tissen v. Tissen,	24
Mathias, Gray v.,	166	Rhodes, Helstrom v.,	53	Tournay, Porter v.,	28
Matthew Manning's Case,	13	Rhodes's Case,	51	Townsend v. Wyndham,	12
Matthews, Hunt v.,	323	Rich v. Parker,	58	Tracy and others, Muriell v. (6	15, 17
Warren v. (6 Mod. 73),	53	Richards, Doe v.,	58	Mod. 169),	15, 17
May v. Wood (3 Bro. Ch. Cas.	474),	Ridout v. Lewis,	487	Trott v. Vernon,	48
474),	275	Right, Lessee of Compton v.	422	Tabbin, Preston v. (1 Vern. 280),	15
Mayne v. Walter,	275	Compton,	422	Turner, Ballythorpe v.,	36
Mead v. Death & Pollard,	226	Rispal, Rex v.,	457	v. Vaughan,	36
Mears, Fenner v.,	457	Roberts v. Saville and others	457	Tyrer, Onions v.,	21
Medcraft, Hone v.,	472	(Carth. 416; 1 Ld. Raym. 378),	13, 15, 16, 17	Tyrril, Feltham v.,	27
Mellor, Denn, Lessee of Moor	66	Robinson v. Rayley (1 Burr.	203	Twyne's Case,	23, 29
v.,	321),	321),	203	Upwell v. Halsey,	64
Meres v. Ansel,	500	Roe v. Griffith,	203	Vallejo v. Wheeler,	7
Meymott's Case,	94	v. Jeffery,	264, 265	Van Mierop & Hopkins, Pillans	47
Mitchinson v. Hewson (7 T. R.	343	Jones v.,	203	& Rose v. (3 Burr. 1671),	47
350),	422	on dem. of Perry, v.	203	Vaughan, Turner v.,	34
Mohun (Lord), Joseph v.,	457	Jones,	203	Vernon, Trott v.,	67
Molesworth, Gregory v.,	13, 19	v. Scott & Smart,	264, 265	Wainwright v. Waterman, 150,	150
Monk, Peacock v.,	274	Routledge, Doe v.,	93	Walter v. Drew,	24
Moone v. Heaseman,	445	Rowden, Killow v.,	53	Mayne v.,	31
Morgan v. Hughes (2 T. R. 226),	53	Royal Exchange Assurance	53	Warren v. Matthews (6 Mod. 73),	13
226),	53	Company, Baring v.,	53	Warrick v. Warrick & Knive-	15
Morton's Case,	15, 19	Rudstone v. Anderson,	226	ton (3 Atk. 204),	15
Moses v. M'Ferlan,	193, 495	Rushton v. Aspinall,	193, 495	Warwick (Countess of) v. Ed-	15
Mons. Goodright v.,	15, 17	Saloucci v. Johnson,	58	wards,	15
Mott, Subley v. (1 Wils. 210),	15, 19	v. Woodmas,	58	Waterman, Wainwright v., 150,	150
Motteux, Bernardiv.,	15, 17	Saltern v. Saltern,	483	Welford, Goodtitle, Lessee of	51
Muriell v. Tracy and others	272	Saul, Goodright v.,	445	Fowler v.,	51
(6 Mod. 169),	272	Saunderson v. Hudson,	350	Wenham, Champion v. (Ambl.	245),
Nevill, Parsons v.,	369	Saville, Roberts v. (Carth. 416; 1	445	Wheeler, Vallejo v.,	7
Newdigate v. Davy,	483, 484	Ld. Raym. 378),	13, 15, 16, 17	& Vernon, Achery v.,	23
Newstead and others v. Searles	70	Sayer, Hughes v.,	483, 485	Whitchurch v. Bevis,	191
and others (1 Atk. 265),	53	Scarborough (Earl of), Wors-	135	Wilkinson, Brayfield v.,	217
Nichols v. Hooper,	67, 68, 69	ley v. (3 Atk. 392),	365	Williams v. Owens,	15
Nutt v. Bourdieu,	217	Scott & Smart, Roe v.,	264, 365	Willings, Tate v.,	436, 437, 438
Oddy v. Bouville,	54	Searles and others, Newstead	369	Wirral, Cox v.,	16, 19
Olney, Lockyer v. (1 T. R. 252),	221	and others v.,	53	Witham v. The Earl of Derby	1
252),	483	Secretan, Christie v.,	208	(1 Wils. 56),	48
Oglander, Harmood v.,	217	Selwyn v. Selwyn,	483	Wood, May v. (3 Bro. Ch. Cas.	23
474),	217	Shemeld v. Lord Orrery,	483	474),	23
Ogle, Fisher v.,	488	Shenton, Denn, Lessee of Geer-	264, 483	Woodhouse, Brayfield v.,	15
Onions v. Tyrer,	53	ing v.,	350	Woodmas, Saloucci v.,	51
Orrery (Lord), Sheffield v.,	193	Sheppard v. Baillie,	484, 485	Worsley v. The Earl of Scar-	250
Otway, Goodtitle v.,	193	v. Lessingham,	484, 485	brough (3 Atk. 392),	250
Owens, Williams v.,	850	Sherrett v. Birch,	151	Wright, Bristow v.,	67
Palmer v. Johnson,	487	Skinner v. Guntton and others	12, 14, 15, 17, 22	Doe, Lessee of Child v.	15
Rebow v.,	487	Slanning v. Style,	236	Wyvill,	42
Parker, Rich v.,	236	236	236	Wyndham, Townsend v.,	16
Parmenter & Barrow, Symonds	236	236	236	Wyvill, Wright v.,	16
v.,	236	236	236	236	16
Parratt, Hyde v.,	236	236	236	236	16

By an act of assembly (passed the 9th of January, 1811) it was enacted "that the court of appeals shall hereafter consist of five judges; any three of said judges shall constitute a court; the said court shall commence its sessions on the 1st day of March next, and its sittings shall be permanent, if the business of the court require it: provided always, that the court may, in their discretion, adjourn for short periods; but it shall be their duty to sit at least two hundred and fifty days in the year, unless they sooner despatch the business of the court."

In conformity with this law, FRANCIS T. BROOKE and JAMES PLEASANTS, jun. Esq's were elected, by joint ballot of the senate and house of delegates, judges of the court of appeals in addition to the three judges then in office; but MR. PLEASANTS having afterwards resigned his appointment, WILLIAM H. CABELL, Esq. was, on the 31st day of March, 1811, commissioned by the governor, with the advice of council, to supply the vacancy.

On Monday, the 4th of March, 1811, FRANCIS T. BROOKE, in open court, took the oaths prescribed by law, and his seat as one of the judges of the court of appeals.

On Wednesday, the 3d of April following, WILLIAM H. CABELL qualified in like manner.

On Tuesday, the 2d of April, JUDGE TUCKER resigned his office, by a letter addressed to the governor, in the following words:

Richmond, April 2, 1811.

SIR,—The period has arrived when I must either submit to an oppressive and, as I conceive, unconstitutional act of the legislature, or, by refusing to obey it, afford some pretext, at least, for a charge of neglect of my duty, as a judge of the court of appeals, or resign my seat in that court. I prefer the last.

That the act of the last session of the general assembly, respecting the court of appeals, is oppressive, certainly cannot require further demonstration, when it is shown that the duty assigned by it to the judges of that court, is not only doubled, (or nearly so,) without a recompense, but imposes upon them the painful alternative, either of abandoning their families altogether, or of removing them to Richmond, under every disadvantage of sacrificing their property and habitations elsewhere, at an under rate, and establishing themselves in Richmond, where the superior value of property, of house-rent, and of every article of life, must render such a sacrifice doubly inconvenient and oppressive. Such, at least, are the alternatives which present themselves in my own case. I could not, without a sacrifice at least equal in value to my whole property in Williamsburgh and its vicinity, establish myself and family in Richmond, nearly as comfortably as we are at present in Williamsburgh. Can such a gratuitous sacrifice be expected? Or, if further proof of the oppressive operations of that act be required, is it not amply furnished from this circumstance, that a judge, who is unwilling to make this gratuitous sacrifice of his property, must either abandon it and his family altogether, or resign his office? An office which he accepted under no such condition, nor any other, but that of good behaviour! A condition which evinced the intention of the founders of our constitution to be, that the legislative, executive, and judiciary departments of the government should not only be forever separate and distinct, but independent of each other; so far, at least, as to prevent

either of the three, or any two of them, from crushing or annihilating the constitutional independence of the other.

On a subject of such importance I beg leave to avail myself of the language of the court of appeals, in a remonstrance to the general assembly, on a similar occasion, in which "they did not hesitate to decide, and in that decision to declare, that the constitution and the act of 1787, for establishing district courts, were in opposition, and could not exist together; and that the former must control the latter;" which may be found on the records of that court of the 12th of May, 1788.

"In forming their judgments," they observe, "they had recourse to that article in the declaration of rights, that no free government, or the blessing of liberty, can be preserved to any people, but, among other things, by frequent recurrence to fundamental principles; an article worthy to be written in letters of gold. The propriety and necessity of the independence of the judges is evident in reason and the nature of their office: since they are to decide between government and the people, as well as between contending citizens; and, if they be dependent on either, corrupt influence may be apprehended, sacrificing the innocent to popular prejudice, and subjecting the poor to oppression and persecution by the rich. And this applies more forcibly to exclude a dependence on the legislature, a branch of whom, in cases of impeachment, is itself a party. This principle supposed, the court are led to consider whether the people have secured or departed from it in the constitution or form of government. In that solemn act, they discover the people distributing the governmental powers into three great branches, legislative, executive, and judiciary: in order to preserve the equipoise which they judged necessary to secure their liberty; declaring that these powers be kept separate and distinct from each other, and that no person shall exercise an office in more than one of them. The independence of the two former could not be admitted; because in them a long continuance in office might be dangerous to liberty; and, therefore, they provided for a change by frequent elections, at stated periods; but in the last, from the influence of the principle before observed upon, they declared that the judges should hold their offices during good behaviour. Their independence would have been rendered complete by fixing the quantum of the salaries, which perhaps would have been done if the duties of their office had been at that time ascertained. But, although it was not then done, yet, in respect to this, the constitution gives a principle not to be departed from; declaring that the salaries shall be adequate and fixed; leaving it to the legislature to judge what would be adequate, when they should appoint the duties. And, when they had done so, they exercised their whole power over the subject, and the salary was thenceforth to be considered as fixed, while the duty should continue the same. And, when public utility should require an increase or diminution of duty, there should be an analogous alteration of salary, with this restriction, however, that such regulation should not blend the duties of the judges of the general court, court of chancery, and court of admiralty, which the constitution seems to require to be exercised by distinct persons; and the legislature appear to have so considered it, in the arrangement of these courts."

"But the act (of 1787, for establishing district courts) now under consideration, presenting a system which assigns to the judges of the chancery and admiralty, jurisdiction in common law cases, which may so far be considered as a new office, the labour of which would greatly exceed that of the former, without a correspondent reward, and to the judges of the general court duties which, though not changed as to their subjects, are yet more than doubled, without any increase of salary, appeared so evident an attack upon the independency of the judges, that they found it inconsistent with a conscientious discharge of their duties to pass it over. For vain would be the precautions of the founders of our government to secure liberty, if the legislature, though restrained from changing the tenure of judicial offices, are at liberty to compel a resignation, by reducing salaries to a copper, or by making it a part of the official duty to become hewers of wood and drawers of water."

The applicability of these remarks to an act increasing the heavy and already enormous duty of one hundred and twenty-six days' attendance in a court of the last resort, overwhelmed with complicated and perplexing business, to two hundred and fifty days in the year, without the consent of those who are thus required to perform it, and without any compensation for the double duty thus imposed upon them, is too striking to require a comment. And were the same venerable characters, who then composed the supreme court of this commonwealth, still in existence, and holding the same offices, I doubt not that they would on this, as on that occasion, have declared, "that they ought not to do any thing officially in execution of an act which appeared to be contrary to the spirit of the constitution."

These, sir, are not the only reasons which have operated with me on the present occasion. For three and twenty years that I have had the honour of serving my country in the office of a judge, either of the general court, or the court of appeals, I have felt an honest pride in the fidelity with which I have endeavoured to discharge my duty, according to the best of my skill and judgment. A generous legislature interposed its shield to repel the shafts of villany, malignity, and slander, which were, on a former occasion, aimed at my character.

My gratitude for that noble act of justice towards me, would be commensurate with my life should it be prolonged even to centuries. I will not contrast with such exalted feelings those which the conduct of the committee of the house of delegates, who were appointed to inquire into the causes of delay in the court of appeals, at the last session of the general assembly, was calculated to excite. If, instead of oblique censure, conveyed in hypothetical presumptions, the committee had proceeded to a full and candid investigation of facts, they would probably have furnished me with another occasion for the expression of similar sentiments, or, if in their zeal for discovering what number of causes had been decided by the court, upon argument, the committee had turned to the reports of Mr. Washington and Mr. Call, they might have discovered that those gentlemen have reported only four hundred and thirty-one causes decided in a period of thirteen years, when the venerable JUDGE PENDLETON presided, and was assisted by four other judges, making an average of thirty-three causes in a year, which is but one more than half the number which they report to have been decided last year. Or had any member of the committee ever attended the court, or been conversant with the nature of the business therein, his attention would probably have been

directed to other causes of delay than the casual, and, possibly, unavoidable absence of one or more judges on the first day of a term of forty-four or fifty-five days' duration. I shall take the liberty to mention some of them:

1. Arbitrary appeals.
2. Smallness of the sum for which an appeal lies.
3. The number of courts from which appeals now lie.
4. The trivial errors for which writs of superseas may be granted.
5. Voluminous records, extending often to one hundred pages.
6. Voluminous, contradictory, and perplexing depositions and other evidence contained in those records; and the duty of deciding facts as well as law, in all but common law cases.
7. Voluminous reports of commissioners in chancery, with the exceptions and answers thereto respecting intricate, perplexed, and often unintelligible accounts and transactions.
8. The unavoidable length of the arguments of counsel arising from the preceding causes.
9. The number of counsel employed in every cause of any importance to the parties.
10. The examination of witnesses viva voce in cases of wills, mills, &c. (1)
11. The frequent abatement of suits by the death of some of the parties, and the difficulty of making new parties, and of convening them before the court.
12. The novelty and difficulty of many cases which are brought before the court for decision.
13. The time necessary for the judges, separately, to procure such voluminous records; to comprehend and decide upon the weight of conflicting evidence; and to investigate and decide the several questions of law or equity arising out of each particular case, according to uniform principles.
14. The interruption frequently given to such an examination of the cases argued in court, by petitions for allowing appeals and writs of superseas, which not only occasion such frequent interruption, but add very considerably to the labour of the judges out of court, of which no traces appear upon the records of the court.

Some of these causes, Sir, (for they did not all exist till within a few years past,) and, perhaps, some others, had contributed to swell the docket of the court of appeals, from the small number of nineteen in November term, 1787, to four hundred and twenty-two causes, in April, 1804, a period of sixteen years and a half. At the latter period I had the honour to become a member of the court. I speak with confidence when I assert that not less than nine hundred and sixty causes have been disposed of since that time. I will not be positive as to the precise number of those which have been decided upon solemn argument, in not a few instances engrossing three, four, five, and even six days each, but, according to my notes, the number exceeds those reported by Mr. Washington and Mr. Call together during a period nearly double. Exclusive of these causes, the daily multiplying petitions for appeals from decrees of the superior courts of chancery, and for writs of superseas to judgments at common law, which have been presented to the judges out of court, and rejected during the terms, the number of which cannot be ascertained, ought not to be forgotten. The number of cases on the docket the first day of last October term, amounted not quite to five hundred and twenty, making an increase of about one hundred suits within the last

(1) The law has since been altered in this respect. See sess. acts of 1810, c. 11, s. 2.

seven years, though the number of courts from which appeals may now be brought, is more than fourfold, and the cases in which the judges may be called upon to decide out of court during the term, are also very much increased in number by allowing petitions for appeals, not only from final decrees in chancery, as formerly, but, also, from interlocutory decrees, and even from the refusal of a judge of either of the courts of chancery to grant a bill of injunction, and from an order of dissolution. The interruption which these last causes occasion to the judges in term time is almost incalculable, and they contribute their full proportion, not only to the labour of the judges, but to the procrastination of the decision of causes under their consideration.

I hope, Sir, I shall be pardoned for the length of these remarks; the insinuation, however indirect, that the delays in the court of appeals might possibly arise from a neglect of duty in the members of it, as it was among the last in which I could have expected to have been in any manner implicated, imperiously demanded such a refutation from one who earnestly invites, and will ever be ready to meet, the strictest inquiry.

The term (as formerly prescribed by law) having ended yesterday, and the court having thought proper, in compliance with the late act, to adjourn to this day, I am under the necessity of making my election, either to conform to the opinion of the other members of the court, or to resign my seat therein.

Whatever personal inconvenience I may be exposed to by resigning an office which I accepted under a full confidence that it would afford me an honourable and competent support for life, the conditions upon which I must henceforth hold it, should I continue to do so, are so much more grievous than any thing that I am willing to apprehend from a contrary course, that I have resolved to make the sacrifice, which a just sense of duty to my country, to my family, and to my own character, seems to

demand. I therefore beg leave to notify to you, Sir, as the first magistrate of the state, my resignation of the office of a judge of the court of appeals, and I do resign the same accordingly.

Permit me to assure you, Sir, of my sincere respect and esteem, and to subscribe myself,

Your most obed't servant,

ST. G. TUCKER.

His Excellency JAMES MONROE, Esq. Governor of the Commonwealth of Virginia.

May 11, 1811, JOHN COALTER, Esq. was commissioned by the governor, with the advice of council, to supply the vacancy occasioned by the resignation of JUDGE TUCKER, and on Saturday, June 1st, took the oaths prescribed by law, and his seat as one of the judges of the court of appeals.

On Thursday, the 13th of December, 1811, the appointments made by the executive, in the recess of the general assembly, having been confirmed, by joint ballot of the senate and house of delegates, and new commissions issued to JUDGES CABELL and COALTER, bearing date the 7th of that month, they again qualified according to law.

The judges who sat in the court of appeals, during the period in which the cases reported in this volume were decided, were, therefore,

The Hon. WILLIAM FLEMING, who sat in this court when it was first organized, on Saturday, the 20th day of June, 1790, pursuant to the act for amending the act entitled an act constituting the court of appeals.

The Hon. SPENCER ROANE, who qualified on Monday, the 18th of April, 1796.

The Hon. ST. GEORGE TUCKER, who qualified on Wednesday, 11th of April, 1804, and resigned the 2d of April, 1811.

The Hon. FRANCIS T. BROOKE, who qualified on Monday, the 4th of March, 1811.

The Hon. WILLIAM H. CABELL, who qualified on Wednesday, the 3d of April, 1811; and the Hon. JOHN COALTER, who qualified on Saturday, the 1st of June, 1811.

CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Appeals of Virginia,

AT THE TERM COMMENCING IN MARCH, 1811,

IN THE THIRTY-FIFTH YEAR OF THE COMMONWEALTH.

Kincaid v. Cuninghame.

Monday, March 4, 1811.

1. **Equitable Relief—Judgment—Error in Law.***—A court of equity will not relieve against a judgment, on the ground of error in law only: it must appear that justice requires its interposition, and that the party was prevented from obtaining it by the legal forms of pleading, or by some fraud, accident or mistake.

2. **Arbitration and Award—Award—Sufficiency.**—The circumstance, that a submission to arbitration contains a recital that one of the parties had warranted the title to a tract of land, (when, in truth, the writing signed by him had not that effect,) is not a sufficient reason to disturb the award, no fraud or undue influence appearing; and it being possible that the contract was mutually understood as a warranty, though its legal construction was otherwise.

This case was argued by Hay, for the appellant, and Nicholas, for the appellee; but so nearly resembles in principle the cases of Terrell v. Dick, (a) Turpin, Administrator of James, v. Thomas, (b) and Syme v. Montague, (c) on the extent of the jurisdiction of a court of equity; and the cases of Shermer v. Beale, (d) Pleasants, Shore & Co. v. Ross, (e) Taylor's Administrator v. Nicholson, (f) Morris, Overton and others v. Ross, (g) and Scott's Executors v. Trents, Crump & Bates, (h) on the obligatory effect of awards, that a brief sketch of its material circumstances (together with the opinions of the judges) may be sufficient.

***Equitable Relief—Judgment—Error of Law.**—To the point that courts of equity cannot correct the errors of courts of law, the principal case is cited in *Bierne v. Mann*, 5 Leigh. 367 it being said that *Kincaid v. Cuninghame* overruled *Bullock v. Goodall*, 3 Call 44. See the principal case cited in *West v. Logwood*, 6 Munf. 499; *Tomkies v. Downman*, 6 Munf. 509.

See further, monographic note on "Judgments" appended to *Smith v. Carlton*, 7 Gratt. 425; monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518; monographic note on "Jurisdiction" appended to *Philpen v. Durham*, 8 Gratt. 457.

Arbitration and Award.—See generally, monographic note on "Arbitration and Award" appended to *Bassett v. Cuninghame*, 9 Gratt. 684.

Same. Award—Fraud—Equitable Relief.—It is well settled that courts of equity will, in proper cases, look into and examine the proceedings of arbitrators to a certain extent, and, if it be found, in conformity with the established rules that, in any given case, the arbitrators have been guilty of corruption or fraud, partiality, misconduct, or gross or palpable mistake, or excess of power, in making their awards, the court will set it aside, and declare it null and void. *Dickinson v. Railroad Co.*, 7 W. Va. 429, 430, citing, among others, the principal case.

- (a) 1 Call, 548.
- (b) 2 H. & M. 139.
- (c) 4 H. & M. 180.
- (d) 1 Wash. 14.
- (e) *Ibid.* 158.
- (f) 1 H. & M. 67.
- (g) 2 H. & M. 408.
- (h) 4 H. & M. 356.

2 *A judgment at law was obtained by Andrew Donnally, (who sued for the benefit of Walter Cuninghame,) against Thomas Kincaid, in the county court of Augusta, for four hundred pounds damages, and costs, in an action on the case, founded on an alleged warranty, by Kincaid, of the title of a tract of land, (called the Spring Lick,) which he had purchased of Jacob Persinger, who claimed it by virtue of a settlement made by a certain Christian Saunders. The title paper from Persinger to Kincaid, dated the 10th of January, 1771, contained a clause of general warranty, and was endorsed by Kincaid, "assigning his full right and title of the within to Andrew Donnally, for and in consideration of the sum of twenty-seven pounds, current money of Virginia." Andrew Donnally, the 5th of February following, "assigned his right thereof unto Walter Cuninghame." Such being the nature of the document on which the claim of the plaintiff rested, the defendant demurred to the evidence. (1) The county court overruled the demurrer, and gave judgment for the plaintiff; Kincaid appealed to the general court; but, instead of prosecuting his appeal, agreed with Cuninghame to submit the controversy to arbitration. The written instrument of submission, bearing date the 21st of August, 1787, and signed by both parties, recited that "Cuninghame was the purchaser of a tract of land in the county of Greenbrier, which was warranted by Kincaid; that the title was evicted in a court of judicature, Cuninghame being a party to the suit, and making the proper defence; that he had called upon Kincaid in the county court of Augusta for compensation, and obtained a verdict, which the latter thought excessive; and that Cuninghame, being unwilling to insist upon what might appear

3 to Kincaid unreasonable, *had submitted the matter to arbitrators to say what he should receive." Cuninghame bound himself to release so much of said judgment as the arbitrators should award; and Kincaid bound himself to pay the balance. The award was, that Kincaid should pay to Cuninghame two hundred and fifty pounds, by three instalments; (one of which was to be in certain property;) that no execution should be levied until the last payment should become due; and that Cuninghame should relinquish the residue, of his judgment.

(1) See Co. Litt. 365, a; Sugden's Law of Vendors, 313, 314; Doug. 664; Bre v. Holbech, which authorities were cited by Mr. Hay in the argument.

Being dissatisfied with this award, Kincaid refused to pay the instalments, and, on the 21st of May, 1789, (shortly after the last had become due,) obtained an injunction from the county court of Augusta to stay proceedings on the judgment, as to 132l. 10s. part thereof; alleging, in his bill, that the arbitrators had awarded the payment of 250l. upon the supposition that the said tract of land contained 400 acres; which opinion he was, at that time, unable to controvert; having no testimony, or voucher, by which the real quantity could be ascertained; but that, in fact, there were only 188 acres. In this bill of injunction, Kincaid expressly admitted that "Cunningham's title to the land, under the aforesaid bill of sale and endorsements, was, by the commissioners for settling the claims to lands on the western waters, previous to the establishing the commonwealth's land-office, determined to be a bad one, in consequence of which he lost the said land." (a)

Cunningham answered the bill, denying any knowledge or belief that the award was founded on the supposition of there being 400 acres of land in the tract; but expressing a belief that it was on the supposition that there ought to have been that quantity, and his title thereto made good; "for, if the claim in its origin had been good, the aforesaid court of commissioners would have granted him the quantity of 400 acres of land, as that was the quantity allowed by law to settlers in the western

4 *country. (b) The defendant did not remember that the complainant ever alleged any deficiency in the quantity of land, or ever attempted to prove or suggest any such matter before the said arbitrators; but that, even supposing there are only 188 acres in the survey, it includes all the good or valuable land, and that the land adjoining, to make 400 acres, is very indifferent, and could have very little weight with the arbitrators to make them increase the sum."

The affidavits of David Stephenson, Joseph Bell, and James Bratton (three of the arbitrators) were taken, from which it appeared that they were governed, principally, in their opinion of the value of the land, by the testimony of a certain Benjamin Strother. David Stephenson "could not recollect whether that witness gave evidence as well to the quantity and quality of the land, as to the real value thereof taken as a tract." Joseph Bell states, that "he thinks Strother was examined as well to the quantity in the survey made, as to what might have been made, had the claimer chose." James Bratton swears, that the award was made "on the apprehension that the tract contained 400 acres."

Benjamin Strother's affidavit (also taken in support of the bill) states, that he valued the land at 250l. "considering the survey as containing only 400 acres."

A plat and certificate of survey, filed in the cause, showed the actual quantity to be 188 acres, according to a survey made for the Greenbrier Company, in the year 1751.

The cause coming on to be heard, the court dissolved the injunction.

"The complainant thereupon showed to the court the original title bond, and contended that he had not stated his full equity, there being no warranty of the land in the assignment, as erroneously stated in the submission; and that the court ought to consider that subject, (although not stated in the bill,) or, at least, permit him to *amend it by stating that the acknowledgment of a warranty in the submission was under the pressure of a judgment for 400l., and was lopping off his most material defence before the arbitrators, without consideration, and, therefore, could not be binding. The court were of opinion that they could not consider that equity, and refused an amendment of the bill." From which decree the plaintiff prayed an appeal, which was allowed, (though objected to by the defendant, on the ground that the decree was interlocutory only,) but does not appear to have been prosecuted.

He afterwards presented a new bill to the judge of the superior court of chancery holden at Staunton, and obtained a second injunction; relying on the equity stated in the former bill, and on additional charges, that Cunningham had artfully stated in the submission to arbitration that Kincaid had warranted the title; (which was not true;) that Cunningham had been legally evicted in a court of law, and had made the proper defence; which was questionable, since he had never given the complainant notice of the claim or trial, and had neglected to have certain witnesses summoned, by whom his right might have been established. The new bill expressed a firm belief that Cunningham had been guilty of fraud and collusion in feebly defending the title; and further contended that Donnally, so far from colluding with the said Cunningham, to throw all the burden on the complainant, when he, Donnally, was equally bound himself, ought to have pursued the warrantor Persinger. The complainant also claimed certain credits for payments, but not to a large amount.

The answers of Cunningham and Donnally (both of whom were made defendants) pointedly denied all charges of fraud or collusion; and Cunningham particularly swore that no undue influence was exerted by him to induce Kincaid to agree to the submission, which was freely and voluntarily done; that the words inserted

6 *relative to the warranty, were plainly understood by the parties; "that it was considered by this defendant that the controversy was to be decided, then, in the same manner as if Persinger, the original obligor, was the party; this the defendant was further induced to do from a knowledge of Persinger's situation, who was not able (as he supposed) to make compensation;" that as to the defence of the title, the said defendant used every exertion in his power to get the land; that it was his wish to get it, and that he could then have sold it (if he had recovered it) for 400l. in property. He contended, moreover, that the circumstance that only 188 acres were surveyed in 1751, could not avail

(a) See acts of May, 1779, c. 12: Ch. Rev. p. 92, 93, 94.

(b) See acts of May, 1779, c. 12: Ch. Rev. p. 92, s. 5.

the complainant, since Persinger's obligation (which was assigned) mentioned no quantity, and since the land law authorized 400 acres for a settlement.

A number of depositions were taken on both sides, but need not here be stated, the general result being expressed in the following opinions of the judges.

The Chancellor perpetuated the injunction as to 30l. 19s. 9d. paid by the plaintiff; but dissolved it, and dismissed the bill, as to the residue of the sum in controversy; from which decree the plaintiff appealed to this court.

Thursday, March 17. The judges pronounced their opinions.

JUDGE BROOKE. This seems to be a hard, though not uncommon case. Settlement rights to lands in the western country, at the time the contract in question was made, were of little value, owing to the situation of the country, and, perhaps, also to the uncertainty whether the legislature would confirm them; especially those that interfered with the previous claim of the Greenbrier Company. On the ground of hardship alone, I see nothing

7 in the case that would authorize a court of chancery to interpose; though enough to induce that court to look with a critical eye for any other ground on which to grant relief. I have, therefore, with great attention, at least, examined the record, and feel some regret that I have not been able to discover any thing in the case to sustain any of the other objections of the counsel for the appellant. I can perceive nothing in the evidence that can authorize me to disturb the judgment of the land commissioners. The allegation that the appellee made a covinous defence before them is not, in my opinion, supported by the testimony; nor do I feel myself at liberty to revise the judgment at law upon the title bond (as it is called) in behalf of Donnelly, the assignee of the appellant, for the benefit of the appellee. I think it more than probable that the appellant intended to bind himself to Donnelly, by the assignment of that bond, to warrant the title; and though, in strictness of law, he may not have executed a proper instrument for that purpose, yet no error that might have been corrected in that court can properly be relieved against in a court of equity; especially one which consisted in conforming the judgment of the court to the intention of the parties, instead of defeating that intention by a rigid adherence to the strict rules of law. On this point I refer to the case of *Syme v. Montague*, in this court. (a)

Upon the last objection I have had less difficulty. There is no evidence that the appellee practised upon the fears of the appellant, by holding the judgment at law over him, to constrain him to enter into the submission to arbitrators; and the words in that instrument, "that Cunningham had made a proper defence before the commissioners," might have been inserted by the counsel who drew it, from excess of caution, or (what is more probable, as has been insisted on) to exclude from the arbitrators all other matter, of controversy

except the value of the land. Whether that value was ascertained *upon correct data, cannot now be questioned, unless misbehaviour in the arbitrators, or some one of them, were proved, or a palpable mistake in the amount, and not in the manner of making up the award, were shown. The case of *Taylor's Adm'r v. Nicholson*, (b) and the case of *Morris & Overton v. Ross*, (c) are authorities to that effect. The depositions of the arbitrators in the present case differ somewhat as to the ground on which the award was made; but nothing can be collected from them that will authorize either a court of law or equity to set aside the award, according to the principles established by the foregoing cases, and many others decided in this court.

I am, therefore, of opinion, that the decree dismissing the appellant's bill be affirmed.

JUDGE TUCKER. I feel every disposition (were it possible) to relieve the appellant from the effects of the original judgment against him, which is contrary to every principle of common law. But as, instead of prosecuting his appeal, he submitted his case to arbitrators, against whom no charge of partiality or misbehaviour is even surmised, and who, from length of time, appear to have, in some measure, forgotten, and certainly do not agree in their opinions as to the grounds upon which they went in making their award, I think there is not sufficient evidence of mistake (in respect to the quantity of land in the tract which they were called upon to value) to set aside their award, or to reduce the amount thereof in proportion to the supposed mistake. I am, therefore, (though very reluctantly,) of opinion, that the decree ought to be affirmed. I concur with the judge who has preceded me on the other points. This case, in principle, bears so near an analogy to that of *Scott's Ex'rs v. Trents, Crump & Bates*, (d) that I beg leave to refer to it for my reasons more fully on this subject. (e)

JUDGE ROANE. For the reasons assigned by the judges *who have gone before me, I concur in opinion that the decree be affirmed.

JUDGE FLEMING. This is, no doubt, a hard case on the part of the appellant; but it seems to have arisen, rather from his own incaution and folly, than from any misconduct or unfair dealing on the part of his opponents; and it appears, indeed, that Cunningham acted with candour and generosity, particularly before the arbitrators. The loudest clamour of the appellant against him is, that he lost the land before the court of commissioners by his own neglect, and the suggestion of a covin between him and M'Clenahan, who claimed under Fulton, who recovered it in the commissioners' court. Besides that there is no evidence of such conduct, it is expressly denied by Cunningham, in his answer; and it is not to be presumed that he would

(b) 1 H. & M. 67.

(c) 2 H. & M. 408.

(d) 4 H. & M. 356.

(e) See also, 3 Atk. 644; Amb. 245; 1 Ves. 370; 1 Wash. 14, 158.

make a feeble defence of the title, with a view of getting compensation from Kincaid, who is represented as a very poor man. As to the deficiency in the quantity of land, supposed to have been 400 acres, which occasioned the high damages assessed by the jury, it may be sufficient to observe, that though there might not be more than 188 acres actually surveyed, whoever established a settlement right was not only entitled to 400 acres for the settlement, but also to a pre-emption of 1000 acres, if there were so much unappropriated land adjoining. (a) But, however all this may be, the appellant is bound and concluded by the award of the arbitrators, judges of his own choosing, who appear to have acted with great candour and circumspection; and who, it is presumed, from some equitable circumstances that appeared in favour of the appellant, reduced the judgment at law more than one third of its amount, and made the terms of payment of the balance easy, by dividing it into three instalments, *one of which was to be paid in property, at a reasonable value.

On these grounds, I concur in opinion that the decree be affirmed.

Kirtley v. Deck and Others.*

Argued Wednesday, April 25, 1811.

Action on Case—Conspiracy—Declaration—Averments—Probable Cause.†—In the action on the case for conspiracy, as well as in the action for malicious prosecution, an averment in the declaration that the prosecution was false and malicious, is not sufficient: but it must be averred to have been without probable cause.

An action was brought in the district court of law holden at Staunton, by St. Clair Kirtley against Michael Deck, John Munger, jun. and Catharine, his wife, Martin Munger, Charles Deck and Christian Deck; the declaration charging, that they, "wickedly contriving to harass and distress the plaintiff, to tarnish his fair reputation, and to destroy his happiness, did falsely and maliciously conspire, agree, and combine together, for the purpose of preferring and supporting against him a false and malicious prosecution; that in pursuance of this unlawful purpose, the aforesaid Catharine Munger, by the advice and procurement of the other defendants, on the 6th day of November, 1799, pre-

(a) Ch. Rev. p. 92.

*For monographic note on Conspiracy, see end of case.

†Actions on the Case—Conspiracy—Declaration—Averments—Probable Cause.—The principal case—which was an action on the case for a conspiracy in preferring, etc., a malicious prosecution for a felony—held that the declaration was radically defective because it did not aver that the prosecution was without probable cause; and that it was not cured by the verdict. For this holding, the principal case is cited with approval in Spengler v. Davy, 15 Gratt. 381; Burkhardt v. Jennings, 2 W. Va. 254; Holliday v. Myers, 11 W. Va. 289; foot-note to Young v. Gregorie, 3 Call 446.

In Marshall v. Bunsac, Gilm. 9, 14, it was held on the authority of the principal case and Young v. Gregorie, 3 Call 446, that the declaration in a special action on the case for suing out a foreign attachment, must aver both malice and want of probable cause, either expressly or by equivalent words.

See further monographic note on "Malicious Prosecution" appended to Guarrant v. Tinder, Gilm. 36. The principal case is also cited in Farmers' Bank v. Clarke, 4 Leigh 609.

ferred, on oath, against the plaintiff, before Layton Yancey, a justice of the peace for the county of Rockingham, a false and malicious charge of a forcible attempt to have carnal knowledge of her body; that, in consequence of this charge, the plaintiff was bound in a recognisance to appear, and did appear, before the next court of Rockingham county, to abide their sentence; that the said court, after hearing the testimony of the defendants, or several of them, without deciding on the truth of the charge exhibited before the magistrate, bound the plaintiff in a recognisance to keep the peace for a year and a day; that, at the same court, the defendants, having not yet gratified their malice, or obtained the full object of their combination, procured an indictment to be submitted to the grand jury for the county of Rockingham, to which John Munger,

11 jun. one *of the defendants, was subscribed, as the prosecutor, and the other defendants were sworn as witnesses; which indictment contained, in substance, the same false and malicious charge exhibited before the magistrate, viz. that on the night of the 5th day of November, 1799, the plaintiff committed an assault and battery on the said Catharine Munger, and forcibly attempted to ravish, or carnally know her; and which indictment the grand jury aforesaid, on the 19th day of November, 1799, found 'not a true bill:' the plaintiff, thus falsely, maliciously and cruelly conspired against, prosecuted and acquitted, of the heinous charge, by the finding of the grand jury, said he had received damages from this unlawful conduct of the defendants, to the amount of 10,000 dollars, and therefore brought his suit."

The suit abated as to John Munger, jun. by his death. The other defendants pleaded, jointly, not guilty. At the trial, a bill of exceptions to the admission, as evidence in the cause, of a record of Rockingham county court, (containing the indictment and finding of the grand jury,) was tendered and sealed according to law.

The jury found the defendants guilty, and assessed joint damages against them, to the amount of five hundred dollars.

A motion was then made in arrest of judgment; 1st. On the ground of a supposed variance between the record and the declaration; 2d. "The declaration was substantially defective in not stating the want of probable cause"; 3d. "The jury had assessed joint, and not several damages, as, it was conceived, they ought to have done;" and, 4th. "By the plaintiff's declaration, and the record therein mentioned, it appeared that the defendants had a probable cause for commencing their prosecution." The court determined the law to be for the defendants; and "it was considered that the plaintiff take nothing by his bill, but, for his false clamour, be 12 in mercy," &c. *To this judgment the plaintiff obtained a writ of supersedeas from this court.

Wirt and Call, for the appellant.

Wickham, for the appellee.

The only point determined by the court, and that on which the argument principally turned, was, whether it was neces-

sary to aver in the declaration the want of probable cause.

The counsel for the appellant insisted, 1st. That, if it was settled in *Ellis v. Thilman*, (a) and *Young v. Gregory*, (b) that such averment is necessary in the action for malicious prosecution, the law was otherwise with respect to the writ of conspiracy, or action on the case in the nature of a writ of conspiracy. This action is founded on the act of assembly against conspirators, (c) copied from stat. 23 Edw. I, in which the words "falsely and maliciously" are used, and not the words "without probable cause." The gist of the action is the conspiracy, united with falsehood and malice. (d) The better opinion seems to be, that the writ of conspiracy, which is a formed action, requires an indictment and acquittal; but the action on the case, in the nature of the writ of conspiracy, will lie without a bill found, or preferred. (e) This distinction is admitted in 4 Burr. 1972, one of the cases on which the leading case of *Ellis v. Thilman* was decided. In 1 Saund. 228, the declaration against three persons for a conspiracy, is exactly similar to the one now in question.

On principle; the rule in the action for malicious prosecution is founded on this, that, if there be a probable cause, individuals ought not to be deterred from prosecuting. But how will this reason apply to the case at bar? that if there be a probable cause to conspire, individuals ought not to be deterred from conspiring, and 13 that falsely and maliciously! A conspiracy implies, *ex vi termini*, that the object against whom it is formed, is innocent; and when to this conspiracy, "false and malicious" are added, and a prosecution flowing from that source, every thing essential to the charge is averred.

2. Even in the action for malicious prosecution, the averment of "want of probable cause" is not necessary, *totidem verbis*. In *Young v. Gregory* (f) it is admitted that equipollent expressions are sufficient; and from 10 Mod. 214, and Gilb. Rep. K. B. 185, (same case more fully reported,) it appears that the words "falsely and maliciously" are equivalent to "without probable cause." Wherever a man prefers an indictment containing slander on the face of it, or putting the indictee to trouble and expense, this action lies; unless the indictor can justify; and this must come from his side. (g) Malice is the gist of this action. Where one sues another without probable cause, he is not subject to an action, unless malice appear, the payment of costs being sufficient punishment; but where the original suit was falsely and maliciously brought, an action for it lies. (h)

In *Ellis v. Thilman* (i) the doctrine on the subject was not fully before the court. The cases cited did not support the position that want of probable cause must be alleged in the declaration. In 6 Mod. 25, 73, it was held that, if there were a probable cause, the action would not lie. The conclusion to be drawn from 4 Burr. 1974, is only that want of such cause must appear at the trial. In 1 Term Rep. 544, the question was not presented by the case before the court; the want of probable cause being actually alleged in the declaration. 2 Term Rep. 226, was not a case of the kind at all; but turned upon the necessity of an averment that the prosecution had terminated. The decision of *Ellis v. Thilman* is, therefore, not supported by the authorities on which it rested; neither did that case resemble this.

3. Under the acts of jeofails, the 14 jury having found the "prosecution malicious, the court ought to presume that every thing necessary to justify such a verdict was proved before them.

Wickham, contra, observed, that he considered this case as settled by the two cases of *Ellis v. Thilman*, and *Young v. Gregory*. The question is not whether the verdict was according to evidence; but whether the declaration was sufficient. The distinction attempted to be drawn between conspiracy and malicious prosecution, is supported neither by reason nor authority. In point of moral turpitude and public policy, what difference can exist between a prosecution by one, or by many? As to precedents, they prove directly the contrary. The cases cited on the other side relate to the writ of conspiracy, or to indictments for conspiracy; but not to case, in the nature of a writ of conspiracy, which this action is.

The writ of conspiracy, at common law, lay only where the prosecution was for treason or felony; (k) and whether at common law, or since the statute, there could be no recovery, unless the plaintiff was acquitted by the verdict of a petit jury. (l) The declaration here would clearly, therefore, not be a good one, if this were an action of conspiracy. In 10 Mod. 219, Chief Justice Parker says, "That actions of conspiracy are the worst sort of actions in the world to be argued from, for there is more contrariety and repugnancy of opinions in them, than in any other species of actions whatever."

The argument, by analogy, from cases relative to indictments for conspiracy, will not hold; for the action is more discouraged than the indictment; because the indictment is exhibited by a high and responsible officer, and must be found a "true bill" by the grand jury, before any proceedings can be had upon it; whereas the action may be, and often is, brought for corrupt purposes; for which reason it is usual 15 to deny the plaintiff a copy of "the proceedings on which he means to bring suit. (m) It does not follow, therefore, that because the averment of want of

(a) 3 Call. 3.

(b) *Ibid.* 446.

(c) 1 Rev. Code. 80.

(d) Rastall, 121, 123, 123; Lill. Ent. 23; 8 Went. 310; 1 Vent. 304; 1 Lev. 62; Sup. to Vin. vol. 2, p. 210, 211; 1 Salk. 174; 1 Str. 193; 9 Co. 66, b.

(e) Sir Wm. Jones, 98, 94; Cro. Car. 15, pl. 6; 2 Vin. 21, pl. 16, 17.

(f) 3 Call. 452.

(g) 3 Vin. 27, pl. 3.

(h) Carth. 416, Roberts v. Saville and others.

(i) 3 Call. 3-5.

(k) Sir T. Raym. 176.

(l) 1 Saund. 280, a; 3 Bl. Comm. 127; 9 Co. 56, b; Rastall, 121, 123, 125.

(m) 3 Bl. Comm. 126; 1 Ld. Raym. 253.

probable cause is not necessary in the indictment, it may be dispensed with in the action.

The gist of the action in this case is not the conspiracy, but the damage sustained by the plaintiff in consequence of the malicious prosecution. (a) If the gist of the action were the conspiracy, judgment could not go against one only, the rest being acquitted; but the rule is well established, that this may be done. (b)

In substance, then, there is no distinction between this, and the action for a malicious prosecution; the only difference being that this is against several, and that against one only. In that action it has been settled, ever since the time of Lord Holt, that the words "without probable cause," or words equivalent, are essential. In 1 *Ld. Raym.* 375, "absque rationabili causa" were used in the declaration, and passed without objection, the point not having been made: but in *Young v. Gregory*, this court decided that "without justifiable cause" was not sufficient. The modern precedents are all drawn with the words "without probable cause." (c)

Curia adv. vult.

Wednesday, March 6th, 1811. The judges pronounced their opinions.

JUDGE TUCKER, after stating the case, (in which he mentioned the four errors assigned in arrest of judgment,) proceeded as follows:

In this court, Mr. Wickham took a fifth objection, that this action would not lie against husband and wife together; but *Fitzh. N. B.* 116, is expressly to the contrary, and the distinction there taken is, that it will not lie against husband and wife alone, because they are but one person; but against husband and wife
16 and a third *person, it well lieth.

Mr. Wirt, for the appellants, very properly contended that the first and fourth of these reasons assigned for arresting the judgment were improper, since the court below could not take notice of the matter contained in the bill of exceptions, upon which the same court had already finally decided; a bill of exceptions being in the nature of an appeal, from the judgment of the court, where the cause was tried, to a higher tribunal. In this he was certainly correct; but, as the whole record is now before this court, we are (if it be necessary) to examine these points as well as the others. As the argument, here, has turned almost altogether upon the second, the want of averment of probable cause, I shall consider that first. That these words are neither necessary in an indictment for a conspiracy, nor in the ancient action, or writ of conspiracy, appears from *Rastall's Entries*, 123—126, as to indictments, and in *F. N. B.* 114—116, as to the ancient writ of conspiracy. (d) And 1 *Strange*, 193, shows they are equally unnecessary in an information. 9 *Co.* 56, (*The Poulterers' Case*.) was an action on the case, like the present, for a combination, confederacy and agreement

between the defendants falsely and maliciously to charge the plaintiff with a robbery, and to procure him to be indicted, &c. There is no notice of this averment in that case; yet the plaintiff, upon good consideration, (as Sir Edw. Coke expresses it,) had judgment. No such averment appears either in the case of *Cox v. Wirral*, *Cro. Jac.* 193, where the declaration was held good; or of *Smith v. Crashaw* and others, 3 *Cro.* 15, (e) or *Bagnal v. Knight*, *ibid.* 553. And even in a quita action on the statute of Hen. VI. c. 10, there is no such averment. *Rast. Entries*, 126. In *Smith v. Drinkwater*, 1 *Keble*, 627, a motion was made in arrest of judgment for want of the averment of jurisdiction; but the court said that, after a verdict, they would not intend the want of jurisdiction, and the plaintiff had judgment. In 17 *Skinner v. Gunton* and others, *(21

Car. II.) 1 *Saund.* 228, (f) there is an averment, that the defendant held the plaintiff to bail, without any just cause. This is the first averment that I have found in any declaration, in this action, at all similar to the present. *Saunders* moved in arrest of judgment without noticing this averment, or the distinction, so much pressed since, between a just and a probable cause. The plaintiff had judgment. In the case of *Box v. Taylor*, (32 and 33 *Car. II.*) 2 *Showr*, 154, "the action was for a false and malicious prosecution of a suit in an inferior court; the declaration says only absque justa causa, and held naught; because it might be with a probable cause for the suit, and this action will not lie; absque aliqua causa will do; or, sine causa justa, vel probabili; but absque justa causa is not good, for the reason aforesaid, and judgment for defendant." In *Saville v. Roberts*, (10 *Wm. III.*) 1 *Ld. Raym.* 374, (g) the prosecution was alleged to be nequiter et malitiose, and sine causa rationabili, and judgment for the plaintiff. In *Muriell v. Tracy*, at nisi prius, (3 *Ann.*) 6 *Mod.* 169, an exception was taken, at the trial, to the declaration, because it was not laid that the warrant, upon which the plaintiff was arrested, was taken out without probable cause. *Holt*, Ch. J., upon this exception, recommended to the parties to withdraw a juror; for he held the declaration ill, for not alleging it to have been without probable cause. In the case of *Jones v. Gwynn*, which occurred about nine years afterwards, (12 *Ann.*) 10 *Mod.* 214, more satisfactorily reported by *Ld. Ch. Baron Gilbert*, in his *Reports*, 185, the question, as to the necessity of such an averment, came on upon a demurrer to the declaration; in which one of the reasons for the demurrer is, that it is not alleged that the indictment was procured by the defendant to be exhibited sine aliqua rationabili causa. *Ld. Ch. J. Parker*, (afterwards *Earl of Macclesfield* and *Lord Chancellor*.) in delivering the opinion of the court of K. B. is re-
18 ported to have expressed *himself as

(a) 1 *Ld. Raym.* 378.

(b) 3 *Bl. Comm.* 126; 1 *Wills.* 210; 1 *Saund.* 230; 2 *Show* 50; 6 *Mod.* 169; 1 *Bac. Abr.* (Gwill. edit.) 94.

(c) 2 *Chitty*, 248, 249.

(d) See also *Salk.* 174; 2 *Ld. Raym.* 1107; 8 *Ld. Raym.* 53; 2 *Burr.* 998; 1 *Bl. Rep.* 209.

(e) *Sir Wm. Jones's Rep.* 98, S. C. And although a motion was made in arrest of judgment, yet no notice was taken of the omission of such an averment.

(f) *Sir T. Raym.* 176, S. C.

(g) 1 *Salk.* 13, and *Carth.* 416, S. C.

follows: "As to the declaration, ad primam, I do agree, it is a circumstance necessary to maintaining of this action, that the indictment was preferred without cause." "For, if there were what is usually called a probable cause; nay, if there be a fair and reasonable account given, how a complaint came to be made before a magistrate which produced an indictment, though it fell short of probability of guilt in the party accused, this action will not lie. *M. 5 Jac. B. R. Cox v. Wirral, Cro. Jac. 193, pl. 19; Yelv. 105; Roll. Abr. 113, (Q) pl. 2.* "Action for maliciously preferring against the plaintiff an indictment for the rape of one A. an infant, whereupon he was arraigned and acquitted: the defendant pleads that A. was his daughter, of the age of eight years, and came to him with tears, and complained that the plaintiff had ravished her; that, thereupon, he immediately complained to a justice of the peace, and carried her with him; that the justice sent for the plaintiff, and, upon examination of the cause, bound the plaintiff to appear at the next assises, and the defendant to prosecute him; whereupon the defendant went to the assises, and, to save his recognisance, preferred an indictment of rape against the plaintiff, which was found, and that he carried his daughter to the assises, prout ei bene licuit."

"In this case, though there was no averment that any rape was committed, it must be understood, as Rolle, in express terms, puts it, that none was committed.

"Though it would not be a just cause to arrest a man for felony, without averment that a felony was committed; though, as Mr. Justice Croke's opinion was, the father seemed too credulous to cause a bill of indictment to be preferred upon the complaint of so small a girl; yet the justification was held good. For the defendant shows, how, by degrees, lawful and justifiable he came to exhibit the indictment. 1st. There was the complaint of his daughter, whom nature forces him to pity, and 19 tenderness *of age frees from suspicion of malice; 2d. He hereupon bruits it not abroad, but applies in a course of justice; and a father could do no less; 3d. He then prefers an indictment for safety of his recognisance; 4th. The crime complained of is what is usually committed in secret; and, on complaint of his daughter, though it be but conjecture, he might well exhibit a complaint to a justice; so that I hold this action is not maintainable, but where there is no probability of guilt, or reasonable cause, nor honest occasion for complaint; but, yet, though this must be the case to maintain the action, it is not necessary to be expressly alleged in the declaration, nor need the plaintiff use the words *sine probabili causa, or sine rationabili causa.*" *Gilb. Cas. 186-188.*

After such an express decision upon the point by the court of K. B., delivered by a judge of Lord Macclesfield's high standing and reputation, as the opinion of that court, and upon a special demurrer, it seems rather extraordinary that the point should have been stirred again; nor, in fact, have I found any subsequent case in England,

in which it has been drawn in question, either by a demurrer, or by a motion in arrest of judgment, except the case of *Morgan v. Hughes, 2 T. R. 225.* Nothing that is said in either of the cases of *Rex v. Spraggs, 2 Burr. 993, (1 Bl. Rep. 209, S. C.)* nor in *Rex v. Rispal, 3 Burr. 1320,* nor in *Brown v. Chapman, ibid. 1418, (1 Bl. Rep. 427, S. C.)* nor in *Farmer v. Darling, 4 Burr. 1971,* nor in *Ludley v. Mott, 1 Wils. 210,* nor in *Sutton v. Johnstone, 1 T. R. 493,* has any relation to the necessity of such an averment in the declaration; but they all show that the plaintiff must prove the want of probable cause upon the trial. But the mere rejection of the bill of indictment by the grand jury to whom it was preferred, has been held to amount to such proof. In the case of *Morgan v. Hughes, 2 T. R. 225, Buller, J.,* alone spoke to this point. His words are, "The grounds of a malicious prosecution are, 1st. That it was done maliciously *and, 2d. Without probable cause. The want of probable cause is the gist of the action; but that is not stated here; for it should have been shown upon the record that the prosecution is at an end." It would seem, then, as if his opinion were that if it had appeared upon the record that the prosecution was at an end, that circumstance might have supplied the want of a positive averment that the prosecution was without probable cause. If this be in reality his meaning his opinion may be well reconciled to that of Lord Macclesfield, where he says, "I do agree it is a circumstance necessary to maintaining of this action, that the indictment was preferred without cause." But what he (Lord Macclesfield) says afterwards clearly shows, he did not mean to say it was necessary to be expressly alleged in the declaration, but the direct contrary. However, from the whole current of the later authorities in England, as also from the several books of precedents, it seems to be now fully agreed and understood there, that the want of probable cause is the gist of the action. Lord Mansfield and Lord Loughborough, in the celebrated case of *Johnstone and Sutton, say, "that the essential ground of an action for a malicious prosecution is, that a legal prosecution has been carried on without any probable cause. We say this is emphatically the essential ground; because every other allegation may be implied but this; but this must be substantially and expressly proved, and cannot be implied." They proceed to say, "From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied. From the most express malice, the want of probable cause cannot be implied." 1 T. R. 544, 545. In the case of *Ellis v. Thilman, 3 Call, 3, Judge Lyons delivered the resolution of the court, that the plaintiff ought to have alleged the want of probable cause; and that the omission was not cured by the verdict. In that of *Young v. Gregory, (ibid. 446,) an averment 21 that the prosecution (which was *an attachment in a foreign country) was instituted without any legal or justifiable cause, was held not to amount to an***

avermment of the want of probable cause. Judge Lyons, in that case, said, that he did not think it indispensably necessary that those very words, and none other, should be used; for any which are tantamount, and calculated to bring the probable cause fairly into issue, would be sufficient. And he rather inclined to think the words justifiable cause are of that kind. But he thought the declaration defective on another ground, and pressed the point no further. These decisions have gone abroad among the gentlemen of the profession, and they will be now better advised as to the necessity of this averment, than they could have been from the mass of conflicting opinions upon the subject, which occur in the English books. I think a uniform practice, and a uniform course of decisions upon practical points, of too much importance not to subscribe cheerfully to the former decisions of this court; and am, therefore, of opinion, that the judgment be affirmed. I therefore consider it unnecessary to notice the other points in the case, as this alone must decide it.

JUDGE ROANE. In the cases of *Ellis v. Thilman*, and *Young v. Gregory*, this court decided that, in an action on the case for a malicious prosecution, the want of probable cause is of the very gist of the action; that its non-existence must be averred in the declaration; and that the want of this averment is not cured by a verdict. The most that was admitted by any of the judges in those cases was, that similar or equipollent expressions might be sufficient. Nothing to impugn this principle is to be found in any modern case that I have seen. The case of *Farmer v. Darling*(a) was relied on, in the argument, for that purpose; to show that it was necessary to prove the want of such cause on the trial; whence it seems to be inferred that it was not necessary to aver

22 *it in the declaration: but that case falls far short of that purpose. It came up on a motion for a new trial, and the sufficiency of the evidence to support the action was particularly discussed by the court; but nothing was said by the court respecting the declaration, unless, indeed, that the contrary of what is contended for by the appellant's counsel is to be inferred from Lord Mansfield's introduction to the case, which runs in this manner: "This action is for a malicious prosecution without a probable cause." If, therefore, I were to infer any thing from that case, as relative to the declaration, it would rather be to conclude (for the declaration is not reported) that it expressly averred the want of probable cause. This idea is again corroborated by its being agreed by the whole court in that case, "that malice and the want of probable cause must both concur as the grounds of this sort of action." Both these grounds being necessary to entitle a plaintiff to recover, I should, upon the general principle, (and independently of any authorities whatsoever,) infer that they must both be stated, as well as proved, to entitle the plaintiff to a judgment.

An attempt is made, however, to withdraw the present declaration from the effect of these decisions, by placing the action upon the ground of the writ of conspiracy at the common law, and by contending that the conspiracy in this case, and not the bringing of the action, is the essential part of the plaintiff's complaint. The case of *Skinner v. Gunton*(b) is directly in the teeth of this position. It was there held, in an action against three, which is pretty similar to the one before us, that the action was "an action on the case," and that, therefore, (aliter in a writ of conspiracy,) judgment would lie against one defendant, though the other was acquitted; and that the "substance of the action was the undue arresting of the plaintiff, and not the conspiracy." This idea of the court is entirely supported by a note of the learned editor of the late edition of *Saunders's Reports*; by *Buller's N. 23 P. *p. 14*; by *1 Bac. 94*, and other authorities; which also lay it down, that it is the damage sustained by the plaintiff by the bringing of the action, and not the conspiracy, which is the ground of the action; and that the insertion of the words "per conspirationem inter eos habitam" does not convert the action into a formal action of conspiracy, but it nevertheless remains an action on the case; that those words are mere surplusage, intended as matter of aggravation, and are, therefore, not necessary to be proved to support the action. This is further shown by its being also held, as aforesaid, that, in this action, all the other defendants may be acquitted except one, and he found guilty, notwithstanding the words "per conspirationem."

The appellant's counsel are, therefore, mistaken in their aforesaid idea relative to the character of this action: it is substantially the same, as to the point in question, with the common action for a malicious prosecution, and stands on a common foundation with it, in respect of the necessity of the averment now in question. I do not deny but that there may have been considerable contrariety and diversity in the old books and entries on the subject; but I take it that this averment is, at this day, a *sine qua non* in actions for malicious prosecution, and must equally be so in the action before us.

On this ground I concur with the district court in arresting the judgment, and am of opinion that its judgment should be affirmed.

JUDGE FLEMING. The declaration in this case being insufficient to maintain the action, it seemed to me unnecessary to consider the other errors filed in arrest of judgment; especially as the whole case has been fully discussed by one of the judges who has preceded me. Besides the English authorities cited on the occasion, we have two decisions of this court in point; 24 and founded *principally on those authorities: one for a malicious prosecution in a criminal, and the other in a civil case. In the first, *Ellis v. Thilman*, the declaration stated that the defendant, "without any just cause," prosecuted the

(a) 4 Burr. 1978.

(b) 1 Saund. 230.

plaintiff on a charge of his having feloniously taken a negro, the property of the defendant. In the other case, of *Young v. Gregory*, the declaration stated that the defendant, without any legal or justifiable cause, did attach, or cause to be attached, at Dunkirk, fifty hogsheads of tobacco, or the proceeds thereof, the property of the plaintiff. And this court, in both cases, adjudged that, for want of an averment in the declaration that the prosecution was without probable cause, the action could not (as the want of probable cause is the gist of the action) be sustained. I therefore concur in the opinion, that the judgment of the district court be affirmed.

Judgment unanimously affirmed.

CONSPIRACY.

- I. Definition and Nature.
- II. Indictment and Trial.
- III. Pleading.
- IV. Evidence.
 - A. Presumption of Conspiracy.
 - B. Competency of Witnesses.
 - C. Weight of Evidence.
 - D. Admissibility of Evidence.

I. DEFINITION AND NATURE.

Definition.—A combination is a conspiracy in law, whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals by unjustly subjecting them to the power of confederates and giving effect to the purposes of the latter, whether of extortion or mischief. *Crump v. Com.*, 84 Va. 935, 6 S. E. Rep. 630. See *Min. Synop. Cr. Law*, pp. 160, 171.

The unlawful act done which constitutes a conspiracy, may be some act of the confederation which it would be unlawful for them to attain, either singly, or which, if lawful singly, it would be dangerous to the public to be attained by the combination of individual means. *Crump v. Com.*, 84 Va. 927, 6 S. E. Rep. 620.

Against Whom an Action Will Lie—Husband and Wife.—An action for conspiracy will not lie against a husband and wife only, since they are but one person in law; but it will lie against them and a third person. *Kirtley v. Deck*, 3 Munf. 10, 5 Am. Dec. 445.

Nature in General—Mutual Liability—Evidence.—It is said by the court in *Danville Bank v. Waddill*, 31 Gratt. 469, quoting from an English author: "When two or more persons conspire together to commit any offence or actionable wrong, everything said, done, or written by any one of them in the execution or furtherance of their common purpose, is deemed to be so said, done or written by every one, and is a relevant fact as against each of them; but relations of measures taken in the execution or furtherance of any such common purpose are not relevant as such against any conspirators, except those who make them, or are present when they are made. Evidence of acts relevant under this article may not be given until the judge is satisfied that, apart from them, there are *prima facie* grounds for believing in the existence of the conspiracy." *Williamson v. Com.*, 4 Gratt. 547. See *Sand's Case*, 21 Gratt. 895; *Brown's Case*, 86 Va. 935, 11 S. E. Rep. 799.

Each Member the Agent of the Other—Assumption of Responsibility.—Each conspirator is the criminal

agent of every other, and when he accedes to the conspiracy he sanctions what may have been previously done or said by the others, or any of them, in furtherance of the common object. *Sands v. Com.*, 21 Gratt. 895.

Liberty of Mind and Will—Conspiracy against.—It is said in *Crump v. Com.*, 84 Va. 935, 6 S. E. Rep. 630, quoting the language of *BRAMWELL, B.*, in *Reg. v. Drutt*, 10 Cox C. C.: "The liberty of a man's mind and will, to say how he shall bestow himself and his means, his talents and his industry is as much a subject of the law's protection, as is that of his body"—and "if any set of men agree among themselves to coerce that liberty of mind and thought, by combination and restraint, they will be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they conducted themselves."

Guilty Knowledge—Necessary Element—Explanation.—The guilty knowledge of the act done by conspirators is a necessary element of their guilt, without proof of which there can be no conviction. But it is not necessary to prove that this guilty knowledge was imparted to all of them at one and the same time, and by one and the same means. It is only necessary to show that each of the conspirators had this guilty knowledge, no matter how, when or where he acquired it. *Sands v. Com.*, 31 Gratt. 871.

What Constitutes the Crime—Instructions.—At trial for criminal conspiracy an instruction is proper which charges, directly, that the defendant and others "did unlawfully and maliciously, wickedly and corruptly, knowingly and intentionally, combine, conspire and confederate together, to injure, ruin, break up and destroy, the plaintiffs in their business as printers and stationers;" and that they did this by unlawfully, knowingly, corruptly, etc., making threats to a great many persons, all of whom had been, and were at the time, regular customers and patrons of the plaintiffs; and that the defendants by their said unlawful acts, etc., did serious injury to the business of the plaintiffs. The court held that this specially and exactly charges a criminal conspiracy unprovoked, wanton, and unlawful, both as to the end aimed at and the means used to accomplish it. *Crump v. Com.*, 84 Va. 927, 6 S. E. Rep. 620.

Crime Established—Case Stated.—It was proved in *Crump v. Com.*, 84 Va. 946, 6 S. E. Rep. 630, that the conspirators who were members of a typographical union declared their set purpose and persistent effort to "crush" the plaintiffs, who were printers doing a large business in the city of Richmond, because they refused to make theirs a union office; that the minions of the boycott committee dogged the firm in all their transactions; followed their delivery wagons; secured the names of their patrons; and used every means, short of actual physical force, to compel them to cease dealing with plaintiffs—thereby causing them to lose one hundred and fifty to two hundred customers and ten thousand dollars of net profit. Here the crime of conspiracy was clearly established and the defendant properly convicted.

West Virginia Statute—Change Not Sustained—False Pretences—Case Stated.—Under § 10, ch. 185, of Acts 1882, W. Va., known as the "Red Men's Act," providing that if any person in pursuance of a combination or conspiracy shall take and carry away any property not his own, he shall be guilty of a felony, an indictment for conspiracy, and the felonious taking and carrying away personal property is not sustained by proof that the property was obtained by false pretences, with the owners' consent, and without force or

threats; the taking contemplated by statute is by physical force or against the owners' consent. *State v. Porter*, 25 W. Va. 685. In this case the facts were that parties, one of whom was the defendant, having seen a boy of eight years find two ten dollar bills on the street, conspired to take it from him by false pretences, and succeeded in getting one bill from the boy on the street; and the other, with the consent of the child's father, after he had reached home, by claiming to have lost it and supporting this claim by testimony of co-conspirators. See *State v. Bingham*, 42 W. Va. 234, 24 S. E. Rep. 888; also, *State v. Flaherty*, 42 W. Va. 240, 24 S. E. Rep. 885.

Indictable Offence.—A conspiracy, or combination to injure a person in his trade or occupation, is indictable. *Crump v. Com.*, 84 Va. 984, 6 S. E. Rep. 620.

Necessity to Establish—Joint Indictment.—When two persons are indicted jointly for a conspiracy against another the jury cannot find either party guilty of conspiracy as charged in the indictment, unless they believe from the evidence that there was an agreement of mind between the two to do and perform the matters and things as charged in the indictment. *Jones v. Com.*, 31 Gratt. 886.

Combination with Other Offences.—At common law the offences of adultery, fornication, and the like, could not be punished by our courts of law unless they were accompanied with other circumstances, which of themselves constitute a misdemeanor; such as the public commission of the act, or a conspiracy. Hence, a conspiracy to seduce and carry off a female over sixteen years of age is indictable, though the seduction and abduction be not indictable. *Anderson v. Com.*, 5 Rand. 627, 16 Am. Dec. 776.

Boycotting—Indictable.—The conspiracy to do the thing which is known by name of "boycotting," is an unlawful and indictable offence. *Crump's Case*, 84 Va. 935, 6 S. E. Rep. 620.

Same—Defined.—The essential idea of boycotting is a confederation, generally secret, of many persons, whose intent is to injure another, by preventing any and all persons from doing business with him, through fear of incurring the displeasure, persecution and vengeance of the conspirators. *Crump v. Com.*, 84 Va. 940, 6 S. E. Rep. 620.

What Constitutes a Threat.—A threat in law is a declaration of an intention or determination to injure another by the commission of some unlawful act, and an intimidation is the act of making one timid or fearful of such declaration. But the announcement of an intention by several persons to do a thing which they have the right to do, either singly or together, cannot be a threat or an intimidation. *Crump v. Com.*, 84 Va. 929, 6 S. E. Rep. 620.

II. INDICTMENT AND TRIAL.

Joint Indictment—Right of Separate Trial—Statute.—Where two persons have been indicted jointly for a misdemeanor, they cannot claim any right to be tried separately. *Com. v. Lewis*, 25 Gratt. 938. In this case it was held that the statute which, changing the common law, allowed persons in a joint indictment for felony at their election to have a joint or several trial, did not apply to misdemeanors. Va. Code 1873, p. 1247, §§ 14, 15; Va. Code 1887, § 4020. In *Curran's Case*, 7 Gratt. 619, 627, it was held that this statutory right of election in cases of felony is subject to the right of the commonwealth, to try the accused severally, notwithstanding they may elect to be tried jointly. See *Crump v. Com.*, 84 Va. 933, 6 S. E. Rep. 620.

When two persons are indicted jointly for a conspiracy to prosecute another for a larceny, neither of them is entitled to a separate trial. *Jones v. m.*, 31 Gratt. 886.

Same—New Trial Granted to One—Effect on Others—General Rule.—Two persons having been tried jointly for the crime of conspiracy and both found guilty, one of them applies for a new trial, which is overruled, and he obtains a writ of error. The other does not apply for a new trial, and there is a judgment against him. The judgment may be reversed as to the one who appeals, without reversing the judgment against the other, who did not apply for a new trial. *Jones v. Com.*, 31 Gratt. 886. It is said in this case that the general rule seems to be, that on conviction of several defendants on a joint indictment for conspiracy, the reversal of the judgment and award of a new trial as to one of the defendants must operate alike as to all. To constitute a conspiracy it must be the act of at least two persons; so that, generally, if one of them be acquitted, such acquittal takes away the foundation of the guilt of the other, who must be acquitted also. But there may be exceptions to the rule and this case seems to be such an exception. Here there was evidence sufficient to convict one of the defendants of the charge of conspiracy but the evidence was not sufficient to establish the guilt of his co-defendant, who therefore was entitled to a new trial and to have the judgment against him reversed, which fact was no ground for reversing the judgment as to the defendant who was found guilty.

III. PLEADING.

Declaration—Necessary Allegations.—In an action to recover for conspiring to maliciously prosecute the plaintiff, an averment in the declaration that the prosecution was false and malicious is not sufficient; it must be alleged that it was without probable cause. *Kirtley v. Deck*, 3 Munf. 10, 5 Am. Dec. 445. See *Ellis v. Thilman*, 3 Call 3; *Young v. Gregorie*, 3 Call 446.

Unnecessary to Allege the Means Employed.—It is not necessary that the particular means employed to carry out the conspiracy be alleged in the declaration, for the means are matters of evidence to prove the charge and not the crime itself. *Crump v. Com.*, 84 Va. 927, 6 S. E. Rep. 620.

IV. EVIDENCE.

A. PRESUMPTION OF CONSPIRACY.

Present at Commission of Offence—Aiding and Abetting.—Four parties were jointly indicted in the circuit court of Cabell county under section 10, ch. 148, Code of W. Va. 1891, called the "Red Men's Act": the indictment charging that they conspired together to inflict bodily injury on R. B. Yowell, and did, in pursuance of the conspiracy, beat, wound, and greatly injure him. The plaintiff in this case was tried separately, convicted, and sentenced to the penitentiary for three years. He brought his case to the supreme court on appeal, where it was held that a jury may find a combination and conspiracy from the fact that the parties were present, aiding and abetting in the commission of the offence charged, if satisfied of such conspiracy beyond a reasonable doubt. The presumption there authorized is one of law, but not conclusive, and may be rebutted. *State v. Bingham*, 42 W. Va. 234, 24 S. E. Rep. 888; *State v. Flaherty*, 42 W. Va. 240, 24 S. E. Rep. 885. See W. Va. Code 1899, ch. 148, sec. 10.

Aiding and Abetting—Statute—Constitutional.—Under sec. 10, ch. 148, the W. Va. Code 1891, that provision of said section providing that, if the alleged conspirators are present, aiding and abetting in the commission of the act, it shall be presumed that the act was done in pursuance of the conspiracy, is constitutional. *State v. Bingham*, 42 W. Va. 234, 24 S. E. Rep. 888; *State v. Flaherty*, 42 W. Va. 240, 24 S. E. Rep. 885; W. Va. Code, 1899, ch. 148, sec. 10.

B. COMPETENCY OF WITNESSES.

Accomplice as a Witness—Statute—Effect of Previous Sentence.—Ordinarily, an accomplice is a competent witness on the trial of his associate, provided he has not been previously sentenced and convicted of an infamous offence. And by statute in Virginia his incompetency by reason of interest has been removed, unless jointly tried with his associate. Code 1873, ch. 196, § 21; *Oliver v. Com.*, 77 Va. 592.

Though a witness on a trial for arson was charged as an accomplice in the indictment, and found guilty by the jury, he is competent to testify, where he has not yet been sentenced. *Brown v. Com.*, 86 Va. 385, 11 S. E. Rep. 799; *Oliver v. Com.*, 77 Va. 590.

C. WEIGHT OF EVIDENCE.

Testimony of Accomplice—Province of Jury.—It is said by the court in *Woods v. Com.*, 86 Va. 529, 11 S. E. Rep. 798, quoting from *Greenleaf on Evidence*, "The degree of credit, which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason, but there is no such rule of law;" forbidding a conviction upon the evidence of one accomplice. *Dove's Case*, 82 Va. 301; *Brown's Case*, 3 Leigh 709; *Oliver's Case*, 77 Va. 590; *Byrd's Case*, 3 Va. Cas. 490.

Evidence Sufficient—Case Stated.—The evidence in the case of *Martin v. Com.*, 3 Leigh 745, showed that the defendant and prisoner having engaged an illiterate young man, went from Richmond into Bedford county for the purpose of purchasing horses; the prisoner furnishing the money for all purposes, which was proved to be counterfeit, his accomplice handling and spending it, and making false statements concerning their purposes along with the prisoner, was sufficient to establish a conspiracy. The notes so passed, mostly by the accomplice, were produced against the prisoner and held admissible in evidence. See *Crump v. Com.*, 84 Va. 946, 6 S. E. Rep. 620; *ante*, "What Constitutes."

Conspiracy—First Aggressor—Instructions.—An instruction that, if a conspiracy to do personal violence to another person in fact exists, it is immaterial which was the first aggressor—the conspirators or the other party who was injured—is wrong. *State v. Bingham*, 43 W. Va. 234, 24 S. E. Rep. 883; *State v. Flaherty*, 42 W. Va. 240, 24 S. E. Rep. 885.

D. ADMISSIBILITY OF EVIDENCE.

Crime Must Be Established—Question for Jury.—Before the declaration of a co-conspirator made in the absence of the prisoner can be given in evidence against the accused, there must be proof sufficient in the opinion of the court to establish, *prima facie*, the fact of conspiracy between the parties; the question of the existence of such conspiracy being ultimately for the jury; but if such evidence of the declaration of an alleged co-conspirator be admitted without such foundation being laid, yet the judgment will not be reversed for this reason, if the facts proved, or evidence certified show that *prima facie* the fact of conspiracy had been established. *State v. Cain*, 20 W. Va. 690; *State v. Burnett*, 47 W. Va. 731, 35 S. E. Rep. 983; *Williamson v. Com.*, 4 Gratt. 547. See *Martin v. Com.*, 2 Leigh 745; *ante*, "Weight of Evidence."

Declarations of Accomplice—In Presence of Defendant.—Declarations of an accomplice to the crime of arson, made in the defendant's presence, that he would have the certain person out of town or "burn the town before morning" and similar statements are inadmissible in evidence, where there is no

evidence of a conspiracy between such witness and defendant. *Brown v. Com.*, 86 Va. 935, 11 S. E. Rep. 799. See *Oliver's Case*, 77 Va. 590; *Williamson v. Com.*, 4 Gratt. 547; *State v. Burnett*, 47 W. Va. 731, 35 S. E. Rep. 983.

Declarations of Co-conspirator—When Admissible—In General.—In considering the admissibility of the declarations of an alleged co-conspirator made in absence of the prisoner, such declarations so made will not be regarded as evidence of the fact of conspiracy, unless they so accompany the execution of the common-criminal intent, as to become a part of the *res gesta*, or in themselves tend to further the execution of the common-criminal intent. *State v. Cain*, 20 W. Va. 694. In this case the only evidence introduced to lay foundation for the declaration was, that the prisoner and the alleged co-conspirator were seen together on the day of the homicide, in the town of Ripley and later riding rapidly down the street together. Of course these facts do not show *prima facie* a conspiracy, and it was error for the court to admit the testimony. If, however, there was proof to the jury that would convince the court, that a *prima facie* conspiracy had been formed between the parties, the evidence would have been admissible. *Hill's Case*, 3 Gratt. 506; *Danville Bank v. Waddill*, 31 Gratt. 469. See also, *State v. Burnett*, 47 W. Va. 731, 35 S. E. Rep. 983.

Subsequent Statements of Co-conspirator.—Though conspiracy has been proved, statements of a conspirator, made after the object of the conspiracy is accomplished, are inadmissible to criminate his co-conspirator. *Oliver v. Com.*, 77 Va. 590. See *Hunter's Case*, 7 Gratt. 641; also, *Haynes' Case*, 28 Gratt. 943; *Jones' Case*, 31 Gratt. 886.

Same—Effort to Prove Conspiracy—Defence.—In an action of *assumpsit* to recover a sum of money in gold which had been delivered by the plaintiff to the defendant for safe-keeping in bank, the only plea in the case was *nonassumpsit*. There was no question as to the delivery of the gold to the defendant, but the defence was that he had been robbed of it, and the effort of the plaintiff was to prove a fraudulent appropriation of it by the defendant conspiring with another person. It was held that after the conspiracy had been consummated, the common purpose carried fully into effect, no subsequent declarations of any of the conspirators, not made in the presence of the others, are admissible as evidence against the latter. *Danville Bank v. Waddill*, 31 Gratt. 469.

Conspiracy to Commit a Felony—Acts and Declarations of Co-conspirator.—Upon an indictment against a person for a conspiracy to commit a felony, or for the felony so actually committed, the acts and declarations of another of the conspirators, though not in the presence of the prisoner or afterwards reported to him, are evidence against him; and this though the acts and declarations were done or made before the prisoner became a party to the conspiracy, if done or said in furtherance of the common object.

In order that such evidence may be admissible, it must be shown that the person whose acts or declarations are sought to be made evidence, was, at the time of making or doing them, himself a conspirator; and also that they were done or said in furtherance of the object of the conspiracy. *Sands v. Com.*, 31 Gratt. 871. See also, *State v. Burnett*, 47 W. Va. 731, 35 S. E. Rep. 983; *Cain's Case*, 20 W. Va. 694; *Brown's Case*, 86 Va. 935, 11 S. E. Rep. 799; *Martin's Case*, 2 Leigh 745.

Such admissibility is not confined to a case in which the prosecution is for the conspiracy itself, but also extends to a case in which the prosecu-

is for the crime committed in pursuance of the conspiracy. And it does not matter whether the prosecution be jointly against all, or severally against each, or one of the perpetrators. *Sands v. Com.*, 21 Gratt. 885.

Confessions and Admissions—When Admissible—In General—Joint Trial.—When two persons are on trial for jointly conspiring to prosecute another for larceny the confessions of one of them in the absence of the other, made after the conspiracy charged in the indictment was completed and ended, are properly admitted as evidence. And when all the evidence has been introduced, the court should then instruct the jury, that, in passing upon the guilt of the other party, they must discard from their consideration the said admissions, they having been made after the conspiracy was completed and ended. *Jones v. Com.*, 31 Gratt. 886.

Same—Time of Making—Accomplice in Felony.—Confessions or admissions of an accomplice in a felony, made after the commission and completion of the offence, are not competent evidence against a prisoner, even though a previous conspiracy and combination between the prisoner and the accomplice to commit the felony has been proved; *FIELD, J.*, in his opinion saying, "The confessions or declarations of an accomplice or confidant made when they were in the act of committing an offence, or when in its way of commission, can be received as evidence against all parties to the conspiracy. But after the commission of the act is complete and over, declarations subsequently made by an accomplice are good evidence against him only, unless made in the presence of his partners in the crime." *Hunter v. Com.*, 7 Gratt. 641; *Oliver v. Com.*, 77 Va. 500; *Jones v. Com.*, 31 Gratt. 886. See *State v. Burnett*, 47 W. Va. 731, 85 S. E. Rep. 983.

Catlett and Others (Justices of King William County) v. Carter's Executors.

Friday, March 8, 1811.

1. **Administration Bond*—Action against Sureties—What Necessary to Sustain.**—An action against the sureties in an administration bond cannot be sustained on the ground that, after a verdict judgment, execution, and return of "no effects," against the executor or administrator, as such, (the verdict being "that he had not fully administered, but had assets to satisfy the debt.") the defendant died, and his estate having been committed to the sheriff, the county court allowed the judgment as a lawful claim against his estate, and directed the sheriff to pay it if assets should be in his hands; and it appeared by the sheriff's return that no such assets existed.
2. **Same—Same—Same.**—It seems, that the executor or administrator must be convicted of a devastavit, by a verdict in a second suit, finding that "he has wasted the assets," or "has eloiigned, disposed of, and converted the same to his own use," before an action can be sustained against the sureties. (1)

The appellants (for the benefit of John D. Watkins, administrator de bonis non of John Watkins, deceased) brought an action of debt in the district court of Williams-

burg, against Charles Carter and William D. Claiborne, surviving obligors in an administration bond given by Judith Browne, with the said Carter and 25 Claiborne *her securities, upon her administering on the estate of William B. Browne, deceased.

The declaration set forth the bond at large, and averred that Judith Browne had broken the conditions thereof in this, that she "did not, nor hath, well and truly administered, &c. but hath misapplied and wasted, &c. in not paying to William Clayton, in his life, executor of John Watkins, or to the said John D. Watkins, administrator, &c. the amount of a judgment recovered in the county court of King William, at the May session of that court in the year 1795, by the said William Clayton, executor as aforesaid, against her as administratrix," for a debt of her intestate; (setting forth the judgment;) that she had assets to satisfy it, but wasted, eloiigned, disposed of, and converted the same to her own use; that she afterwards died; and, no person choosing to administer on her estate, it was committed to the sheriff of King William; (a) that the said John D. Watkins, as administrator, &c. exhibited his claim to the court of that county against her estate, by whom it was allowed and directed to be paid by the sheriff, "if a sufficiency of her estate should be in his hands for paying the same and all other claims; or, if there should be an insufficiency, the court reserved to themselves the power of proportioning the assets among the claimants;" that the sheriff made return to the court, that "he could not find any estate of Judith Browne, deceased, and had no reason to believe or suspect that she had any estate;" whereby action accrued, &c.

The writ being executed on the defendant Carter, he appeared, and demurred to the declaration, and the plaintiffs joined in demurrer.

On argument, the court was of opinion "that the demurrer, admitting the fact of waste charged in the declaration, ought to be overruled; but it appearing to the court that the question whether a verdict convicting the administratrix of a devastavit in a suit suggesting such

26 *devastavit was requisite previous to this suit, (which was the question intended to be submitted,) could not, by the present pleadings, come fairly before the court, but, being a matter of evidence, would be brought on, more properly, after a plea, by an instruction to the jury on the evidence; it was ordered, that the defendant's counsel have leave to withdraw his demurrer; and thereupon the defendant pleaded the general issue, to which the plaintiffs replied generally."

On the trial of the cause, the plaintiffs gave in evidence the bond and records referred to in the declaration, with the copy of an execution which issued on the original judgment against Mrs. Browne, as administratrix, and a return thereupon of nulla bona. The pleas of the administratrix to the original suit were, payment by her intestate, and plene administravit,

(a) See Rev. Code, vol. 1, p. 167; also vol. 2, p. 130.

***Administration Bond.**—See, on this subject, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6; monographic note on "Official Bonds" appended to *Sangster v. Com.*, 17 Gratt. 124.

***Same—Action on—What Necessary to Sustain.**—A judgment against a personal representative is necessary before a suit can be brought on his official bond. *Foot-note to Call v. Ruffin*, 1 Call 333.

The principal case was cited in *Spottswood v. Dandridge*, 4 Munf. 294. See also, *foot-note* to *Gordan v. Frederick Justices*, 1 Munf. 1.

(1) *Quære*, whether there may not be some exceptions to the rule?—Note in Original Edition.

on which issues were joined; and both were decided against her by verdict; the jury, upon their oaths, saying, "that the said Judith Browne, at the time of the exhibition of the bill of the said plaintiffs, had not fully administered all the goods and chattels which belonged to the said William B. Browne at the time of his death in her hands to be administered, and that the said Judith, at the day of the exhibition of the said bill, and ever after, had goods and chattels, which were of the said William B. Browne at the time of his death, in her hands to be administered, wherewith she could have paid the debt in the said bill specified; and that the said defendant's testator" (meaning intestate) "did not pay in his lifetime the debt in the declaration mentioned." The judgment was dated the 15th of May, 1795; the fieri facias the 30th of June following. The order of court, committing the estate of Judith Browne to the hands of the sheriff, was made in October, 1802; and that allowing the claim of John D. Watkins, administrator, &c. in February, 1803. It also appeared, from a copy of a record laid before the county court when the claim was allowed,

27 that, on the 10th of June, 1797, a suit was brought in the district court of Williamsburg, on the same administration bond now in question, (for the benefit of William Clayton, executor as aforesaid,) against Charles Carter, as security for the administratrix, and was determined in favour of the defendant, (May 5, 1802,) upon a question submitted to the court by the jury, whether the defendant, "as a security in the bond for the due administration, &c. was liable to the plaintiffs in this action, before a judgment obtained against the administratrix in an action against her, charging a devastavit."

Upon this evidence, (being all that was exhibited in this cause,) the defendant's counsel moved the court to instruct the jury, "that it was necessary for the plaintiffs to produce the verdict of a jury, convicting the administratrix of a devastavit, in a suit for that purpose against her, before this suit can be maintained; and that, unless the plaintiffs produced such conviction, they should find for the defendant;" and the court instructed the jury to that effect; to which opinion of the court the plaintiffs excepted. The jury found for the defendant: judgment was rendered on the verdict; and the plaintiffs appealed.

Wickham, for the appellants, relied on the following points:

1st. That, after judgment against the administratrix, as such, execution issued, and return of nulla bona, she having died intestate, and no person administering on her estate, the creditor had a right to proceed, immediately, on the administration bond, against her sureties. In the case of *Gordon's Adm'rs v. The Justices of Frederick*, (a) it could not have been intended to require a second suit, suggesting a devastavit, in all cases. The inconvenience of such a rule would be extreme, and, in some cases, the bringing the second suit impossible; as where an executor has left the state, on

28 purpose to prevent it. The authorities collected by Serjeant Williams, in his note (8) to 1 Saunders, 219, show the doctrine on this subject very fully, and do not justify the conclusion that the action suggesting the devastavit is the only way in which it can be fixed upon the executor. But,

2dly. If further proceedings were necessary, the order against the sheriff (being the only step that could be taken in this case, before the suit on the administration bond) was sufficient.

3dly. The court's direction to the jury was clearly erroneous; since an executor or administrator, by suffering judgment to pass by default, or on demurrer, might always prevent the plaintiff from putting the matter in issue before a jury; without which there could be no verdict convicting the defendant of a devastavit.

4th. The plea of the general issue, (in so many words,) without expressing what plea was intended, was informal and insensible; and, therefore, there should be a repleader. (1)

Call, contra. I admit the plea is informal; but that is no ground of repleader.

1. The point is settled, that there must be two suits, before the suit against the sureties. It is contended that this has been sufficiently done. But the second suit required is to establish the point, devastavit, or not. Here the proceedings (as to the sheriff, &c.) have only shown that Judith Browne had no property of her own; but not that she wasted the property of her intestate.

2. The right of Watkins, the administrator de bonis non, to sue on the judgment obtained by Clayton, the executor, is also questionable. In 6 Bac. 112, (Gwill. edit.) it is laid down, that where an executor obtains a judgment, and dies, the administrator de bonis non cannot sue out a scire facias, but must bring a new trial. (2)

29 *3. Another point makes the plaintiff's case very defective. A judgment against an executor does not bind his security, who may still controvert the devastavit. (b) Therefore, in this suit, the plaintiffs were bound, in the first place, to prove that, once, there had been assets; then the security would have been bound to prove what had become of them; that they had been expended in due course of administration; but this the plaintiffs have not done.

4. The judgment for the defendant, Carter, in a former action for the same cause, is a bar to this action.

Wickham, in reply. The last point is not law. This suit was for a new cause of action accruing after that judgment. According to Mr. Call's own doctrine, the right of action against the security accrues only by the judgment in the second suit against the executor. Here, after the judgment for the defendant had been given on

(1) See the case of *Kirtley v. Deck*, 8 H. & M. 388.

(2) JUDGE BROOKE asked Mr. Call if this point had not been decided otherwise in the case of *Backhouse v. Tabb*, in the federal court: to which he answered "yes; but it never has been determined in this court."—Note in Original Edition.

(b) *Granbury v. Hamilton*, in the federal court; a case not reported.

the ground that the action against him was premature, we obtained a judgment against the estate of the administratrix, which judgment became the gist of the present action. The court of appeals cannot have intended that where a decree in chancery has been obtained for a balance against an executor, on a settlement of his administration account, to be paid de bonis propriis, a second suit should be necessary, before the creditor can sue the securities. In this case, the order was that the sheriff should pay out of the estate of Judith Browne. We did, therefore, what was equivalent to the second suit.

The federal court, in the case of *Granbury v. Hamilton*, did indeed decide that a judgment against an executor was not binding on his securities; but certainly it is prima facie evidence, and of itself sufficient, if not controverted.

30 *Wednesday, March 27th. The Judges, BROOKE, TUCKER, and FLEMING, (ROANE not sitting in the cause,) pronounced their opinions.

JUDGE BROOKE. Though I do not entirely subscribe to the opinion of the district court, delivered in its instruction to the jury in this case; yet, confining that opinion to the subject matter to which it related, I think it was correct enough. The order obtained in King William court, upon the motion of the plaintiff against the sheriff of that court, to whom administration of the estate of Judith Browne had been committed, and the return of the sheriff thereon, "that no estate of the said Judith Browne could be found," was certainly no evidence of her having wasted the estate of William B. Browne, her intestate, to charge her securities in this action. I am, therefore, of opinion, the judgment of the district court must be affirmed.

JUDGE TUCKER. I am of opinion that the judgment is perfectly correct.

JUDGE FLEMING. It appears to me there is no error in the judgment of the district court; it being sustainable on two grounds; 1st. The declaration, according to former decisions of this court, being uncertain and insufficient to maintain the action; and, 2dly. There is no evidence of a devastavit on the part of the administratrix of William B. Browne; without proof of which the securities were not responsible, nor liable to an action on the administration bond: and no less proof than the verdict of a jury is sufficient to convict an executor or administrator of a devastavit, according to the decision in the case of *Gordon's Adm'rs v. The Justices of Frederick*, (a) which was founded on principles laid down in the case of *Call v. Ruffin*; (b) and, therefore, the instruction of the court to that effect, as stated in the bill of exceptions, was correct and proper.

I am of opinion that the judgment be affirmed.

(a) 1 Munf. 1.
(b) 1 Call. 388.

31 *The Auditor of Public Accounts (in Behalf of the Commonwealth) v. Nicholas, Clerk of Dinwiddie.

March, 1811.

1. Clerk of Court—Motion against*—Failure to Pay Taxes on Process—Defence.—On a motion against a clerk for the penalty incurred by failing to pay the taxes on law process, he may defend himself by showing that he used due diligence to get a commissioner of the revenue to compare his account with the books in his office, and certify thereupon as the law requires, and was prevented by the default of such commissioner from obtaining a *quietus*.

2. Same—Same—Same—Same—Equitable Relief, &c.—And if he fail to make such defence, without a competent excuse, he cannot obtain relief in equity on the same ground.

Upon an appeal from a decree of the superior court of chancery for the Richmond district, pronounced the 12th of March, 1805, by which an injunction, to stay proceedings on two judgments of the general court against the appellee, was made perpetual.

The case is sufficiently stated in the following opinions of the judges.

The Attorney-General, for the appellant. Peyton Randolph, for the appellee.

Tuesday, March 19th. The judges pronounced their opinions.

JUDGE BROOKE. The object of the appellee in the court of chancery was to be relieved against two judgments rendered against him in the general court, as clerk of Dinwiddie county, for failing to account for, and pay, the taxes on law process,

*Clerk of Court—Motion against.—Where a clerk fails to pay the taxes received by him, on law process, into the public treasury, the auditor has a remedy for this delinquency, by motion. *Stephoe v. Auditor*, 3 Rand. 221, citing the principal case at p. 226.

*Equitable Jurisdiction—Judgments of Court of Law.—The doctrine is well established in Virginia that decisions at law cannot be revised in a court of chancery upon the mere ground of error in the law court, nor upon circumstances of which that court had cognizance, unless the complainant can make a competent excuse for having failed to defend himself at law. *West v. Logwood*, 6 Munf. 500, 501, 503, quoting from the principal case. To the same effect, the principal cases cited in *Stephoe v. The Auditor*, 3 Rand. 226; *Bierne v. Mann*, 5 Leigh 367, 369; *Tomkies v. Downman*, 6 Munf. 569; *West v. Logwood*, 6 Munf. 498.

For, to permit a court of equity to reverse the decision of a court of law on the sole ground that it was erroneous, would be to confound the jurisdictions of the two courts, and contradict the many decisions of this court which have denied to a court of equity that power. *Duvals v. Ross*, 3 Munf. 294, citing the principal case. "It would establish a grievous precedent, and one of great public inconvenience, to interfere in any other case than one of indispensable necessity and wholly free from any kind of negligence." *Slack v. Wood*, 9 Gratt. 48; *foot-note* to *Donally v. Ginatt*, 5 Leigh 350, both citing principal case.

Thus, the rule is well established that after a trial at law, if there appear to have been no fraud or surprise upon the part of the plaintiff, equity cannot relieve the defendant from the consequences of mere negligence, notwithstanding it may be manifest that great injustice has been done. If it appears that, by the use of proper diligence, he could have defended himself successfully, however hard his case, equity must not interfere, and this upon sound principles of general policy which no court is at liberty to disregard. *Tapp v. Rankin*, 9 Leigh 480, relying on the principal case, *Faulkner v. Harwood*, 6 Rand. 125, and *Arthur v. Chavis*, 6 Rand. 142.

See further, *foot-note* to *Slack v. Wood*, 9 Gratt. 40; *foot-note* to *Tapp v. Rankin*, 9 Leigh 478; monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425; monographic note on "Jurisdiction" appended to *Philpen v. Durham*, 8 Gratt. 457; monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

according to the act of the assembly, entitled "An act to impose certain taxes on law process and for other purposes." The circumstances relied on, in his bill, are precisely such as he might have submitted to the general court. To the notice of the first motion in that court against him, he appeared; to the second notice he failed to appear, but does not assign any cause for it. The doctrine is well established in this court, that decisions at law cannot be revised in a court of chancery upon the mere ground of error in the law court, nor upon circumstances of which that court had cognisance, unless the complainant can make a competent "excuse for having failed to defend himself at law." (1) The decree, therefore, must be reversed, the injunction dissolved, and the bill dismissed.

JUDGE TUCKER. The appellee brought a bill in the Richmond chancery court, to be relieved against two judgments against him in the general court, for a fine of 600 dollars each, for failing to account for and pay into the treasury taxes collected by him as clerk of Dinwiddie county, upon law process, pursuant to the act of 1798, c. 2. (a)

The second section of the act requires the clerk to account upon oath to the auditor of public accounts for all taxes received by him, and pay the amount thereof into the treasury on or before the first of October annually. And, "that a commissioner of the tax shall compare the account of each clerk with the books in his office, and certify that it thence appears that all taxes by him received are accounted for."

The bill charges that he applied several times to Mr. Goodwin, a commissioner of the tax in his county, to come to his office for that purpose; and this is supported by the deposition of Mr. Goodwin himself, who says the applications were made to him at the court-house, on court days, and he forgot to look into the law to see whether it was his duty to do so. The auditor, in his answer, says there were two commissioners in the county; but, as he does not name them, nor produce any proof of this substantive allegation, I pass it over.

The law makes no provision, by summons or otherwise, by which a commissioner can be compelled to perform this duty, or be punished for neglect of it. There are two judgments in the record, the first for less than forty dollars, the second for less than one hundred dollars. The fines are 1,200 dollars; and the act inflicts a further penalty, of being liable to lose his office.

33 *From the records of the general court, it appears that the appellee appeared, and was heard in his defence on the motion for the first judgment; but that he failed to do so on the second. No reason is assigned for this failure in the latter instance; nor are we informed what was the nature of the defence made on the first motion.

It is with infinite regret I find myself compelled to say that, grievous as this penalty is, and favourable as the deposition of Mr.

Goodwin is to the appellee, I think we cannot, without departing from principles long established, and recently confirmed, grant the appellee that relief which the decree of the chancellor was calculated to afford him; but that that decree must be reversed entirely.

JUDGE ROANE was of the same opinion. It was a hard case; but the decree must be reversed.

JUDGE FLEMING. This is, no doubt, a very hard case on the part of the appellee; but, as it is a question purely of a legal nature, and has been discussed and decided in a court of law, it seems that, by a number of precedents of this court, he is precluded from redress in a court of equity. Had he appealed from the judgment of the general court, and rested his defence on the law of the case, I should probably have been of opinion that it was in his favour, and that the judgment ought to have been reversed; but am of opinion that a court of equity had no jurisdiction of the case; and, therefore, concur in the opinion that the decree be reversed, and the bill dismissed, with costs. (2)

34 *Flournoy's Executors v. Halcomb.

Wednesday, March 13, 1811.

Equity Practice—Concurrent Jurisdiction*—Revision of Awards.—The power of the courts of equity to revise awards is concurrent with that of the courts of common law; but, if the court of law first get possession of the subject, its decision is binding on the court of equity; unless new circumstances be adduced to authorize the interpolation of the latter.

The circumstances of this case, and the point decided, sufficiently appear from the following opinions, pronounced on Friday, March 15, 1811.

Wickham, for the appellants.

Peyton Randolph, for the appellee.

JUDGE BROOKE. Upon an examination of the bill in this case, it appears to be a naked attempt to reverse, in the court of chancery, the decision of this court. It is not necessary to hunt up precedents to establish the position that a court of chancery cannot revise the decision of a court of law upon the same subject of controversy, where no circumstance is adduced to give that court jurisdiction. If it were, I could refer to the case of *Morris & Overton v. Ross*, in this court, (b) and the list of cases there cited. Where there is concurrent jurisdiction, and the court of law first gets possession of the subject, its decision is

(3) The general assembly, by an act passed the 4th of February, 1812, directed the penalties in question, which John Nicholas, the appellee in this case, was compelled to pay into the treasury, to be refunded to him; it appearing that he had also paid the sums due for taxes on law process.—Note in Original Edition.

***Equity Jurisdiction—Judgment of Law Court.**—It is too well settled to need a reference to authorities, that equity cannot revise a decision of a law court; and, where there is concurrent jurisdiction, and the law court first gets possession of the subject, equity is bound by its decision. As so holding, the principal case is cited in *Head v. Muir*, 3 Rand. 181. See further, *foot-note* to The Auditor v. Nicholas, 2 Munf. 31, and notes in this series of reports to which reference is there made.

†Arbitration and Award.—See generally, monographic notes on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

(b) 2 H. & M. 408.

(1) See *Kincald v. Cunningham*, ante, 1.

(a) Rev. Code, vol. 1, p. 385.

equally binding on a court of equity. This bill states expressly, that the same defence, now relied on, against the award, was made in the district court; that it was there overruled; and, upon an appeal to this court, the judgment of the district court was affirmed. As to the 37l. 7s. 9d. not included in the first award, the appellees have now credit for it on the execution. I am of opinion, therefore, that the decree be reversed, and the bill dismissed.

JUDGE TUCKER. The appellee, Halcomb, in his bill of injunction, states, that Flournoy having instituted a suit against him upon his bond for indemnification of

35 Edward county, whose deputy *the complainant was, a submission to arbitrators was made by rule of court; that they made their report accordingly, establishing a certain balance against him; "that the said report being presented to the district court of Prince Edward (where the suit was depending) for confirmation, he, by his attorney, opposed the same, upon the facts which he now (in his bill) charges to be true, namely, first, the absence of a material witness, &c.; nevertheless, the district court confirmed the award of the arbitrators, although he offered to lay before the court documents and proofs to show great injustice, &c.; that he had hoped to obtain relief from this court; but no special entry having been made of the preceding facts, and the cause coming on to be heard on the naked record, the court consisting only of four judges, they being equally divided, the judgment was thereby affirmed. The case thus referred to is reported at large in 2 Call, 433, from which it appears that the judges were not equally divided, but there was a majority of the court who concurred in affirming the judgment. The other grounds of complaint in the bill appear to be completely overturned by the answer, and other evidence in the record.

The question whether a party, who has been once fully heard in this court, in a case at law, shall be permitted to revise the judgment of this court by a resort to a court of equity, was so fully discussed and considered, both by the bar and the court, in the case of *Morris & Overton v. Ross*, (a) that I cannot suppose this court will hesitate to pronounce the same opinion on this occasion as on that. Independent of which, I should, on the merits alone, be of opinion that the chancellor's decree be reversed, and the appellee's bill dismissed with costs.

JUDGE ROANE. It is the unanimous opinion of the court, (1) that the decree be reversed, and bill dismissed.

36

*Hansbrough v. Baylor.

Tuesday, March 12, 1811.

1. **Bonds—No Consideration—Rights of Bona Fide Purchaser.**—If a bond be given, without any consideration, but to be used as an article of traffic to raise money, the bona fide purchaser (tho' at a large discount) of such bond, without notice of the purpose for which it was executed, is entitled to recover the full amount.

(a) 2 H. & M. 408.

(1) **JUDGE FLEMING** did not sit in this case.

2. **Same—Purchase at Discount—Usury.**—A fair purchase of a bond, at any discount, is not usurious. See, accordant, *Keener v. Hord*, 3 H. & M. 14, *Musgrove v. Gibbs*, 1 Dall. 217, and *Wycoff v. Longhead*, 2 Dall. 92.

A bill of injunction was exhibited by John Baylor against Peter Hansbrough, to stay proceedings on two judgments at law, on the ground of usury; alleging that "the complainant, through his agent authorized for that purpose, received of the defendant the sum of 1,070l. for which it was usuriously agreed, that he should be paid at a future day the sum of 1,420l. with six per cent. interest on the same until fully discharged; but, by way of device to bar the effect of the statute against usury, the complainant executed two bonds, each for the sum of 710l. made payable to a third person, and by him to be assigned over to the said Hansbrough, which was accordingly done, through the assistance of Thomas R. Rootes, Esq. who was made the payee and assignor; that each of the said bonds was drawn payable with interest from the date, but, whether on demand, or at a nominal period to come, the complainant did not positively recollect; but he certainly understood that a reasonable time was to be given, in which arrangements might be made for payment; as the sum then received was to be appropriated in satisfaction of urgent demands against him: but the said Hansbrough, notwithstanding, by the loan aforesaid, he had acquired to himself a net gain of 350l. with an additional profit thereon after the rate of six per centum per annum, (exclusive of lawful interest on the 1,070l.) further to harass and aggrieve the complainant, and without giving that indulgence, either verbally expressed, or mutually understood between them, (and which most cogently induced the complainant to make the sacri-

***Bonds—Notes—Purchase at Discount—Usury.**—An ordinary note or bond may be purchased at a greater discount than the legal interest, without imputations of usury, although such bond or note be given for accommodation, the purchaser being ignorant of that fact. *JUDGE COALTER* in *Whitworth v. Adams*, 5 Rand. 386. In this same case, *JUDGE CARR* (at p. 388) distinguishes the principal case from the case at bar.

In *Grigsby v. Weaver*, 5 Leigh 212, the principal case is cited as authority for the proposition that a man may lawfully purchase a bona fide bond at a discount.

And, in *Gordon v. Dooley*, 10 Fed. Cas. 785, it is said: "A man may purchase bonds or negotiable paper in the market at any discount, whether they were manufactured for sale or not, and not be guilty of usury: *Hansbrough v. Baylor*, 3 Munf. 36; *Taylor v. Bruce*, Gilmer. 42; *Whitworth v. Adams*, 5 Rand. 383; and the same is held in many other cases. Nay, more, he may sell property greatly above its market value, knowing that the purchaser intends selling it again at its market value for the purpose of raising money, and the sale will not be usurious if it is a sale. *Selby v. Morgan*, 3 Leigh 577; and *Brockenbrough v. Spindle*, 17 Gratt. 21. But if such sale is accompanied by a loan of money as part of the transaction, the whole is usurious. *Bank v. Stribling*, 7 Leigh 26."

On this subject, the principal case is also cited in *Taylor v. Holloway*, Gilmer. 42, 66, 67, 93, and *foot-note*; *foot-note* to *Brummel v. Enders*, 18 Gratt. 872.

For further information on this subject, see monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; monographic note on "Usury" appended to *Coffman & Bruffy v. Miller*, 26 Gratt. 698; monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 623.

In regard to the liability of the assignor of a bond or other instrument not negotiable, the principal case was cited in *Hopkins v. Richardson*, 9 Gratt. 485.

fice,) soon after instituted suits on the bonds, and obtained judgments, &c.; that the complainant could not be relieved against the said usurious contract, but from the discovery on oath by the said Hansbrough, which he therefore prayed," &c.

The defendant filed his answer, setting forth "that Thomas R. Rootes came to his house, about the latter end of 1801, and proposed to sell two bonds, (without at first naming the obligors,) at a discount of 25 per cent. that he afterwards showed the bonds; when they appeared to be executed by Baylor; the one for 700l. dated 20th of September, 1801, payable on demand, the other for 727l. payable the 10th of December following; and not such bonds as were in the bill mentioned; that these bonds were regularly, to appearance, executed by the complainant to the said Rootes, who, of course, had a property in them, as the defendant supposed; that, considering bonds as a proper subject of traffic, and knowing that the best men in the country had not scrupled to purchase them at less than their nominal amount, (holding it, as they seem to do, more fair to appreciate, and deduct for, the risks of insolvency, the trouble, the expenses, and hazards of lawsuits and collections, than to purchase at an under value any other property capable of immediate enjoyment,) he neither felt or expressed any reluctance at treating with the said Rootes for the purchase of the bonds; yet that treaty was not of his own seeking: the defendant purchased the said bonds from the said Rootes for the sum of 1,070l. 5s. which he settled with the said Rootes: he could not say what the understanding of the complainant was about time, as he knew him not, as a contracting party, or as interested in the contract made by the said Rootes with the defendant; but the defendant knew that he gave no promise that he did not perform; he denied that Rootes treated or contracted in the character of agent for the complainant, or that Rootes, or any other person, gave the defendant the least reason to believe that he was not a bona fide obligee of the bonds, until some time after the contract had been completed; when the defendant

38 ant was *informed that the complainant had issued these bonds to be sent into market, for the purpose of raising what money they would bring, and that, in the sale, Mr. Rootes was a mere private agent of the complainant; and the defendant solemnly declared that, if he had known of that circumstance before the completion of his contract, he would not have been concerned in the purchase: he utterly denied the usury charged upon him; averring that the contract was not a device to evade the statute against usury, or intended to cover, or conceal any other transaction; that there never was any loan from him to the said Baylor, or any contract between them, directly or indirectly, further, or otherwise, than as declared in this answer; and that he had not the most distant suspicion that his purchase was morally, legally, or equitably exceptionable."

This answer was supported, in all its material parts, by several depositions, and contradicted by none.

The late chancellor for the Richmond district being of opinion "that the bonds were usurious, against the form of the act of the general assembly, to amend the act against usury, and a shift, past between the parties, relative to the loan," adjudged and decreed that the injunction, awarded, &c. be perpetual, except as to 1,070l.; from which decree the defendant appealed to this court.

Wickham, for the appellant.

The Attorney-General, for the appellee.

Thursday, March 14th. By the whole Court, (consisting of JUDGES FLEMING, ROANE, TUCKER and BROOKE,) the decree was reversed, and bill dismissed, with costs.

The following opinions were pronounced by JUDGES TUCKER and FLEMING.

JUDGE TUCKER (after stating the case) observed, this answer (which is 39 rather supported by the testimony) *is not any where impugned or contradicted in the record. It, therefore, must prevail, being perfectly responsive to every allegation in the bill. Had those allegations been proved, I should have felt no doubt that the transaction was a shift to avoid the statute of usury, and, consequently, within the words, as well as the true intent and meaning thereof. For I concur with Lord Mansfield, that, "in all questions, in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction; the view of the parties must be ascertained, to satisfy the court that there is a loan, and a borrowing; and that the substance was to borrow on the one hand, and to lend on the other; and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute." (a)

If the bill and answer in this case be both true, (as is possible from the manner in which the transaction was conducted,) whatever might have been Baylor's intention, Hansbrough was ignorant of it; and though the former might have intended to borrow, even upon usury, the latter seems only to have intended to make a fair purchase, instead of a loan. That the deposition of Mr. Rootes, the agent employed by Mr. Baylor on this occasion, was not taken in this cause, although upon the spot, is to me convincing proof that he could not have contradicted the answer of Hansbrough. I am therefore for reversing the chancellor's decree, and dismissing the bill with costs.

JUDGE FLEMING. Although I am strongly prepossessed against usurious contracts, in whatever form they may appear, it seems to me that this case is not within either of our acts of assembly against usury. The transaction appears, as well from sundry depositions, as from the answer of the appellant, which is in no instance contradicted, to have been fair and upright, without any knowledge, or suspicion in him, that the bonds were 40 *executed merely for the purpose of traffic. The contract was not of his own seeking, but pressed upon him by the friend and agent of Mr. Baylor; concealing, from him, for whose use the

(a) Floyer v. Edwards, Cowp. 114.

money was to be applied; and it is every day's practice to purchase bonds at a discount, without blame or censure on the purchasers.

I am therefore of opinion that the decree is erroneous, and ought to be reversed, and the bill dismissed with costs.

King v. Newman.

Wednesday, March 30, 1811.

Mortgage—Conditional Sale—How Distinguished.*—

Whether a contract is a mortgage, or a conditional sale, "depends on the whole circumstances of the contract, and not the mere written evidence of it;" the great point to be considered being, whether the parties intended to treat of a purchase, and, contemplating the value of the commodity, fixed the price; or whether the object was a loan of money, and a security, or pledge, for repayment.

Same—Same.—The former was the case in *Chapman v. Turner*, 1 Call, 280; the latter in *Rose v. Norvell*, 1 Wash. 14, and *Robertson v. Campbell & Wheeler*, 2 Call, 421—423.

The question in this case was whether the contract, between Henry Newman and William King, relative to a tract of land

***Mortgage—Conditional Sale—How Distinguished.—**

It is often a nice and difficult question to draw the line between mortgages and conditional sales. But the great desideratum which the Court of Appeals of Virginia has made the ground of their decision, is whether the purpose of the parties was to treat of a purchase, the value of the commodity contemplated, and the price fixed; or whether the object was a loan of money, and a security or pledge for the repayment intended. As adopting this rule laid down by Judge Pendleton in *Robertson v. Campbell*, 2 Call 421, the principal case is cited in *Earp v. Boothe*, 24 Gratt. 368.

The circumstance, that there were negotiations pending for a loan, or the admission by the grantee, that he loaned the money to the grantor, is a strong circumstance to show, that the real transaction was a mortgage, and not a conditional sale. *Davis v. Demming*, 12 W. Va. 238, citing the principal case as authority.

See the principal case also cited with approval on this subject in *Hyde v. Nick*, 5 Leigh 343; *Moss v. Green*, 10 Leigh 373; *Kilnack v. Price*, 4 W. Va. 9.

See further, monographic note on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197, and footnotes to cases in this series of reports there collected.

Same—Same—Parol Evidence.—It has been frequently decided that parol evidence may be received to prove that a deed absolute upon its face is in truth a mortgage, and this is upon the principle that it is competent to prove by parol testimony the express or agreed conditions upon which the legal title is acquired. *Walraven v. Lock*, 3 Pat. & H. 552, citing the principal case; *Ross v. Norvell*, 1 Wash. 19; *Robertson v. Campbell*, 2 Call 421; *Thompson v. Davenport*, 1 Wash. 125; *Dabney v. Green*, 4 Hen. & M. 101. To the same effect, the principal case was cited in *Snavely v. Pickle*, 29 Gratt. 31.

And in *Davis v. Demming*, 12 W. Va. 232, it is said: "Parol evidence, the declarations and conduct of the parties at the time of the transaction or subsequently, as well as all the circumstances attending or surrounding the same are received to show, whether the transaction was a conditional sale, or mortgage; and this is done though the deed, or bill of sale be absolute on its face. *Robertson v. Campbell*, 2 Call 421; *King v. Newman*, 2 Munf. 40; *Lamb v. Shears*, 1 Wend. 437; *Horne v. Kitletas*, 46 N.Y. 605." To this same point, the principal case is cited in *Hoffman v. Ryan*, 21 W. Va. 429.

The fact, that by the papers executed no right of redemption exists, will be considered a matter of no importance, if it is shown satisfactorily by proof or by the surrounding circumstances, that a security or pledge for a debt was intended; for a party is never allowed to take from his debtor by any form of contract his right to redeem. *Davis v. Demming*, 12 W. Va. 232; *Lawrence v. DuBois*, 16 W. Va. 460, 461; *Hoffman v. Ryan*, 21 W. Va. 429, 430.

See further, foot-note to *Snavely v. Pickle*, 29 Gratt. 31; monographic note on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197; monographic note on "Evidence" appended to *Lee v. Tapscott*, 2 Wash.

in Wythe county, was to be considered by a court of equity as a conditional sale, or a mortgage, and it was decided to have been a mortgage, conformably to the principles laid down by Pendleton, President, in the case of *Robertson v. Campbell & Wheeler*, 2 Call, 429.

The bill was filed in the county court by Newman against King, praying relief against a judgment in ejectment obtained by the latter.

The grounds of equity stated were, that about the year 1783, a certain George Perry obtained a certificate from the commissioners, appointed for settling claims to lands on the western waters, for 135 acres of land, lying in the county of Montgomery, (now Wythe,) which certificate, and the land located thereon, was, in the year 1786, purchased by the plaintiff, (who, it seems, was then living on the land, and had contested Perry's right before the commissioners,) for the consideration of sixty pounds payable in horses; that he, thereupon, applied to William King, the defendant, to let him have horses to pay part of said sum, to which King

41 agreed, on condition "that the certificate should be lodged in his hands, as a security for payment of the price of the horses so furnished by him; that, in consequence of this agreement, the plaintiff received of the defendant two horses, amounting in value to forty-five pounds, which sum, it was agreed, the plaintiff should pay the defendant at the end of twelve months from the date of said agreement, with interest thereafter, in case of failure of payment; that King insisted upon an assignment of the certificate; and the plaintiff, being ignorant and illiterate, and not conceiving that an assignment would in this case injure him, or give any interest to King in the land, did, by an endorsement upon the said certificate, assign it to him; though no assignment of it had ever been made to himself; that the defendant afterwards, by some means unknown to the plaintiff, obtained a grant on said certificate in his own name, instituted an action of ejectment, and obtained a judgment for the land.

The prayer of the bill was, therefore, that, by a decree of the court, the defendant be compelled to convey the said land to the plaintiff, on his paying him the sum of forty-five pounds, and interest.

The terms of the agreement were stated differently in the answer; the defendant alleging that the plaintiff came to him, and proposed a conditional sale of the land; "that is to say, that, if the respondent would let him have 45l. in horses, the respondent should have the land for that sum, (as the plaintiff was himself unable to pay for it,) unless the plaintiff should pay the respondent, in twelve months, the said 45l. in money; in which case the sale to the respondent was to be void." He farther stated, that "the money not having been paid him in twelve months, he considered the land his own; but, contemplating his bargain as not very advantageous, and considering the situation of the complainant, who is poor, and, at the time of the bar-

gain, lived, and still lives, on the land, he repeatedly offered to take the 451. and 42 interest, *for the same; but the complainant never complied with any of those proposals."

A number of depositions were taken; by which, in general, the statement in the bill was supported. It also appeared that, in the year 1796, the defendant having threatened to turn the plaintiff out of possession, the plaintiff agreed to give him the sum of one hundred and eighty pounds in the fall of the same year, and, if he failed in such payment, to quit claim to the land; but this agreement was not mentioned in the answer.

The county court decreed according to the prayer of the bill; and that decree was affirmed by the superior court of chancery for the Staunton district; whereupon the appellant again appealed to this court.

Hay, for the appellant.

Call, for the appellee.

Monday, March 25th. The president pronounced the unanimous opinion of the court, that the contract was properly considered a mortgage, and that the decree be affirmed.

Goodwin and Others, Executors, Widow, and Devises of Matthew Mayes, Deceased, v. Miller and Others.

Thursday, March 28, 1811.

Decrees—Interlocutory—What Constitutes.—A decree empowering an executor, for payment of debts, to sell the lands of his testator, and report his proceedings, in execution thereof, to the court, is not final, but interlocutory.

See *The President, &c. of William and Mary College v. Hodgson and others*, and *Fairfax v. Muse's Ex'rs*, 2 H. & M. 567.

See also *Allen v. Belches and others*, id. 505.

In this suit, brought by certain creditors of Matthew Mayes, deceased, to subject the lands, devised by him, in the possession of the devisees, the late judge of

the superior court of chancery for the Richmond district, on *the 20th of May, 1805, decreed as follows: "The court, being of opinion that the lands, whereof the testator Matthew Mayes was seized at the time of his death, are by his testament made subject to payment of his debts, doth empower the defendants, who are executors thereof, if not before empowered, to sell such of the said lands as, after application of the testator's goods and credits, shall be necessary to the payment of his debts, and report their proceedings, in execution of this decree, to the court."

From this decree the chancellor, in vacation, granted an appeal: but it appearing to this court, on inspecting the record, "that the said appeal, having been allowed from an interlocutory decree, in time of vacation, was improvidently granted," it was ordered that the same be dismissed, and that the cause be remanded for further proceedings.

Heffner v. Miller and Others.

Monday, March 25, 1811.

1. **Chancery Practice—Answer—Weight as Evidence.**†—The testimony of one witness is not sufficient to outweigh an answer denying the allegations of a bill.

See *Maupin v. Whiting*, 1 Call, 324; *Pryor v. Adams*, id. 390; *Beatty v. Smith & Thompson*, 2 H. & M. 395, accordant.

See also, *Paynes v. Coles*, 1 Munf. 373.

2. **Appellate Practice—Failure to Direct Bill Dismissed.**‡—If, in a decree of a superior court of chancery, reversing that of a county court, there be no error but an omission to direct the bill to be dismissed, the court of appeals will affirm the decree, and add the proper direction.

See *Mantz v. Hendley*, 2 H. & M. 317, 318, and *Ellzey v. Lane's Ex'x*, id. 504.

The circumstances of this case (which was an appeal from the superior court of chancery for the Staunton district, and turned chiefly on the weight of evidence)

Leigh 587—though, in a mortgage suit, it forecloses the mortgage, and directs the sale of the property, *Fairfax v. Muse*, 2 Hen. & M. 558; *Ellzey v. Lane*, 2 Hen. & M. 593; *Allen v. Belches*, 2 Hen. & M. 505—yet, in all these cases, the decree is only interlocutory, if something yet remains to be done in the cause, and so the parties are not put out of court. For, no decree is final where the judicial action of the court in the cause has not been exhausted; not that the decree should respond to all the questions in controversy, but a decree is never final if something remains to be done in the cause to render it effectual. *Cocke v. Gilpin*, 1 Rob. 20, 21.

On the subject of the finality of the decrees, the principal case is also cited with approval in *Royall v. Johnson*, 1 Rand. 427; *Manion v. Faby*, 11 W. Va. 493; *foot-note* to *Fleming v. Bolling*, 8 Gratt. 293 (containing an extract from *Manion v. Faby*, 11 W. Va. 493); *State v. Hays*, 30 W. Va. 120, 3 S. E. Rep. 184. See further, monographic *note* on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

†**Chancery Practice—Answer—Weight as Evidence.**—The old rule in equity, that, where a matter of fact is directly put in issue by the answer, the evidence of two witnesses is required as the foundation of a decree, has been modified in modern practice. But a single witness is still insufficient. He must be corroborated either by additional testimony or by circumstances, before a decree can be entered for the complainant. *Powden v. Johnson*, 19 Fed. Cas. 1210, citing principal case.

See further, monographic *note* on "Answers in Equity Pleading" appended to *Tate v. Vance*, 27 Gratt. 571.

‡**Appellate Practice.**—In *Handly v. Snodgrass*, 9 Leigh 494, the decree of the lower court was affirmed with costs, the appellate court correcting an error therein, upon the authority of the principal case.

See generally, monographic *note* on "Appeal and Error" appended to *Hill v. Salem, etc.*, *Turnpike Co.*, 1 Rob. 233.

***Decrees—When Interlocutory—When Final.**—It will be seen from an examination of the numerous decisions on the subject of the finality of decrees, in reference to appeals, bills of review, etc., that they have all been founded upon the idea that a decree is not final unless the cause itself has been thereby terminated in the court below. Thus, though a decree decides upon the question of title, or otherwise settles the principles of the cause, *Young v. Skipwith*, 2 Wash. 300; *Bowyer v. Lewis*, 1 Hen. & M. 553—though it dismisses the plaintiff's bill as to one of two separate subjects of controversy, and as to the other also determines the rights of the parties, *Templeman v. Steptoe*, 1 Munf. 330—though a decree nisi directs that the tract of land in the bill mentioned be surveyed and part thereof allotted to the plaintiff, and that the defendant shall execute to him a conveyance for such part, and pay the costs of the suit, *Aldridge v. Giles*, 3 Hen. & M. 138—though the decree directs the defendant to pay to the plaintiff hires to be ascertained by commissioners, and to deliver up the property to be sold by the commissioners, and the proceeds applied to payment of the plaintiff's claim and the cost of suit, and the residue, if any, to be paid to the defendant, *Mackey v. Bell*, 2 Munf. 523—though, at the suit of creditors against executors and devisees, it empowers the executors to sell such of the lands held by the devisees, as after application of the testator's goods and credits, shall be necessary for the payment of his debts, *Goodwin v. Miller*, 2 Munf. 42—though it awards to the plaintiff his principal money, interest, and costs, if it directs, in the event of an unproductive execution, that certain trust property shall be delivered by the defendant to the marshal to be sold, and the proceeds, after deducting a sum to be deposited for another, to be applied to the satisfaction of the plaintiff, *Hill v. Fox*, 10

are sufficiently set forth in the following opinion of Judge Tucker.

After argument, by Williams, for the appellant, and Wickham, for the appellees, the judges, on Thursday, March 28th, pronounced their opinions.

JUDGE BROOKE. The chancellor's decree is perfectly correct; except that the bill should have been dismissed,
44 "instead of merely reversing the decree of the county court.

JUDGE TUCKER. John Codery, the elder, in 1752, made an entry in Lord Fairfax's office for a tract of land in Frederick county, which was surveyed for him the same year; but, before he obtained a grant, he died, leaving a widow, and one son. The widow intermarried with one Boon; and, with her son, an infant, removed with him to some remote part of the state. In 1772, she returned to Frederick, (being still married, and her son still an infant,) and, while there, entered into a bond to Covey and Crumpton, in the penalty of 20l. with condition as follows: "That if the above bound Hannah Boon (her husband George Boon not here present) doth come here in November, 1774, and give his bond that his wife, her son, John Codery, shall sign a clear deed, or whomever may be the heir of a certain plantation, containing, &c. or, upon failure, if the above bound Hannah Boon, or her heirs, or executors, shall pay to the obligees ten pounds, now paid to the said Hannah, with lawful interest from the date of the bond," then the obligation to be void, &c. The obligees took, or, as it would seem, already had, possession of the land; and the appellant, Heffner, derives his claim from them, as assignee of the above bond for valuable consideration. The bill states, that Codery, the son, came to this country in 1782, and, while there, agreed to ratify and confirm the sale of the land made by his mother, and received a further part of the purchase-money, agreed to be paid, and took a bond from Covey and Crumpton for the residue; (notwithstanding which, he afterwards sold to Askew, under whom Miller claims;) and charges Askew and Miller with notice, &c. Codery, in his answer, admits the bond of his mother; but denies that anything was paid to her, in consequence of the agreement; believes a rifle gun was sent him; but he understood it was as some

45 "small consideration for the previous use of the land; that he went, when of age, into Berkeley county, and applied to Covey, and offered to ratify his mother's contract, if the money was then paid him; or he would take horses; but could not obtain payment in either mode, and, after waiting some time, sold to Askew.

Miller having obtained a grant, brought an ejectment for the land, and recovered. The county court enjoined the judgment. Upon an appeal to the court of chancery at Staunton, that decree was reversed.

One witness swears that Codery, on his return to Berkeley, made his house his home; that he said he was willing to confirm his mother's sale, if the purchase-money was paid him: and afterwards informed him that Covey and Crumpton had paid him every farthing. This, I

think, is the only witness who contradicts the answer of Codery; and the testimony of several others appears rather to strengthen than impugn it.

There certainly was no legal or moral obligation upon John Codery, the son, to give up his lands, (a tract of 330 acres,) in consequence of any thing that appears in this case. The bond of his mother, then a feme covert, could not bind him, even as her heir, had she left him an estate in lands. The price (if the ten pounds she is said to have received were the price of the land) was very inadequate, and the alternative condition, to pay the money back, with interest, on failure to make a deed, would have left him an election, even if he had been bound (as heir to his mother) by the bond. It therefore formed no ground, or consideration, in law or equity, for his alleged confirmation of the bargain; and as he positively denies in his answer (which is not disproved) having received any payment whatever from Covey and Crumpton, I think he was at full liberty to act as he did. Heffner was a purchaser with notice of the defect of title of those under whom he claims; having taken an assignment of the bond. I have, therefore, no doubt

46 that "the chancellor's decree ought to be affirmed, so far as it goes. But I think he should have proceeded to dissolve the injunction, (which the county court had decreed to be perpetual,) and the bill to be dismissed. With this amendment, I am of opinion that the decree be affirmed.

JUDGES ROANE and FLEMING concurred.

The following was entered as the opinion of the court: "That there is no error in the decree of the superior court of chancery reversing the decree of the said county court with costs; therefore, it is decreed and ordered that the same be so far affirmed, and that the appellant pay to the appellees, being the parties substantially prevailing, their costs by them, &c.; but this court is further of opinion that the said superior court of chancery erred in not dismissing the appellant's will; and, this court proceeding to make such decree as the said superior court of chancery ought to have pronounced, it is further decreed and ordered that the injunction, awarded the appellant, &c. be dissolved, and that his bill be dismissed."

M'Rea v. Brown.

Friday, March 22, 1811.

Costs—Interest upon—Statute—Construction.—The 5th section of the act passed January 20, 1804, entitled "An act concerning the proceedings in courts of chancery, and for other purposes," did not authorize a judgment for interest upon the costs of suit.

Upon an appeal from a judgment recovered by the appellee against the appellant in the district court held at Haymarket the 22d day of May, 1805, affirming, with damages and costs, a judgment of the county court of King William, dated the 8th day of June, 1804, for sixty pounds, debt, and nine dollars and sixteen cents, costs, to be

*Costs—Interest on.—See the principal case cited and quoted in *Douglass v. McCoy*, 24 W. Va. 725, 727. See further, monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

discharged by the payment of thirty pounds, with interest thereon from the 1st of December, 1800, till paid, "and the said costs, with interest thereon from the 4th day of June, 1804, till paid."

47 *Williams, for the appellant, (among other points,) insisted that this judgment, being for interest upon costs, was erroneous.

Botts, contra, relied on the act passed January 20, 1804, sect. 5, (a) as authorizing such a judgment, and cited the case of Atwell's Adm'rs v. Towles, decided April 26, 1810. (b)

Tuesday, April 2d. The judges pronounced their opinions.

JUDGE BROOKE. The 5th section of the act, entitled "An act concerning the proceedings in courts of chancery, and for other purposes," relied on by the counsel for the appellee, does not, upon sound construction, authorize a judgment for interest on costs. The words are, "Upon all judgments, interest shall be awarded on the principal sum, or damages recovered, and costs, until such judgment shall be satisfied." Costs, generally, are not a part of the judgment; they are given by the law, and not the court, in most cases, and follow the judgment as incidental thereto. The phraseology of the sentence under consideration clearly distinguishes them from the judgment; if included in it, the words "and costs" would have been entirely superfluous; and the expressions which follow immediately after the words "and costs," evidently mark the intention of the legislature, if possible, more strongly; they are, "until such judgment shall be satisfied;" that is, the judgment for the principal sum, or damages, mentioned in the first member of the section; which judgment certainly does not include costs; unless, indeed, costs can be said to be a part of the principal sum, or damages recovered.

JUDGE ROANE. The general principle is, that costs are considered as an appendage to the judgment, rather *than a part of the judgment itself; that they are considered, in some sense, as damages, and are always entered, in effect, "as an increase of damages by the court." This doctrine is to be found in 3 Bl. Com. 399. I presume it was, on the ground of this general principle, that this court reversed the judgment, in the case of Hudson v. Johnson, (c) which gave damages on the costs; for, as costs are in the nature of damages, and damages and interest are considered, in some sense, as the same, (d) it might seem that that judgment gave, in effect, interest upon interest, or compound interest, which has been always highly discountenanced by the courts and the legislature.

Such being the general principle, it would require clear legislative expressions to change it, in any particular case: and no act, or section of an act, shall be construed to have that effect, which, by any fair construction, or even by a natural

transposition of the words, can be otherwise accounted for and satisfied. In the case before us, the legislature, in allowing damages upon costs to be given by the appellate court, in two several instances in the act in question, (e) sensible of the general principle before mentioned, have used the most express and unequivocal words; their not using which in the particular case embraced by the 5th section is conclusive to show their obedience to the general principle. By using an easy and natural transposition, in the words of that section, it precisely accords with the general principle above mentioned. The case of Atwell's Adm'rs v. Towles, (f) is no authority against this opinion. The point was not made in that case, nor relied upon by more than one of the judges.

I am, therefore, of opinion that, on this ground only the judgment must be reversed.

JUDGE FLEMING concurred; and the judgment was unanimously reversed.

49 *Braxton's Adm'x v. Hilyard.

Wednesday, March 20, 1811.

Bond—Joint Obligers—Declaration—Necessary Allegations.—In an action against the representatives of one of two joint obligors in a bond, dated in 1788, it is essential to state in the declaration that that obligor survived his companion.
See Atwell's Adm'rs v. Milton, 4 H. & M. 253, and Atwell's Adm'rs v. Towles, 1 Munf. 181.

Same—Same—Witnesses.—The widow of one of two joint obligors is a competent witness, in support of the plea of infancy, in a suit against the other, or his representatives; and this notwithstanding her husband died intestate; her interest, in such case, being remote and uncertain, and either equal between the parties, or against the party in whose favour her testimony operates.
See Baring v. Reeder, 1 H. & M. 154—176.

This was an action of debt in the district court of King & Queen, on a joint bond executed the 21st of January, 1783, by Carter Braxton and George Braxton, to Anthony Thornton, executor of Walter Taliaferro; by him assigned to Robert Pollard; and by Robert Pollard to Joseph Hilyard, the plaintiff. The suit was against Mary Braxton, administratrix with the will annexed of George Braxton; the declaration charging that "whereas the said George Braxton, in his lifetime, together with Carter Braxton, by his certain writing obligatory, sealed with his seal, &c. acknowledged himself to be held and firmly bound," &c. (proceeding to set forth the assignments, and alleging that) "the said George, in his lifetime, or the defendant, since his death, or any other person for them, or either of them, the said sum of money had not paid,"

(e) Rev. Code, vol. 2, p. 29.

(f) 1 Munf. 179.

***Joint Bond—Death of One Obligor—Effect.**—On this subject, see the principal case cited in Somerville v. Grim, 17 W. Va. 808; *foot-note* to Harrison v. Field, 2 Wash. 136 (containing excerpt from Somerville v. Grim, 17 W. Va. 808); Reynolds v. Hurst, 18 W. Va. 664; *foot-note* to Crawford v. Daigh, 2 Va. Cas. 531 (containing extract from Reynolds v. Hurst, 18 W. Va. 664); *foot-note* to Elliott v. Lyell, 3 Call 208; *foot-note* to Atwell v. Towles, 1 Munf. 175.

See further, monographic note on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

The principal case is cited in a note appended to Hill v. Harvey, 2 Munf. 528, in regard to the appellate practice on reversing a judgment when the declaration is radically defective, but the defendant pleaded to the action. On this subject, see monographic note on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.

(a) Rev. Code, vol. 2, p. 20, c. 29.

(b) 1 Munf. 179.

(c) 1 Wash. 11.

(d) See 2 Fonb. 494.

&c. without containing any averment that Carter Braxton (the joint obligor) was dead, or that no payment had been made by him.

The defendant pleaded that her testator, George Braxton, was an infant within the age of twenty-one years, when the said writing obligatory, in the plaintiff's declaration mentioned, was signed and sealed; on which plea issue was joined.

At the trial the defendant offered in evidence the deposition of Mrs. Elizabeth Braxton, proving that she was mother of George Braxton, lately deceased, and that he was born on the 17th day of September, 1762.

The jury found a special verdict as follows: "We of the jury find for the plaintiff, &c. if the court shall be of opinion that the deposition of Elizabeth Braxton, the widow of Carter Braxton, one of the obligors in the bond in the declaration mentioned, and who died intestate, be inadmissible; if not, we find for the defendant; it
50 "being agreed by the plaintiff and defendant that the presence of the said Elizabeth Braxton is dispensed with."

The district court was of opinion that the law upon this verdict was for the plaintiff. Judgment was, therefore, entered in his favour: whereupon the defendant appealed.

Call, for the appellant made two points;

1. The declaration is substantially defective, in not setting forth what had become of Carter Braxton, the joint obligor. Neither does the special verdict relieve the plaintiff from this difficulty; for it does not appear when Carter Braxton died, whether before George Braxton, or afterwards.

2. Elizabeth Braxton's deposition ought to have been received as evidence. If George Braxton was a surety, it was plain to the commonest apprehension that she stood indifferent; for, whichever way that suit went, her husband's estate was responsible; he being the principal in the bond. If, on the contrary, George Braxton was not merely a surety, but bound for part, Mrs. Braxton swore, in fact, against her own interest; for, by relieving George Braxton entirely, she diminished her own dividend of the estate of Carter Braxton. In this point of view, then, she was the best possible witness. (a)

Peyton Randolph, contra. 1. In the case of Bentley, Executor of Ronald, v. Harmanon, (b) the same objection with that taken by Mr. Call to this declaration was overruled.

2. Mrs. Braxton was not a competent witness. Carter Braxton, her husband, could not have been a witness to prove the infancy of George Braxton at the time of signing the bond; because the record of the judgment against George Braxton would be conclusive evidence in a suit, by him as surety, to recover the money of Carter

Braxton as principal. (c) It may be
51 said that Carter *Braxton's interest was equal either way. But, if he exonerated George Braxton by his testimony, the record would not be evidence against

him, in a suit on behalf of Hilyard. The interest, therefore, does not hang equal.

Again; if Carter Braxton was sued by Hilyard, he might bring forward discounts; but, in defending a suit by George Braxton against him, (founded on a recovery by Hilyard in this suit,) he could not avail himself of any discounts he might have against Hilyard.

Carter Braxton, therefore, was not indifferent between these parties. And, if he could not have been a witness, neither could his executor or administrator. An executor or administrator is identified, in the eye of the law, with the testator, or intestate; being considered as a legal continuation of his life. His liability to costs, also, when defendant, disqualifies him from giving evidence. The case of Goodtitle, Lessee of Fowler, v. Welford, (d) seems to discountenance this idea; but that is counteracted by Rhode's Case, (e) cited Esp. N. P. 705, and, ibid. 704, the doctrine is laid down, as well established, that a *prochein ami* cannot be a witness, because responsible for costs.

But Mrs. Braxton, as widow of Carter Braxton, was clearly inadmissible. He died intestate; and she is entitled to her share of his residuary estate. Her interest, therefore, is stronger than that of an executor; and, being certain and immediate, was sufficient to set her aside. (f)

Williams, on the same side. A witness when examined must be competent as to all questions that may be asked. Carter Braxton must have known the age of his son; he, therefore, practised a fraud on the obligee by passing him as an adult, when he signed the bond. Mrs. Braxton (his wife) ought not to be received to prove her husband guilty of fraud. If she could not be a witness for such purpose during his life, neither could she after his death.
52

"Call, in reply. It did not judicially appear in the case of Bentley v. Harmanon, 1 Wash. 273, that the bond was joint; but it was admitted by the court that the objection would have been a sound one, if the fact upon which it was founded had appeared in the record.

As to the competency of Mrs. Braxton; there is no such rule of law as that a wife can in no case give evidence proving her husband guilty of fraud. But it does not appear that Carter Braxton was guilty of fraud. There is no evidence that he concealed from the obligee the fact of his son's being under age.

Carter Braxton himself might have been a witness in this case; because he was responsible, whether George Braxton was, or not.

Tuesday, March 26th. The JUDGES BROOKE, ROANE, and FLEMING (TUCKER not sitting in the cause) pronounced their opinions.

JUDGE BROOKE. The judgment ought to be reversed on both grounds taken by the counsel for the appellant.

In the first place, the suit: being on a joint bond dated in 1783, the declaration was defective in not setting forth what had

(a) Peake's Ev. 160; 2 East, 458, Birt and others v. Kershaw.

(b) 1 Wash. 273.

(c) Peake's Ev. 144; 1 Esp. N. P. 106; 1 H. & M. 165.

(d) Doug. 184; cited in Esp. N. P. 704.

(e) Leach's Crown Cas. 26.

(f) 1 H. & M. 167.

become of the other obligor. Instead of averring he was dead, it rather showed, on its face, that he was still alive.

In the second place, Elizabeth Braxton's testimony should have been admitted. The verdict does not show clearly how she could be considered as interested. If she had any interest at all, it was in favour of the party who objected to her evidence.

JUDGES ROANE and FLEMING concurred on both points, which (the former observed) had been well settled in this court.

Judgment reversed, and "this court proceeding, &c. is of opinion that the law arising upon the special verdict is for the appellant; therefore, it is further considered that the appellee take nothing," &c.

53 *Hadfield v. Jameson.

April & May, 1809.

Evidence—Foreign Judgment.—What is sufficient evidence to authenticate, in the courts of this country, the sentence or act of a foreign tribunal, or government; after a destruction of such government by revolution or conquest.

Charter-Party—Freight—When Not Recoverable.—

Freight (though, by the terms of a charter-party, payable monthly if required) is not to be recovered, where the voyage was never completed, but the vessel condemned, by a foreign tribunal, in consequence of a fraud attempted by one of the owners, intrusted by the rest with the care of the vessel, though no proof appear of their assenting to such fraudulent act.

Same—Fraud of Partner.—In such case, the copartners are not entitled to compensation for the loss: except against the fraudulent partner.

Same—Same—Liability of Copartners.—It seems, too, that moreover, the copartners collectively (as well as the fraudulent partner individually) are responsible to a third person for a loss occasioned by the fraud.

Foreign Judgment—Effect as Evidence.—Quære, how far is the sentence of a foreign court of admiralty, or other foreign tribunal, to be regarded as evidence by the courts of Virginia? (1)

Attachments—Effect of Endorsement on Subpoena.—Quære, whether an endorsement on a subpoena in

***Evidence—Foreign Judgment.**—See monographic note on "Evidence" appended to Lee v. Tapscott, 2 Wash. 276: monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

(1) For the British doctrines, on this subject, see Hughes v. Cornelius, 2 Show. 232; Bernardi v. Motteux, Doug. 575; Mayne v. Walter, Park. 363; Barzilai v. Lewis, Park. 359; Saloucci v. Woodmas, Park. 362; Saloucci v. Johnson, Park. 364; De Souza v. Ewer, Park. 361; Calvert v. Boville, 7 T. R. 523; Geyer v. Aguilar, 7 T. R. 681; Rich v. Parker, 7 T. R. 706; Christie v. Secretan, 8 T. R. 192; Garrels v. Kingston, 8 T. R. 230; Pollard v. Bell, 8 T. R. 434; Helstrom v. Rhodes, 8 T. R. 444; Bird v. Appleton, 8 T. R. 562; Price v. Bell, 1 East. 668; Kindersley v. Chase, Park. (5th edit.) 363, o; Oddy v. Boville, 2 East. 473; Baring v. Claggett, 3 Bos. & Pull. 201; Lothian v. Henderson, 3 Bos. & Pull. 490; Baring v. The Royal Exchange Assurance Company, 5 East. 99; Bolton v. Gladstone, 5 East. 155; Fisher v. Ogle, 1 Campb. 418, and Donaldson v. Thompson, 1 Campb. 420.

For the doctrine in the federal courts, see Croudson and others v. Leonard, 4 Cranch, 434. For that in New York, see Vandenberg v. The United Insurance Company, 3 Johns. Cas. in error. 217. For the law of Pennsylvania, see the act of March 29, 1800, Laws Penn. vol. 9, p. 132. Quære, ought not congress and the other states in the union to pass similar laws?

The general result of the above cases is, that, in Great Britain, the sentence of a foreign court of admiralty seems to be regarded as conclusive to all purposes. The decision in the supreme court of the United States is to the same effect. In New York and Pennsylvania, the law is now established, that such a sentence (though it binds the property) is not conclusive evidence in any other respect. "except of acts and doings" of the tribunal by which it is pronounced.—Note in Original Edition.

†**Attachments.**—See monographic note on "Attachments" appended to Lancaster v. Wilson, 37 Gratt. 624.

Absent Defendant—Decree against.—No decree should be rendered affecting the interest of an

chancery, without any previous order of court, and not by the clerk, but the plaintiff's attorney can operate as an attachment to stay the effects of one defendant in the hands of another?

Upon an appeal from a decree of the late judge of the superior court of chancery for the Richmond district, affirming a decree of the county court of Fairfax.

54 *The suit was an attachment in chancery, on behalf of Robert Brown Jameson and Samuel Montgomery Brown, styling themselves merchants and traders under the firm of Robert Brown Jameson & Co. against Joseph Hadfield, a defendant residing out of this state, and certain debtors of his garnishees. The claim of the plaintiffs was for a balance appearing on accounts, exhibited and stated by them; which, by an answer, in the name of Hadfield, by James Barry, his agent and attorney, were admitted to be correct, except in two items, of charges, against the said defendant, for the freight and insurance of a ship called the Favourite, chartered by him, on the 10th of March, 1793, of Samuel M. Brown, (one of the plaintiffs,) acting for the owners. To these items the defendant objected; alleging that the ship and cargo were confiscated at Port-au-Prince, in St. Domingo, for a fraud on the revenue laws of that island, attempted by the said Brown, who commanded the ship when chartered, and had charge of her when confiscated.

A farther statement by the reporter seems unnecessary; the steps taken in both the courts below, with the merits of the case as presented by the record, being fully set forth in the following opinions.

The cause was argued, at great length, by Call, Warden and Wirt, for the appellant, and Wickham and Randolph, for Jameson, the only appellee; (S. M. Brown having departed this life before the decree of the superior court of chancery;) but from the views taken of the case by the judges, the numerous arguments of counsel are pretermitted; many of the points made at the bar being not determined by the court, and such as were determined being sufficiently discussed in the opinions delivered.

Tuesday, March 12, 1811. The judges pronounced their opinions.

55 *JUDGE TUCKER. In this case, which has occupied six days of a former term in the argument, a great variety of points have been discussed.

Robert Brown Jameson, and Samuel Montgomery Brown, in April, 1795, sued out a subpoena in chancery from the county court of Fairfax, against the appellant Hadfield, Josiah Watson, and Jonah Thompson, on which the following endorsement appears to have been made by the complainants' attorney: "Memorandum, to stay the effects and debts in the hands of the defendants, Josiah and Jonah, belonging and due to the defendant Joseph, to satisfy a debt due from him to the complainants."

absent defendant, unless it appear (if he be not otherwise brought before the court), that he has been regularly proceeded against by order of publication duly published in a newspaper and posted at the front door of the courthouse. Craig v. Sebrell, 9 Gratt. 138, and McCoy v. McCoy, 9 W. Va. 444, both citing the principal case as authority. See generally, monographic note on "Decrees" appended to Evans v. Spurgin, 11 Gratt. 615.

And it has been objected, (and I think on good grounds,) that this endorsement, not made by order of court, or by an officer thereof, but by the complainants' attorney, could not operate as an attachment, under the act of assembly, (a) to stay the effects of one of the defendants in the hands of any other. (1) The case of *Williams v. Williams* (b) furnishes the principle upon which I found my opinion. In that case the bank of England was made a party defendant; and the counsel for the plaintiff said that, in practice, the subpoena being served, operated upon the bank as an injunction, and prevented a transfer; which they never would permit after service of the subpoena. But the master of the rolls replied, that although this was so in practice, it was not so in law; as a subpoena served would not be an answer to an action for not permitting a transfer, though an injunction would. The reason appears to me to be the same in the case of an attachment against the effects of a defendant in foreign parts.

56 I mention this for the sake *of the practice; for in the present case the defendants appeared and answered; which removes any objection to the process, on their parts. Mr. Warden contended that none but citizens of Virginia were entitled to the benefit of this course of proceeding against absent debtors, or defendants. The fourth article of the constitution of the United States, providing that the citizens of each state shall be entitled to all the privileges of citizens of the several states, furnishes a complete answer, so far as relates to citizens of the United States.

The subpoena having been returned executed on Josiah Watson and Jonah Thompson, at a court held for the same county on the 18th of June, 1795, "came the complainants, by their attorney; and thereupon Jonah Thompson in open court became security that the defendant, Joseph Hadfield, shall perform the decree of the court, if against him; and, on the motion of the said defendant, Joseph Hadfield, by his attorney, the attachment is discharged, as to the effects in the hands of the other defendants." At this time there was no bill filed, the bill appearing to be filed at the September rules thereafter. And, on the same day of filing the bill, an attachment for failing to answer the complainants' bill was ordered against all the defendants, which issued and bears date the 29th of the same month. Here let it be observed that the county court act (c) allows a defendant until the next rules, after his appearance, and bill filed, to put in his answer. The attachment was therefore prematurely awarded. The attachment being returned not executed on Hadfield; on the 22d of March, 1796, at a court held for the same county, came the complainants, by their at-

torney, when the following suggestion appears upon the record. "The defendant, Joseph Hadfield, not having entered his appearance, and given security according to the act of assembly, and the rules of this court, and it appearing to the satisfaction of the court that he is not an inhabitant of this country, an order or publication is awarded against him, and an order to 57 stay his effects in *the hands of the other defendants" is made; as if nothing had been done at the former court, held in June. The record of which is thus expressly contradicted by this suggestion on the part of the complainants.

Here let it be observed, that after Hadfield had appeared and given security, as required by the act of assembly, the cause ought to have proceeded as if the subpoena against him had in the first instance been returned executed. Consequently, the order of publication against him as an absent defendant, in the order for staying his effects in the hands of the other defendants, (after he had given security to perform the decree,) was irregular and erroneous. The complainants, after the time allowed by law for him to put in his answer, might have taken out an attachment for want of answer, and if it had not been executed, an attachment with proclamations might have issued; upon the return of which, if no answer were put in, the bill might have been taken for confessed, and the matter thereof decreed.

At the March rules, 1796, which was, consequently, posterior to the last-mentioned order made in court, it was ordered that an attachment with proclamations be issued against Hadfield. But the clerk certifies that the said attachment does not appear among the papers in the cause. Neither does the order of publication appear to have been actually complied with. The cause was continued from time to time, at the rules, until the 18th of July, 1797, when, the defendants having failed to file their answer, it was ordered that the complainants' bill be taken for confessed.

The cause was set for hearing in March, 1799, and was heard in June following: when an interlocutory decree was entered, by the terms of which, the complainants, within a limited time, were to give bond and security for repayment of the money decreed them, in case the said Joseph Hadfield should, within seven years, put 58 *in his answer, and make it appear that he is entitled to restoration.

Thompson having appeared and put in his answer, on the 19th of November, 1799, a final decree (in which it is suggested "that it having appeared to the satisfaction of the court, that the complainants' bill hath been duly taken for confessed") was entered. How, or when it had been made so to appear to the court, is not to be discovered from the face of the record.

From this abstract of the proceedings in the county court, the first question which presents itself is, whether the cause was ripe for a hearing and decree against the defendant Hadfield.

Hadfield having appeared in court by his attorney, and given the security required by law, the proceedings against him as a

(a) Laws of Virginia, edit. 1794. c. 78.

(1) Note by the Reporter. See the case of *Smith v. Jenny et al.* 4 H. & M. 441. referring to that of *McKim v. Fulton* and others. (MS.) In which it was decided that an endorsement on the subpoena, by the clerk of the court, (though without any previous order,) operated as sufficient notice, binding the home defendants not to part with the debts or effects of the absent defendants, in their hands, without leave of the court. See also *ibid.* 361.

(b) 3 Bro. Ch. Cas. 87. 88.

Rev. Code, vol. 1, c. 67, s. 44.

absent defendant were wholly at an end: every thing done against him thereafter in that character was erroneous: if the order of publication had been duly published and returned, (that not being the proper course which the law prescribes in such a case,) it would not have justified a decree. But if it had been the proper course, not having been actually published, the court ought not to have proceeded to pronounce a decree, as was decided in the case of *Hunter v. Spottawood*. (a)

On the other hand, the attachment (for want of an answer) ordered on the very day the bill was filed, was an irregularity which, possibly, runs through the subsequent proceedings; but, whether it doth or not, the attachment with proclamations, afterwards awarded, having never issued or been executed, (as far as appears from the record,) the bill against Hadfield ought not to have been taken for confessed upon that ground.

Independent of these objections, the decree appears to be erroneous in another respect. Hadfield having appeared and given security to perform the decree, the attachment was discharged (as already noticed)

59 as to his *effects in the hands of Watson and Thompson; notwithstanding which, the sum of 498l. 15s. 3d. sterling, alleged to be due from Thompson to him, is decreed to be paid by Thompson as his debtor; whereas, no decree (after security given, and the attachment discharged) ought to have been made as to any money he might have in Thompson's hands; the decree ought to have been against Hadfield alone: if he did not perform it, then the complainant, and not till then, was entitled to call upon the security for the performance of it, or damages for non-performance.

The decree of the county court was, therefore, clearly erroneous, and ought to have been reversed by the chancellor.

I shall now proceed to examine the proceedings in the superior court of chancery; first, with a view to the regularity and correctness of the same.

On a petition of appeal being presented to the chancellor of the Richmond district, the same was allowed, December 19, 1802, upon terms (as I understand the record) that the petitioner Hadfield should consent to answer the bill within four months, and also consent, at the term approaching, to a reference of the accounts between the parties. In June, 1803, the order of reference was made in court, by consent of parties. In page 74, of the record we find the answer of Joseph Hadfield, by James Barry, his agent, to a bill exhibited against him and others, in the county court of Fairfax, which appears to have been sworn to by Barry, September 15, 1802; not only after the final decree in the county court, but after the petition of appeal, which was first conditionally allowed by the chancellor on the 12th of April, 1802. And the very next entry in the record is, that at rules held in the office of the said court, (the superior court of chancery, I presume, as the cause was then moved thither,) in the month of March, 1803, Robert Brown Jameson & Co.

by counsel, replied, generally, to the foregoing answer *of Joseph Hadfield, by James Barry, his agent; and commissions were awarded the parties to take depositions; and, at rules held in February, 1804, the cause was set for hearing, on the motion of Hadfield by counsel. "And at a superior court of chancery held at the capitol, March 7, 1804, this cause, on appeal from a decree of the county court of Fairfax, was heard last term, on the transcript of the record of the county court, and on master commissioner Keith's report, in pursuance of this court's order, with the objections stated, and documents and exhibits mentioned therein, &c. On consideration whereof, the court pronounced the decree of the county court to be correct, and affirmed the same, with costs against the appellant."

I conceive it to be an undeniable principle, that whenever a cause is brought before a superior court by an appeal, that court is to proceed to consider the cause as the record of the court (whose judgment or decree is sought to be reversed) presents the same for consideration; and to affirm or reverse the same accordingly, previous to any steps whatsoever to be taken in the appellate court, as if the suit had been originally commenced therein. That the chancellor, after reversing the decree of an inferior court, has a right to retain the cause, and thereafter proceed therein as if it were an original suit, is unquestionable from the authority of this court in *Ambler v. Wyld*. (b) But it would lead to the most mischievous consequences, if an appellate court at common law, or in chancery, antecedent to pronouncing a judgment or decree of affirmance, in cases of appeal, were to admit proceedings to be had, which might cure the errors of the inferior court, committed at the time of pronouncing the original decree. In the present case, according to my view of it, the proceedings and decree of the county court were palpably erroneous, upon whatever ground the same may be examined, according to the record in that court. The party grieved

61 by that decree *was compelled to give security in 15,000 dollars before he could obtain his petition of appeal to be allowed. His security probably consulted counsel whether he could be brought in danger of losing so large a sum, by the affirmance of the decree, upon the proceedings had in the county court. He might have been advised (and well advised) that there could be no danger that the decree would be affirmed. What, then, is his situation, if other evidence and other proceedings be had in the appellate court, to cure the errors below, and furnish a ground for an affirmance? The case speaks too plainly for itself to require any further comment. I have therefore no doubt, upon this point, that the chancellor's decree, affirming the decree of the county court, is erroneous, and ought to be so far reversed.

We are now to consider the cause upon the merits, so far as the evidence before us will permit us to decide upon them.

Samuel Montgomery Brown, one of the original complainants in this suit, a part-

(a) 1 Wash. 140.

(b) 2 Wash. 42.

ner in a mercantile house, with the other complainant, (now survivor,) Robert Brown Jameson, and, with that partner, a part owner of the ship *Favourite*, an American ship, and master of the ship, and agent for the owners of the ship generally, entered into a charter-party for the ship, in England, with the defendant Hadfield, in behalf of two French gentlemen, to proceed from England to Philadelphia, to take in a cargo of flour on account of Hadfield; from thence to Port-au-Prince to take in a cargo of sugar, and from thence to proceed to Falmouth, where she is to be subject to the order of Hadfield, and proceed to a market, provided it be without the straits and the Baltic, and to a port where there is a sufficiency of water for the ship to lay in safety; with the usual covenants as to seaworthiness, &c.: and, in consideration of the aforesaid agreement, "on the part of Samuel Montgomery Brown, in behalf of the owners, Hadfield, in behalf of the other parties,

covenanted to deliver the cargoes
62 alongside the "ship," and "to pay or cause to be paid to the order of Samuel M. Brown, in behalf of the owners, monthly, if required, and for every month during the time the ship shall be employed in the prosecution of the voyage therein before mentioned, and until she is finally discharged at the port of discharge, freight at a certain rate: and that, although the ship may be detained by embargo, or restraint of princes or states, the freight shall be paid, as if no such detention had happened. And the parties bind themselves to the performance of the preceding covenants, their executors, administrators and assigns;" "that is to say, the said Samuel M. Brown, in behalf of the owners of the ship and her apparel, to the affreighter; and Joseph Hadfield, in behalf of the French gentlemen, and the respective cargoes, to the owners." The ship proceeded to Philadelphia; and from thence, with a cargo of flour, to Port-au-Prince. An insurance having been ordered by the owners, Hadfield, on the 2d of August, 1793, writes S. M. Brown thus: "I have insured the *Favourite*, and cargo, to all ports and places for one year, at 15 guineas per cent. therefore make yourself easy."

In a succeeding letter to S. M. Brown, October 2, 1793, he says, "I trust you will have sent the proceeds of the *Favourite's* adventure to New-York or Baltimore, or perhaps to Europe; in any case rather than to the house of Clough & Co." From this letter it would appear that the proceeds of the flour were not to be applied to the purchase of the sugars, which were to constitute the return cargo of the *Favourite* from Port-au-Prince to Falmouth.

Several other extracts of letters from Hadfield to S. M. Brown, in the record of the county court mentioned as exhibits annexed to the bill, show an unlimited confidence to have been placed by Hadfield in Brown. In a letter, annexed to commissioner Keith's report, March 11, 1793, he says, "I wish you would buy Mr.
63 Watson's "share, and hold it for my account, by which you will have the 'possession of the ship *Favourite* entirely."

And the remaining letters annexed to that report, (none of which are later than the 2d of October, 1793,) express the same sentiments of unlimited confidence in Brown. An extract of a letter dated London, November 15, 1793, in which Hadfield mentions that he had heard of Brown's arrival at Port-au-Prince, "and of his unfortunate prospects," with a trust in his friendship and exertions, appears to conclude the correspondence between them.

The bill which was filed in the county court, and to which no subsequent amendment was made, charges, as the ground of the complainants' demand against Hadfield, "that he stands justly indebted to them in the sum of 860l. 12s. 1d. sterling, as will appear by the accounts thereto annexed," (accounts not rendered to them by Hadfield, but stated by themselves against him, and, therefore, requiring proof in support of every article,) "and also by the charter-party, and letters above noticed, which are particularly referred to, and prayed to be made a part of the bill." By what evidence the items of freight, amounting to 2,843l. 1s. 1d. and insurance, to 2,200l. sterling, were proved, or established before the county court, nowhere appears from the record. The deposition of Josiah Watson, taken before the commissioner, states that, to the best of his recollection, the ship was directed to be insured at 2,200l. sterling: and James Lawason swears that he knew the ship, and that he considers her to have been worth 3,000l. Virginia currency. Watson likewise deposes, that the *Favourite* did proceed upon her voyage, pursuant to the charter-party, and arrived at Port-au-Prince, where she was seized by the government and condemned, about the 17th of July, 1794; that he was a part owner of the ship, and, in the settlement of accounts between himself and Hadfield, "with his agent in this country, his part of the freight from London to Port-au-

64 Prince was never controverted, *but was agreed to be allowed;" that Benjamin Moody was captain of the *Favourite* at Port-au-Prince; and, he believes, that he went out as such from Philadelphia. A certificate from an insurance broker at Baltimore, states, that policies to the amount of 2,812l. 10s. Maryland currency, made on the ship *Favourite* for six months, and another for 937l. 10s. like money, for the like period, from June 21, 1793, had been cancelled, on satisfactory proof that an insurance had been effected in England.

If the chancellor, disregarding the answer of Hadfield, which I shall notice hereafter, proceeded to pronounce his decree from the evidence arising out of these depositions, which must be regarded as the basis of the commissioner's report, predicated upon the liability of Hadfield, both for freight, pro rata, and insurance, I think the evidence insufficient; because the *Favourite* being an American ship, and in the port of a friend and (at that time) an ally of the government, under whose authority it is stated that she was seized and condemned, the presumption was, that she was lawfully seized and lawfully condemned. At least no presumption to the contrary

could be admitted under such circumstances. The chancellor, therefore, ought to have suspended pronouncing any decree until further proof, as to this point. It mattered not whether Brown, or Moody, or any other person, was master of the ship at the time of the seizure and condemnation. If the master be not a part owner of the ship, he is the confidential servant and agent of the owners at large; if a part owner, he is so of his co-partners. (a) There is no case in law, in which the maxim respondeat superior more generally holds, than between the freighters and the owners of ships, in respect to the conduct of the master. For if any injury or loss happen to the ship or cargo, by reason of his negligence, or misconduct, the merchant may elect to sue him, or the owners, to make good the damages. (b) If the naked

65 *fact of a seizure and condemnation of a ship, by the government, in the port of a friend and ally, could furnish any ground for a presumption, it was a presumption unfavourable to the master and his employers. And if Brown be presumed to have been the cause of the seizure, as the agent of Hadfield, his delinquency must have been at least equal in his character of part owner of the ship. And it would be a new doctrine to me for a court of equity to establish, that he who hath occasioned a loss, both to another and himself, shall be recompensed by the other, for the loss to himself, occasioned by his own default or misconduct.

But if the case be considered as standing in any way connected with Hadfield's answer; (which, I have already noticed, was filed at the rules, in the superior court of chancery, without any exception taken thereto, and replied to generally; which put the matter contained in the answer in issue between the parties; commissions to take depositions being at the same time awarded, though none were taken;) the matter contained in the answer, if true, amounted, in my apprehension, to a full and complete defence; for it charges the loss of the ship, and of the defendant's property on board the same, to the misconduct of Samuel M. Brown, one of the complainants in the bill, and one of the part owners of the ship, then upon the spot. The documents annexed to the answer, if they did not amount to full and complete proof of the matters therein alleged, for want of due solemnities in the authentication thereof, at least furnished strong presumption in favour of the verity of the answer. The deposition of Josiah Watson, the complainants' own witness, went to corroborate this presumption; and the silence of Samuel M. Brown, to whose fraud and misconduct the loss of the ship, and cargo, are positively and expressly imputed, gives to these presumptions a

66 strength little short of what is *deemed in law full proof. If, under this view of the proceedings in the cause, and the evidence and presumptions, authorized by these circumstances, united, the cause was ripe for a decree, I should draw a conclusion very different from that

of the chancellor, in his decree. Robert B. Jameson, and Samuel M. Brown, the original complainants in this suit, were general partners in trade, a consequence of which is, that they are to take share in the profits, and bear a proportion of the loss, sustained by them in the course of their partnership dealings. Where an individual deals with partners in trade, he goes upon the credit of the whole, considering the act of one, in a joint concern, as the act of the whole copartnership firm, throughout the ordinary course of general trade. (c) And the law is positive with respect even to secret partners, that, when discovered, they shall be liable to the whole extent. (d) If one partner be guilty of trading on the joint account in contraband goods, or in any manner prohibited by law, the rest of the partners must be considered, more or less, implicated in the transaction. (e) And a secret partner, (though a clergyman, who is prohibited from trading, by act of parliament, under a penalty,) has been held liable to become a bankrupt, in respect to the partnership concern. (f) And where there are joint partners in any trade or business, (the books are kept in the name of the whole, and the stock being joint,) it is understood by merchants, that, in every occurrence between the partnership and third persons, the company is considered as a single person; therefore the mode of traffic must in all respects be considered the same between partners and third persons, as with an individual merchant and the world. (g) The complainants, R. B. Jameson and S. M. Brown, in respect to their joint share in this ship, are to be considered as one and the same person, and, therefore, whatever act, lawful, or unlawful, hath been done by S. M.

67 Brown, in respect to the ship, is to be considered as if he *were the sole owner of the share held by Jameson and himself in partnership. And if, by his fraud or misconduct, or that of the master, who was subject to and must be presumed to have acted under his immediate orders, as being present, and superintending the business of the ship, at Port-au-Prince, the ship with her cargo became forfeited and lost, under the laws of the country where she then was; the partnership of Jameson and Brown became equally liable to Hadfield, for the loss of the cargo on board, as Brown himself, if sole owner of their part, could have been. And, upon the same principle, both freighters and underwriters would be discharged from all obligation to pay the freight that might otherwise have accrued, upon the completion of the voyage, and the insurance which would have been demandable if the ship had been lost by any of the risks contemplated in the policy. On the other hand, Brown is not only answerable to his partner Jameson, but to the other part owners of the ship, both for the freight and insurance, thus lost by his fraud and miscon-

(c) Watson on Partn. 45. 62. 96.

(d) 1 Hen. Bl. 48; 2 W. Bl. 1000, 1001; Doug. 371.

(e) Watson. 164; 3 T. R. 454. Biggs v. Lawrence: Watson. 174. 175.

(f) 1 Atk. 198, 199. Meymot's Case.

(g) Watson. 239.

(a) Abbott on Shipping, 83 (marg.)

(b) Ibid. 123 (marg.)

duct, if such be the fact.(a) And this upon the general principle in law, that, if one tenant in common of a personal chattel destroy the common property, he is liable to be sued by his companion for the loss.

(b) Thus, where one part owner of a ship had forcibly taken it out of the possession of another, secreted it, and changed its name; and the ship afterwards came into possession of a third person, who sent it to Antigua, where it was sunk and lost, the chief justice, Lord King, left it to the jury to say, under all the circumstances of the case, whether this was not a destruction of the ship, by means of the defendant; and they finding it to be so, the plaintiff recovered; and the court of common pleas, afterwards, approved of the direction.(c) But, if the loss of the ship were in fact owing to the misconduct of Moody alone, (the master spoken of by Watson,) the only difference would be, that, unless such misconduct should

68 amount to barratry, he would be "the person liable to repair the owners their damages sustained in the loss of freight and insurance by his misconduct.(d) On these grounds, I differ from the hypothetical reasoning of the chancellor in his decree, wherein he says, "That if Brown were responsible for the loss of the ship, and the product of its cargo, he was privately responsible, so that the surviving partner was not bound to make reparation, unless he appear to be a debtor to Brown upon a settlement of their private accounts."

Neither can I assent to his proposition, that, from the length of time without any tidings of the ship, legally attested, the presumption is sufficient evidence of the loss. There was not the smallest particle of foundation for presumption in this case. The complainant, Brown, was himself with the ship when she was lost. If he were not the cause of that loss, as the defendant alleges, why did he not produce such proof of the loss (as undoubtedly was in his power) as might remove all doubts and conjectures on the subject? Without proof of the loss he could not be entitled to recover the insurance; and without proof that the loss was occasioned by some event insured against, and within the scope of the policy, his right to recover would be precisely the same as without proof of the actual loss. Presumption of loss is only admitted on the ground of shipwreck, or other danger of seas; but never where the last tidings of the ship point to a more immediate cause of loss.(e) Equally unsound, in my opinion, is that part of the decree, which pronounces that freight was due when the ship arrived at Port-au-Prince, if thereby the chancellor meant (as he appears to have done) that, being payable monthly, if required, it could not be refused, if the voyage were afterwards defeated; or reclaimed, if paid monthly, according to stipulation. From the best consideration I have been able to give to

the charter-party, it appears to me to be for one entire voyage: the proceeds of the cargo of flour, taken in at Philadelphia, were invested in "coffee at

69 Port-au-Prince: what benefit could accrue, to the owner of the cargo, by the delivery of the flour at Port-au-Prince, if the proceeds thereof should be lost before the ship arrived at her final port of discharge? None whatever. The profits, both of the shipowners and the owners of the cargo, were to depend upon the safe arrival of the ship at her port of discharge. And, although the freighter should have advanced the whole freight, for a year, or more, before the ship sailed from England, yet, if she were lost, I am of opinion that, upon this charter-party, it might be recovered back. Had I any doubt of this, upon principle, (which I have not,) the decision of Lord Ellenborough, in *Mashiter v. Buller*,(f) would remove it.(g)

With respect to the insurance; the law appears to be settled that in all cases of actual fraud, on the part of the assured, or his agent, the underwriter is not only not liable, but may retain the premium he has received;(h) nor can the insured recover any loss, which is not a direct and immediate consequence of the peril insured against;(i) and, therefore, although an underwriter is liable for all damage arising to the owner of the ship, or goods, from the restraint or detention of princes, &c. (which are ordinarily acts of power or force,) yet that rule shall not be extended to cases, where the insured shall navigate against the laws of the country, in the ports of which he may chance to be detained, or to cases where there shall be a seizure for non-payment of customs.(k) Neither is the loss (according to the defence set up by the answer) attributable to the barratry of the master. For though barratry may be committed by the master of a ship smuggling on his own account, without the privity of the owners;(l) yet it appears, that if the act of the master be done with a view to the benefit of his owners, or with their privity or consent, and not to advance his own private interest, it is not barratry; and, therefore, not within

70 the terms of the policy, upon "that ground;(m) and, according to the words of Lord Mansfield, in the case of *Vallejo v. Wheeler*,(n) nothing is so clear as that, if the owner of a ship insure, and bring an action on the policy, he can never set up, as a crime, a thing done by his own direction and consent. The same doctrine was recognised, and repeated, by the same judge, in *Nutt v. Bourdieu*,(o) who said, "Barratry is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the owners of the ship. An owner of a ship cannot commit barratry. He may make

(a) Watson, 105.

(b) Co. Litt. 200.

(c) Watson, 61, 62.

(d) Abbott, 105, 123; 1 T. R. 253; Park on Ins. 34.

(e) 2 Marsh. 418.

(f) 1 Campb. Rep. 84.

(g) Abbott, 179, 20, 8, 2 265, 270. (marg.) S. P.

(h) Park on Ins. 218.

(i) Ibid. 55.

(k) 2 Vern. 176; Park, 80.

(l) Lockyer v. Offey, 1 T. R. 253; Park on Ins. 31.

(m) Park, 84; Cowp. 154; 2 Stra. 1173, 1264.

(n) Cowp. 143.

(o) 1 T. R. 330.

himself liable by his fraudulent conduct to the owners of the goods, but not as for barratry. And besides, barratry cannot be committed against the owner with his consent; for though the owner may become liable for a civil loss, by the misbehaviour of the captain, if he consents, yet that is not barratry. Barratry must partake of something criminal, and must be committed against the owner, by the master, or mariners." And it seems also clear, that if the owner be also the master of the ship, any act which in another master would be construed barratry, cannot be so in him; because such doctrine would militate against an acknowledged rule in criminal law, that no man shall be allowed to derive a benefit from his own crime, which he would do, were he to recover against the insurer for a loss occasioned by his own act. (a)

The evidence of the seizure and condemnation of the ship, for a fraud on the revenue laws of St. Domingo, as annexed to the answer of the defendant, remains to be considered.

In the case of *Young v. Gregory*, (b) in which the district court reversed the judgment of the county court, because the latter admitted letters and depositions to go in evidence to the jury to prove that an attachment had been levied on the plaintiff's property in a foreign country; and

because the attachment in the proceedings mentioned, *or an authenticated copy thereof, was the best evidence, and ought to have been produced; three of the judges of this court concurred in the opinion that the evidence was admissible, as it related to proceedings in a foreign country, which oftentimes can be proved in no other way than by depositions, and testimony dehors the proceedings; of which it is not always in the power of the party to procure copies. The actual situation of the island of St. Domingo, during the last sixteen or seventeen years, is too generally known, to create much doubt of the applicability of the reasons, just mentioned, to the proceedings in that country. The history produced by Mr. Wirt cannot be doubted; (c) and the evidence arising from the certificate of attestation by Sir Adam Williamson, governor and commander in chief of the British possessions in Hispaniola, shows that the possession of the place, and the government thereof, had passed from the dominion of France to that of England, in the short period of eighteen months from the time of the alleged seizure and condemnation of the *Favourite*, at that place. The certificate is probably in the usual form adopted by the British governor, at that period; and it would be too much to say, it is not duly authenticated, or worthy of credit, because, under such circumstances, it is certified only under the governor's seal of arms, instead of a colonial, or public seal. The revolutionary history of our own country shows, that, at a particular period, commissioners of every kind, though by the constitution required to be made with the seal of the commonwealth annexed, were,

of necessity, authorized to be granted, and declared efficacious and valid to all intents and purposes, without that symbol of the public authority. (d)

I think, therefore, the certificate sufficiently authentic. Brown, being on the spot when the seizure and condemnation took place, might, if so disposed, have obtained,

I presume, a copy of the proceedings, 72 *authenticated according to the ordinary forms of the French colonies.

He having neglected to do so; or not choosing to produce it, if he had one, I think the court well warranted in considering this as the best evidence to be had in the cause.

The first document, in point of time, relative to the seizure of the ship, is contained in the copy of a letter addressed by S. M. Brown, calling himself owner of the ship, to the civil ordonnateur of St. Domingo, (an officer whose particular functions I am unacquainted with,) dated December 30, 1783; in which he endeavours to exculpate himself from any intention to commit a fraud. The condemnation of the ship does not appear to have taken place until the 16th of January following. Of the ordinary course of proceedings in such cases, we have no information, and cannot possibly form either a judgment, or conjecture.

The sentence of confiscation and condemnation was pronounced by commissioners, calling themselves "The intermediary commission, exercising, provisionally, all the functions appertaining to colonial assemblies," (of whose functions we have no information,) "being moreover the only administrative body of the colony, in virtue of legal powers granted to them by the delegates of the republic, having consequently the right of investigating frauds or infractions of law of any sort, and esteeming it their first duty to administer impartial justice, without respect of persons;" it proceeds to state the allegations of fraud, the evidence, and the penalty prescribed by law; and concludes with declaring the confiscation of the ship, together with all the merchandise on board; condemns the captain to the fine provided by a certain arret; and directs the immediate execution of that sentence.

Were there nothing more in the record, it would be difficult to refuse to this intermediary commission, as it styles itself, the character of a judicial tribunal; or to

73 *disapprove of the sentence pronounced, upon the evidence therein stated. And yet, on the very same day that this sentence was ratified, after being read over and signed on the succeeding day to that on which it was first pronounced, we find the commission, after due deliberation, resolve to address a letter immediately to the civil commissary of the French republic, in which, speaking of their body, they say, "The commission, not being a judiciary tribunal, where parties may plead their causes pro and con, but an administrative tribunal, which pronounces on the representation of the ordonnateur, and a review of the documents, expect your orders, directing them how to act in this

(a) Park, 94, c. 5.

(b) 3 Call, 446.

(c) Edwards's History of the West Indies.

(d) Laws of Virginia, October, 1776, c. 18. See Ch. Rev. p. 43.

occurrence," &c. After this, I find myself utterly at a loss in what light to consider this tribunal, and its proceedings. The reply of the civil commissioner leaves no room for any favourable construction either of the power and functions of the intermediary commission, or of its course of proceeding, as the means of administering impartial justice.

How, then, are this court to decide upon the question, as between the owners of the ship, and the affreighters, who are involved in the same common loss, and, apparently, upon the same common ground; or, as between the assured and the underwriters? I can only answer, that both were questions properly cognisable in a court of law, and not in a court of equity. The liability of the freighters, to recover freight pro rata itineris, or of the shipowners, to compensate them in damages for the loss of the cargo, through the fraud or misconduct of a part owner, or of the master, were questions exclusively proper for a court of law; as was the liability of the underwriters to pay, or not to pay, the insurance; and retain, or demand, the premium; according to circumstances. Why did the owners of the ship withdraw their insurance made in Baltimore, and direct an insurance to be made in England? Certainly for

74 some cogent reasons. Were they not bound, according to the principles of universal law, to follow the person of the defendant, if still residing where the contract was made? Why did they not? Perhaps, because, according to the laws of the country, where both the charter-party and the insurance were made, there was something in the one or the other, which avoided the contract from the beginning. Be that as it may, I think the plaintiffs were bound to establish their right, both to the freight and the insurance, before they could be entitled to a decree for either, in a court of equity here. Let it be remembered that, if Hadfield actually caused an insurance to be made, (as he alleges in his letter of the 2d August, 1793,) he could not be made liable to the owners of the ship for it, until a recovery against the underwriters; and in an action against them, the owners would never have recovered, if the ship was lost by their own misconduct, or that of their agent. This was a question purely legal. If they seek to charge Hadfield, as an underwriter, for having, in fact, neglected to make an insurance, notwithstanding his assertion to the contrary, the question whether he was guilty of such neglect, is also purely legal, and the recompense for it is wholly in damages; besides, in such an action, Hadfield would be entitled to the benefit of every defence which the underwriters, if the suit had been brought against them, could have made. So that his defence was doubly proper in a court of law. The law, which gives to a party a right to attach the property of another in the hands of his debtor in Virginia, certainly was not meant to draw the decision of all litigated questions, proper for the courts of law, in the country where the defendant resides, exclusively to decide, to the final and exclusive decision of our courts of equity. This very case furnishes

the strongest reason against such a construction; for the bill contains not any proper allegation, and the
75 *whole course of proceedings no evidence, sufficient for a court of equity to decide between the parties.

My opinion, therefore, is, that if the cause had been ripe for a decree in the county court, that court ought only to have retained it for a year, or such further period as might have been necessary, to give the plaintiffs an opportunity of prosecuting their action at law upon the charter-party, and policy of insurance, respectively; and, in case they should establish their claim, against the defendant Hadfield, to both, or either, and it should be made appear that the claim so established remained unsatisfied, then the court ought to have pronounced a decree for the amount of the same; to be levied upon the effects attached in the hands of the other defendants, or paid by the security for performing the decree, as either course might be adapted to the nature of the case. And I am of opinion, that both decrees be reversed with costs; and that the cause ought now to be remanded to the superior court of chancery, with directions to retain the same for a year, or such further period as may be necessary for the same course to be now pursued by the parties, if they think proper. But, should this course not be approved of, I think the court of chancery ought to direct an issue or issues to be made up, with respect to all the material facts in the cause, and direct a trial thereof to be had by a jury of merchants; and, if such jury shall be of opinion that the plaintiffs are entitled to recover any damages, that they assess the same, and that the verdict be returned, &c.; or, (if the majority of the court are of a different opinion,) that the plaintiff's bill be dismissed without prejudice to any future action that he may be advised to bring upon the charter-party or policy of insurance. (1) In the view
76 I have taken of this *cause, I have unavoidably pretermitted several important points, which would require much time to consider, and which I pass over only for that reason.

JUDGE ROANE. Upon the merits of

(1) May 25, 1809. JUDGE TUCKER submitted the following question to the court, as proper to be argued by counsel, and considered by the court, in the discussion of this cause: "Whether, in cases of attachment against the effects of absent defendants, if a question purely legal arise upon a contract of charter-party, or policy of insurance, entered into in a foreign country, where the defendant still resides, and where the proper remedy is by an action sounding altogether in damages, it be proper for the court (in which the attachment is levied, or security is given to perform the decree) only to retain the cause, until the complainant shall have liquidated his demand by a settlement, or established the same by a judgment against the defendant in the country where he resides; or whether it be competent to the court, in which the attachment is levied, to proceed to the trial and determination of every such question, whether of law, or fact, and to ascertain the plaintiff's damages, if entitled to any? And, in the latter case, whether the trial ought to be had, according to the course of proceeding in courts of equity; or whether the court ought to direct an issue to be made up at law, and a trial thereof to be had by a jury for that purpose to be empanelled?"

JUDGE ROANE and FLEMING took time to consider this proposition; but gave no opinion upon it.—Note in Original Edition.

this case, I concur in reversing the decree in question; upon the ground that the sentence in St. Domingo, stated in the record, was authentic and admissible evidence, for the reasons which have been assigned; and because it appears that the loss of the vessel and cargo was produced by the act of S. M. Brown, who was, at the time, a part owner of the ship, and a partner of the present appellee. As that act, if it had succeeded, would have produced a profit to the company of which he was a partner, so, in the event which has happened, they should abide by the loss. This is especially the case, as the present appellee asks the aid of a court of equity. It would be highly unjust to add to the calamity brought upon the appellant by the act of the appellee by his partner, in the loss of his cargo, by decreeing him to pay the freight and insurance of the vessel. If those items are stricken out of the appellee's account, or even S. M. Brown's proportion thereof, the balance will be in favour of the appellant:

77 *the consequence of which is, that, in my opinion, both decrees ought to be reversed, and the bill dismissed.

JUDGE FLEMING. Without a critical examination of the irregularity of the proceedings in this case, (as they have been particularly noticed by Judge Tucker; and as the appellant, in his answer, by his agent James Barry, took only a slight exception to them, but admitted the accounts filed by the plaintiffs to be correctly stated, except as to two items, to wit, the charge for the freight of the ship *Favourite*, from the 10th of March, 1793, until the 4th of January, 1794, and the charge for the insurance of the said ship,) I proceed to consider the cause on its merits, which seem to place the appellant on still firmer ground. And the first and principal question is, whether a copy of the proceedings, against the ship *Favourite*, in the island of St. Domingo, and referred to in the appellant's answer, be authentic and admissible evidence? and, if so, 2dly, what effect it ought to have on the cause.

With respect to the first point; the late Chancellor Wythe, in his decree, the 7th of March, 1804, declared that evidence not authentic: but, notwithstanding the great respect I have, and ever had, for the opinions of that venerable, learned and upright judge, I cannot but differ with him on the present occasion; 1st. Because the admission of them is agreeable to the spirit and principles of our act of assembly of 1792, c. 91.(a) Although they may not be attended, precisely, with all the formalities required by the said act, they are certified under the hand and seal of Adam Williamson, then governor, &c. of that part of the island of St. Domingo, where those transactions had taken place under the French government, (and which had fallen into the hands of the British by conquest,) and are attested by William Shaw, the said

78 British governor's secretary; *which to me appears the best evidence of their authenticity, that the nature and circumstances of the case would admit of.

2. Because we have a precedent of this

court, in the case of *Young v. Gregory*, 3 Call, 446, where the proceedings on an attachment in a foreign country, were adjudged by the whole court to be legal evidence, although no copy of them was produced; and the only proof of their existence was by depositions and letters; which was very far short of the proofs in the case before us, where well attested copies of the proceedings, in both the French and English languages, appear in the record.

And, 3dly, because there is no other evidence of the loss of the ship *Favourite*; without proof of which the plaintiffs have not a shadow of right to demand the insurance, which constitutes a very important charge in their account against the appellant.

The authenticity of those papers, then, being established to my satisfaction, I proceed to consider the effect which, as I conceive, they ought to have on the cause. They support every material allegation in the appellant's answer; and it appears on the face of the whole record, that Samuel M. Brown was part owner, and captain, or commander of the ship *Favourite*, and on the 10th day of March, 1793, as agent, and in behalf of the owners, was party to, and signed, the charter-party under which she sailed from a place called The Mother Bank, (where she then lay,) to Philadelphia, there took in a cargo of flour, and from thence sailed to Port-au-Prince in the island of St. Domingo, (then under the government of France,) where she safely arrived in autumn, 1793; S. M. Brown, one of the plaintiffs in the cause, (though he had employed another captain,) being still on board, and, by his own acknowledgment, having the sole direction and management of the ship, both with respect

79 to the disposal of the cargo of flour taken on board at Philadelphia, *and the reloading her for the further prosecution of her voyage under the charter-party. And here commenced his extraordinary, illegal, and fraudulent conduct, by means of which the ship and cargo were forfeited, condemned and lost to the owners, of whom he himself was one; and, also, as before observed, the agent of the whole. His misconduct, by which the ship and cargo were lost, was briefly this: having a very considerable interest in the cargo taken on board at Port-au-Prince, (whether solely for himself, or, which is more probable, for himself and Jameson, who, at the commencement of this suit, about fifteen months after the loss of the ship and cargo, styled themselves "Robert Brown Jameson and Samuel Montgomery Brown, merchants, trading under the firm of Robert Brown Jameson & Co." seems not very material,) he, Brown, in order to defraud the French government of their export duties to a considerable amount, and thereby save so much to the company, attempted to smuggle 63,776 pounds of coffee, by taking on board so much more than was entered at the custom-house of Port-au-Prince. The fraud, however, having been detected, the catastrophe above mentioned consequently followed.

Brown, in order to exculpate himself from misconduct, preferred a petition to

(a) Rev. Code, vol. 1, p. 160.

the officers of the government, and stated that, being a stranger, and ignorant himself of the commercial laws of the colony, he chose an obscure merchant (one Forbes) to direct him in his operations; and, when it was necessary to make his declaration of the cargo on board, Forbes was in gaol; and one of his representatives (not named) charged himself with fulfilling the customary formalities, and led him into the error, by telling him that the declaration was conformable to the tariffs which regulate coffee hogsheads at 9 quintals, sugar hogsheads at 16, &c. But his apology was thought too futile to have any operation in his favour; as it appeared the entry

80 was short of the quantity "actually on board, not only 63,776 pounds in weight, but also 36 packages in number; to wit, 24 hogsheads, 1 tierce, and 11 barrels.

But, admitting that he was misled by the unnamed representative of Forbes; he was inexcusable for applying to him for advice; for it appears, from a document exhibited by the plaintiffs themselves, that, on the 11th of March, 1793, (the day after the date of the charter-party,) Brown was instructed to apply, on his arrival at Port-au-Prince, to Monsieur Goursas de Bellevue, (a particular friend of the Marquis de Feronays, on whose behalf the charter-party was made,) as qualified to give him the first information of the state of the commerce of St. Domingo; and to collect from that gentleman the most essential details of what might be necessary to prosecute their plan with success; and further to consult him (as a correspondent of the Marquis de Feronays) on the local circumstances of the island. But, instead of following this prudent and salutary instruction, he applied, by his own confession, to an imprisoned merchant, by whose advice his conducting that important business was to have been governed; and who being in gaol at the time of reporting and entering the cargo, "one of his representatives" (without a name) "charged himself with fulfilling the customary formalities, and led him into an error," the fatal consequences of which have already been noticed.

It being manifest that the loss of the ship and cargo was occasioned by the unjustifiable conduct of Brown, I have no hesitation in saying that retribution ought to be made to the sufferers; and, particularly, to the appellant, and those concerned with him in interest, for the loss of the proceeds of the cargo of flour shipped on their account at Philadelphia. But a question may arise, by whom, and in what manner, ought the retribution to be made? I answer, by the owners of the ship Favourite, the misconduct of whose agent, and part

81 "owner, caused the loss; and by a forfeiture of the freight, and of the insurance made on the ship. Besides, there is no evidence that the appellant ever received a shilling on account of insurance, though charged to him in the plaintiff's account.

But the chancellor, in his decree affirming that of the county court, observed that "if S. M. Brown was responsible for the loss of the ship, and the product of the cargo," (which he seemed much to doubt,

keeping in view the idea that the proceedings against the ship at Port-au-Prince were inadmissible evidence,) "he was privately responsible, and that the surviving copartner is not bound to make reparation, unless he appear to be so much the debtor of Brown, on the settlement of their private accounts." But the transaction makes a very different impression on my mind. Brown was not acting as an individual in a private capacity, but as the avowed agent of the owners of the ship; which clearly appears by the charter-party, and by his subsequent conduct; and, in my conception, they are as much bound by, and as responsible for, the acts of their agent, as if they had all been on board, and personally assenting to the transactions which occasioned the loss of the ship and cargo. And, admitting that Jameson is not bound, as the surviving copartner of Brown, in a distinct mercantile trade, he is responsible as part owner of the ship, and must forfeit his proportion of the freight and insurance. And it appears that, if those two items be stricken out of the account, or even S. M. Brown's moiety of them, the balance will be in favour of the appellant. And I know not a case where the maxim that "whoever asks equity must appear with pure hands and do equity," more forcibly applies than in the one now before us. I am, therefore, of opinion, that both decrees are erroneous, and ought to be reversed, and the bill dismissed with costs; though without

82 prejudice to any suit or action "which the plaintiff may be advised to bring hereafter, for the same subject.

By the Court; both decrees reversed, and bill dismissed, "without prejudice to any suit or action which the appellee may hereafter be advised to institute relative to the subject matter of controversy."

On motion of Mr. Wickham, suggesting that the documents from St. Domingo had not been faithfully translated, the court agreed that another translation might be made, and used in support of a motion for a rehearing of the cause.

Accordingly, on Tuesday, the 19th of March, he laid before the court the new translation, which, he contended, proved (more completely than the former) that the body of men by whom the ship was condemned were not a judicial tribunal, and their decision not a legal sentence, but a mere act of plunder; since Brown was arbitrarily condemned, without being heard in his defence. He relied also on the reasoning, and authorities cited, in the opinion of Judge Cooper, of Pennsylvania, upon the effect of a sentence of a foreign court of admiralty. (a)

Wirt observed that these matters were explained to the court, and commented upon at the former argument. If this course be pursued, when shall we ever get to the end of a cause?

Judge Cooper stood alone, against all the other judges of Pennsylvania. The case of Hooe and Harrison v. Pierce's Administrator (b) is also against him.

(a) In the case of Dempsey, Assignee of Brown v. The Ins. Co. of Pennsylvania. See the report of that case by Mr. Dallas, in 1810.

(b) 1 Wash. 312.

(1) But what have we to do, in this case, with the conclusiveness or inconclusiveness of the sentence of a foreign court of admiralty? Judge Cooper contends 83 for no more than that it is not conclusive, but may be rebutted by evidence. This is enough for our purpose; there being no evidence to rebut the sentence.

It is true, there was no court of admiralty in the island. The intermediary commission was the only power to decide on the subject; but their authority was complete, and their decision equally obligatory with that of a court. Their being possessed of arbitrary powers, is no objection; for such was the nature of the government in the West Indies under the old regime, as well as since the revolution. (a)

Under the old government, mandatory letters from the king's minister were laws, from which no appeal could be taken. Samuel M. Brown might have been tried, by the governor and five judges appointed by him, and hung on the spot. The governor was an absolute prince, and had power to stop judicial proceedings.

Wickham. Mr. Wirt's quotations, proving that the commissioners possessed arbitrary powers, show plainly (as well as their own confession) that their sentence was not one of a judicial tribunal. The loss by their act is, therefore, such as comes within the insurance "against detention by kings and princes." But, even if the commissioners had been a court of justice, it is a rule that, if it appear on the face of the proceedings, that a court acted unjustly, its sentence is not to be regarded. They refused to hear Brown in his defence. The assertion of those who proceeded illegally against him is not evidence of his guilt. Their sentence is not even prima facie evidence; being rebutted by the circumstance that they refused to hear him.

Wednesday, March 27th, the judges declared their adherence to their former opinions.

JUDGE TUCKER only said, he had considered the subject, and saw no cause for changing his opinion formerly delivered.

84 *JUDGE ROANE. In the few remarks I made, in delivering my opinion in this case, on the former occasion, I stated that I considered the record of condemnation in St. Domingo, (referred to in the proceedings,) as authentic and admissible evidence, to prove as well the ground as the fact of that condemnation. In saying it was authentic, I meant that it was as well verified as (all circumstances considered) could be expected; and, in expressly allowing it to be admissible evidence, I certainly did not decide that it was conclusive. That was not necessary; for no evidence exhibited on the part of the appellee conflicted with the ground of that condemnation: on the contrary, that ground was corroborated and supported by

the conduct of Brown, from his own admission; which admission was one of the principal grounds of my opinion.

On the subject of the conclusiveness of sentences of foreign courts of admiralty, however the doctrine seems to have been affirmatively settled, in relation to ordinary times and circumstances, I am inclined to think that that doctrine cannot be transplanted into our code, at this time, without producing the greatest injustice. An æra has arrived, when neither the ordinary laws of nations, nor those laws as founded upon treaties and conventions between nations, give the rule; but the arbitrary edicts, and orders, of the king and emperor, with whom we have the most extensive relations; and their judges are servile enough to carry them into rigid execution. I should not, therefore, as at present advised, incline to extend to those courts a comity or courtesy to which they are, at the present day, by no means entitled. But here I must pause! The question is important, and I mean not to prejudge it, as it neither actually occurs in the case before us, nor is it probable that questions of this character will often again occur in this court.

85 *Upon the whole, I see no cause to depart from the opinion I formerly delivered.

JUDGE FLEMING. I have perused, and considered with great attention, the translation of the documents lately presented to the court; and also the reasoning of Judge Cooper, in the case of *Dempsey v. The Insurance Company of Pennsylvania*; in which I can discover no ground for changing my former opinion; but, out of respect to the ingenious remarks made by Mr. Wickham on the subject of them, I am induced to take a brief notice of some of those remarks.

With respect to the documents, they throw no new light, to my conception, on the merits of the cause; they only show the great avidity of those in power at Port-au-Prince, to have the case of the ship *Favourite* (libelled for a breach of their revenue laws) brought to a speedy decision: and this may be readily accounted for, from the critical situation of the country; in which a civil war was then carried on with great virulence; and, at the same time, it was threatened with an invasion by a powerful enemy, who, soon after, made a conquest of that part of the island.

With regard to the reasoning of Judge Cooper, in the case of *Dempsey v. The Insurance Company of Pennsylvania*, where the principal question was, how far the proceedings, and sentence, of a foreign court of admiralty is proper, or conclusive evidence in our courts, in cases between insurers and insured, where vessels are captured at sea; his reasoning shows him to be a judge of distinguished talents, and of extensive legal research: but it is worthy of remark, that his opinion was in opposition to five other judges, of whom the court was composed, (2) and with whose

(1) Note by the Reporter. In that case, the effect of the sentence of a foreign court of admiralty did not come in question. The president, in pronouncing the opinion of the court, mentions incidentally, that such a sentence would have been regarded; but to what extent does not appear.

(a) 4 Edwards's History, p. 2, 3, 110, 111.

(2) Note by the Reporter. The legislature of Pennsylvania, by their act passed March 29, 1809, (Penn. Laws, vol. 9, p. 132,) have settled the law of

reasoning, or the grounds of
86 *whose opinion, we have not been favoured. And, to me, there appears a clear and important distinction between cases of capture of neutral vessels at sea, and condemning them as lawful prize, either under the French decrees, or the British orders in council, and the case now under consideration. The former cases have emanated from the exercise of power, rather than of right; and are in violation of the general, and long established law of nations, which the courts in all civilized countries are presumed to understand; and in which cases, neither the owners, nor commanders, of the captured vessels are supposed to be in fault; and must be held blameless, unless some pointed evidence should appear to the contrary. But, in the case before us, the law of nations seems out of the question. The ship and cargo were seized and condemned for a manifest infraction of the revenue laws of a power with which we were at peace, and in habits of friendly intercourse; and in one of whose ports she was trading, and taking in a cargo of merchandise, to complete her voyage. And this breach or infringement of the law, which occasioned the loss of the ship and cargo, was committed by one of the owners, and agent of the whole; who was on board, and had the sole, exclusive direction and management of the ship, from the commencement of her voyage to the time of her seizure, or condemnation. In effecting the latter, it is probable that great rigour or strictness, and, perhaps, injustice, might have been practised by the officers of police at Port-au-Prince, where the event took place; but of this we can form no correct judgment, for want of a competent knowledge of the municipal laws of foreign countries in general, and of that country in particular, which, at the time of those transactions, was very probably in a state of revolutionary tumult, and convulsion.

87 *But however that may have been, it is evident that the loss of the ship and cargo was occasioned by the imprudent, and, I may add, the unwarrantable conduct of Samuel Montgomery Brown, one of the original plaintiffs in this suit, who, (instead of bringing their action or actions in London, where the defendant lived, where the charter-party under which they claim the freight was executed, and where the insurance was made on the ship,) having discovered some property of the defendant in the hands of a correspondent in the town of Alexandria, made their election, and there exhibited their bill in equity, by way of foreign attachment, against the effects of the defendant; a thousand leagues from the place of his residence, and from where the contracts were made; leaving him to be defended (if defended at all) by a garnishee, unacquainted, probably, with the transactions between the parties; and uninterested in the event of the suit; in the prosecution of which, the irregular, and illegal proceedings have been sufficiently

commented upon by a member of this court, on a former occasion. And I shall only add, that, after a mature reconsideration of the case, I am clearly of opinion that the decree, (now sought to be revised and altered,) in favour of the appellee, is correct, and ought not to be disturbed.

88 *Waller's Executors v. Ellis and Others.*

Argued October, 1809.

1. *Heirs—Liability of Heir of an Heir.*—The heir of an heir is responsible upon an obligation in which the heirs are bound; provided he have assets by descent from the obligor.
2. *Same—Declaration against Remote Heir.*—In declaring against such remote heir, he should be charged as heir of the heir of the obligor, or as heir of the obligor, with a videlicet, setting forth the intervening descent; but it is not necessary to state how he is heir.
3. *Same—Charging—Debet and Detinet.*—An heir should be charged in the debet and detinet; but if he be charged in the detinet only, the defect is not fatal, after verdict, or upon general demurrer.
4. *Bond—When Copy May Be Declared on.*—Where a bond is filed in a suit against the executor of the obligor, a copy may be declared upon, against the heirs, in another court; and the original need not be produced, unless the defendants crave oyer of the original, or object to the copy as incorrect, or plead that there is no such bond; in either of which cases, the original may be procured by a writ of subpoena duces tecum.
5. *Pleading and Practice—Pleading Several Matters.*—Under the act of 1792. (Rev. Code, vol. 1, c. 66, s. 40.) the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law, or fact, as he shall think necessary for his defence: notwithstanding such several matters be inconsistent with each other.
6. *Same—Plea and Demurrer—Effect.*—If a defendant plead and demur to the whole declaration; and the demurrer be overruled, judgment ought not to be entered, without first trying the issues joined on the other pleas.

In an action of debt in the district court of Williamsburg, John Waller and others, executors of Benjamin Waller, deceased, complained of 'John Ellis and Mary his wife, late Mary Fleming,) and Susannah Lewis, (late Susannah Fleming,) coheir-esses, in parcenary, of John Fleming, jun. deceased, who was heir and devisee of John Fleming, deceased, in custody, &c. of a plea of debt, that they render unto them the sum of eight hundred pounds, sterling money of Great Britain, of the value of twelve hundred pounds, money of Virginia, which they from them unjustly detain; for that, whereas the said John Fleming, last above mentioned, in his lifetime, that is to say, on the third day of May, in the year of our Lord seventeen hundred and sixty, at the parish of Abingdon, in the county aforesaid, made his certain writing obligatory, sealed with his seal, (and a copy of which writing obligatory now remaining of record in the office of the court of the district of Richmond, where the same has been filed, duly attested by the clerk of the said district court, is to the court now here shown,) the date whereof is the same day and year aforesaid; whereby he acknowledged himself to be held and firmly bound unto the said Benjamin Waller, in his lifetime, in

89 *the just and full sum of eight hun-

that state in conformity with JUDGE COOPER'S opinion. See also *Calbraith v. Grace*, 1 Binney's Rep. 206, and *Calboun v. The Insurance Company of Pennsylvania*, *ibid.* 208.

*As an instance where, at common law, an action on the personal covenant of the covenantor, in which he expressly named his heirs as bound, was sustained, the principal case was cited in *Rex v. Creel*, 22 W. Va. 877.

dred pounds, sterling money of Great Britain, to be paid unto the said Benjamin Waller, whenever he the said John Fleming should be thereto required; and, for the true and faithful payment of the aforesaid sum of eight hundred pounds, the said John Fleming, by the same writing obligatory, also bound his heirs; nevertheless, the said John Fleming, during his lifetime, nor the said John Fleming, jun. since the decease of the said John Fleming, nor the said John Ellis, and Mary his wife, and Susannah Lewis, or either of them, since the decease of the said John Fleming, jun. (he the said John Fleming, jun. being the heir and devisee of the said John Fleming, and they the said Mary and Susannah being coheireesses in parcenary of the said John Fleming, jun.) have not, nor hath either of them, paid, or in any way satisfied, the said sum of eight hundred pounds, sterling money of Great Britain, of the value aforesaid, or any part thereof, to the said Benjamin Waller, during his lifetime, or to the plaintiffs, his executors aforesaid, since his decease, or to either of them; although they and each of them have been thereto frequently requested by them and each of them; but the same to pay he the said John Fleming, in his lifetime, and he the said John Fleming, jun. since the decease of the said John Fleming, and they the said John Ellis, and Mary his wife, and Susannah Lewis, since the decease of the said John Fleming, jun. hitherto have altogether refused, and still the said defendants do refuse; whereby the said plaintiffs say they are injured and endamaged ten pounds; and thereof they bring suit, &c. and bring here into court the letters testamentary," &c.

To this declaration the defendants (having craved oyer of the writing obligatory, &c. and a copy being read to them) filed eight pleas; 1. "That the copy of the writing obligatory aforesaid, so as aforesaid read to them, and *also the copy of the said condition, are not true copies of the said writing obligatory and condition filed among the records of the court for the district of Richmond, as in the declaration is set forth; and of this they put themselves on the country;" 2. "That there is no such writing obligatory of the said John Fleming, filed among the records of the said district court; and this they are ready to verify; wherefore they pray judgment," &c.; 3. "That John Fleming the younger, in the declaration mentioned, was not the heir or devisee of the said John Fleming, charged by the said declaration to be the obligor in the writing obligatory supposed aforesaid; and of this they put themselves upon the country;" 4. "That they the defendants are not the heirs or devisees of the said John Fleming the younger, as in the declaration is alleged; and of this they put themselves on the country;" 5. A demurrer to the whole declaration; introduced with a protestation, insisting on the two last-mentioned pleas; the causes of demurrer assigned being, "That the defendants are charged as the heir of an heir upon the obligation of the ancestor of the first heir; and, as such, they are not chargeable by said obligation;

and, secondly, they are charged as the heir of John Fleming the younger, who is alleged to be the heir of John Fleming, the supposed obligor; and it is not averred and shown, in and by the said declaration, how the said defendants are heirs to the said John the younger; and because the writing obligatory aforesaid is not a writing obligatory filed in the general court, in a county, or other inferior court, or in the court of a district, in a suit founded, therein, on the same writing obligatory, against a person or persons jointly, or jointly and severally, bound, for the performance of any contract, or for the payment of money or tobacco, together with the said John Fleming;" (a)

The 6th plea was, that the plaintiffs had obtained a judgment in the Richmond district court, upon the same *writing obligatory against the executor of John Fleming, the obligor; "And the said judgment determines the specialty; so that now the heir of the said John Fleming is not bound, and there is not any lien upon the said heir by reason of the debt aforesaid."

The 7th and 8th pleas were, 7th, that the executor had assets to satisfy the said judgment; and, 8th, "That the defendants have not any lands or tenements in fee-simple, by hereditary descent, nor by devise, from the said John Fleming; nor from the said John Fleming the younger, which came by descent or devise from the said John the obligor; nor had on the day of obtaining the writ of the said plaintiffs; nor ever before, or afterwards; and this they are ready to verify."

The plaintiffs filed general replications to, and issues were made upon, the 1st, 2d, 3d, 4th, 7th and 8th pleas. To the 5th plea they joined in demurrer; and to the 6th demurred generally; and thereupon the defendants filed a joinder to the last-mentioned demurrer.

On motion of the plaintiffs, a writ of subpoena duces tecum was awarded, to bring the original bond in question; "Which being seen and inspected by the court, it sufficiently appeared to the court that, among the records of the court for the said district of Richmond, there is filed such a writing obligatory of the said John Fleming, as the said plaintiffs in their replication" (to the second plea) "have alleged."

The defendants then withdrew their first plea; and the demurrer to the declaration being argued, the court sustained the demurrer; and (without any further notice of the remaining issues) judgment was entered "That the plaintiffs take nothing by their bill," &c.; whereupon they appealed.

After argument, by Wickham, for the appellant, and Wirt, for the appellee, (October 14, 1809,) the court took time to consider the case.

92 *Monday, June 4th, 1810. The Judges, TUCKER and ROANE, (FLEMING not sitting in the cause,) pronounced their opinions.

JUDGE TUCKER (after setting forth the substance of the declaration) said, To this declaration the defendants have pleaded several pleas; two only of which I shall notice

(a) See Rev. Code, vol. 1, c. 66, s. 24.

at present. In the former, they plead that John Fleming, jun. was not the heir or devisee of the obligor; and of this they put themselves upon the country. In the latter, they plead that Mary Ellis and Susanah Lewis are not the heirs or devisees of the said John Fleming the younger; and of this they likewise put themselves upon the country. At the same time, the defendants also (by protestation that they were not the heirs or devisees of the said John Fleming the younger, and that the said John Fleming the younger was not the heir or devisee of the obligor in the declaration mentioned) demurred to the declaration, and for cause of demurrer they say, "That they are charged as the heir of an heir, upon the obligation of the ancestor of the first heir, and as such they are not chargeable by the said obligation; and, secondly, that they are charged as the heirs of John Fleming the younger, who is alleged to be the heir of the supposed obligor, and that it is not averred and shown, in and by the said declaration, how the said defendants are heirs of the said John the younger; thirdly, because the writing obligatory aforesaid is not a writing obligatory filed in the general court, in any county, or other inferior court, or in the court of a district, in a suit founded, therein, on the same writing obligatory, against a person or persons jointly, or jointly and severally, bound, for the performance of any contract for the payment of money or tobacco, together with the said John Fleming." The plaintiff joined issue upon both the before-mentioned pleas, and also joined in the demurrer.

93 *The defendants pleaded several other pleas, to one of which there was a demurrer, which I shall notice hereafter. I shall now proceed to consider the demurrer to the declaration, upon which the district court rendered a judgment in favour of the defendants, and that the plaintiffs take nothing by their bill.

1. The first cause of demurrer is, "That the defendants are charged as the heir of an heir, upon the obligation of the ancestor of the first heir; and, as such, they are not chargeable in the said obligation."

But, with respect to the above cause of demurrer, it is necessary to observe, that where the lands have descended from the obligor to another, who has died seised, and from him to the defendant, the descent must be specially stated; as that the defendant is the heir of A. (who died last seised,) who was the heir of the obligor; and so it must be, where there have been several intermediate descents; for, if the declaration be against the defendant, as heir of the obligor, and it appears in evidence, on the plea of *riens per discent* from the obligor, that the defendant is heir of the heir of the obligor, it is a fatal variance. (a) And therewith the opinion of the court, in 3 Mod. 257, *Killow v. Rowden*, appears to me to be perfectly reconcileable: for there the court admitted, that if the lands had descended to the brother, and nephew of the defendant, in fee, (instead of in tail, as was the case,) that then they ought to

have been named: that is, (as I understand the book,) it ought to have been shown that the defendant was the heir of his nephew, to whom the lands descended as heir to his father, who was heir to the obligor; instead of charging the defendant himself as heir (that is, as immediate heir) to the obligor himself, without noticing the intermediate descent. So, where, in debt against the defendant as heir of B., it appeared in evidence, on the issue of *riens per discent* from B., that he died seised in fee, leaving the defendant his daughter, and his wife with child of a son, who was afterwards born, and lived an hour,

94 *it was held that this evidence did not support the issue; for the defendant had nothing from her father, the obligor, but the lands came to her by descent, as heir of her brother, who was last seised. (b) The case cited in *Dyer*, 368, though cited by the learned editor of *Saunders*, as in conformity with these cases, appears to me to be contrary. For it is there said, that a man seised in fee has issue two sons, and bound himself and his heirs in a bond, and died seised of assets; the eldest son enters and dies without issue; the youngest son enters; he shall be charged by these assets as son and heir to his father, although there was an intermediate descent to the eldest. And the same is the law of grandfather, father and son. (c) We are told, however, that it is held to be unnecessary to state how the defendant is heir; for it may not be in the plaintiff's knowledge. (d) The precedents, as far as I have had an opportunity of examining them, are both ways. The declaration in *Quennel v. Diddlesford* (e) charges the defendant as heir of John Diddlesford, deceased, to wit, brother and heir of Richard D—, son and heir of William D—, brother and heir of the said John Diddlesford, the obligor, in the bond; and assigns breach in the non-payment by either of these persons, successively. A similar precedent will be found in 2 Mod. Ent. 226. In the case of *Joseph v. Lord Mohun*, (f) the declaration is against "Thomas Orby, Esq. and Charlotte, his wife, James, Duke of Hamilton, and Elizabeth, his wife, and John Erlington, gent. (which said Charlotte, Elizabeth and John, are co-heirs of Fitton, late Earl of Macclesfield; late brother and heir of Charles, late Earl of Macclesfield; the same Charlotte being one of the sisters of the late earls; the said Elizabeth being daughter and heir of Elizabeth, late Lady G., late another of the sisters of the said earl; and the same John being son and heir of Anne Erlington, late another of the sisters of the late earls;) and against Charles, Lord Mohun, devisee of the said late Earl Charles, of certain lands," &c.; and set forth "an obligation of Earl Charles; and assigned breach in the non-payment by either of those persons. The precedent in *Rebow v.*

(b) 2 Roll. Abr. 709; cited 3 Mod. 256; *Saunders*, *ibid.*

(c) *Dyer*, *supra*.

(d) *Saunders*, *ibid.* editor's note: cites *Denham v. Stephenson*, 1 Salk 355, and 6 Mod. 241; S. C. accordant.

(e) Lill. Ent. 147.

(f) Lill. Ent. 145.

(a) 2 Saund. 7; (editor's note) 3 Cro. 261; *Jenks's Case*.

Palmer(a) is to the same effect, and seems (*mutatis mutandis*) to have been copied by the framer of the declaration in the case before us. Here, then, we have two precedents in which the defendants are charged as heirs to the obligors, respectively, though shown under a *videlicet*, not to be immediate, but intermediate heirs. In the two last, they are not charged as heirs to the obligors, but as heirs to those who were heirs to the obligors, in their lifetime. It would seem, then, to me, that it is sufficient to charge the defendants in the latter mode. For if the immediate heir shall have aliened the lands in his lifetime, so as to break the descent, the defendants could never be charged upon their plea of "riens per discent from the first obligor;" and if, on the other hand, they were in fact heirs to the heir of the obligor only *ex parte materna*, and not on the father's side also, they would be equally protected by that plea of "riens per discent from the obligor;" for, although they should have lands by descent from the son of the obligor, yet if those lands were *ex parte materna*, that evidence would be sufficient to maintain their plea. So that I can discover no inconvenience from this mode of declaring. On these grounds I am of opinion that the declaration is not insufficient, for the first reason assigned as a cause of demurrer thereto.

The second cause of demurrer assigned is, that the defendants are charged as heirs of John Fleming the younger, who is alleged to be the heir of the supposed obligor, and that it is not averred and shown by the declaration, how the said defendants are heirs to the said John Fleming the younger. This objection appears to have been overruled in the case of *Denham v. Stephenson*, (b) in which it was made; and the court took this difference, between an action by, and against, an heir; in the former case, he must show his pedigree, and how *heir, for it lies within his knowledge; but, in the latter, it is not necessary; for the plaintiff is a stranger, and it would be hard to compel him to set forth another's pedigree. (c)

The third objection to the declaration is founded upon the profert of a copy of the bond of the ancestor, instead of the original. "The same not being filed in another court, in a suit founded thereon, against a person or persons jointly, or jointly and severally, bound with the obligor, for the payment of money or tobacco;" so as to bring the case within the provisions of the district court law; edit. 1794, c. 66, s. 24, (d) and if the case rested altogether upon our statute, I should be of opinion with the defendant. But *Co. Litt.* 231, b, is express, that if a deed remain in one court, it may be pleaded in another court, without showing forth; *quia lex non cogit ad impossibilia*. The case appears to me to be completely within the reason of the modern practice, stated in the case of *Read v. Brookman*, in 3 T. R. 151, &c. cited and approved by

this court in the case of *Taylor v. Peyton*. (e)

Here it may be necessary to inquire, whether, if the declaration be sufficient, the judgment which this court ought to pronounce must be final against the defendant; (f) they having demurred to the whole of the plaintiff's declaration, and thereby admitted all such facts as are therein sufficiently stated to be true; or, whether, notwithstanding this, the cause must be sent back for the trial of the issues joined upon the several pleas, which the defendants have pleaded in their defence. Two of those pleas, viz. one that John Fleming, jun. was not heir or devisee of the obligor; and another, that the defendants Mary Ellis and Susannah Lewis are not the heirs or devisees of the said John Fleming the younger, are in direct opposition to the facts alleged in the declaration, and admitted to be true by the defendants' demurrer to that declaration.

97 Is it consistent with *reason, that, when a defendant has, in the course of pleading, admitted the facts charged in the plaintiff's declaration, and relied upon their insufficiency in law to charge him, that he should put the plaintiff, by a negative plea, to the trouble and delay of a trial to ascertain the very facts thus admitted by the demurrer? More especially when the facts thus admitted by the demurrer, but denied by the pleas, go to the whole merits of the case! It is true, our law permits a man to plead as many several matters, whether of law or fact, as he may think necessary for his defence. But such matters, to be available, ought to be consistent with each other, and not contradictory or immaterial. In England, *non est factum*, and *solvit ad diem*, could not be pleaded to the same bond, because the one admitted, and the other denied, the execution of the bond. 2 Bl. Rep. 993. (g) In the case of *Nuttall's Ex'rs v. M'Dowal & Co.* in this court, (h) which was an action of debt brought by the appellees against the appellants, executors, upon a judgment theretofore obtained against them, the defendants offered four several pleas; 1st. No such record; 2d. No waste; 3d. That the defendant's testator paid the debt in his lifetime; and, 4th. That the former judgment was obtained by surprise. The district court rejected the two last pleas, and this court affirmed the judgment. In *Stone v. Patterson*, (i) according to my note of the case, nothing was said, by the court, upon the subject of pleading and demurring to the declaration at the same time. The cause went off upon a different point. Let it be admitted, that a defendant under the act of assembly may plead and demur to the plaintiff's declaration at the same time; or may plead as many pleas, however frivolous or contradictory they may be to each other;

(e) 1 Wash. 258.

(f) *Rayner v. Pointer*, 1 Wille's Rep. 410, 411; *Bal-lythorpe v. Turner*. *ibid.* 475.

(g) A defendant not permitted to plead non assumpsit to the whole, and tender as to part. 4 T. R. 194. Nor non est factum, and tender as to part. 5 T. R. 97.

(h) April 23, 1805. MS.

(i) May 6, 1806. MS.

(a) *Lill. Ent.* 172.

(b) 1 *Salk.* 355.

(c) *Saund. ibid.*

(d) *Rev. Code*, vol. 1, p. 77.

does it follow, that, when he has put the whole merits of his cause upon an issue in law, and that is determined against him, he shall be indulged with a trial of 98 such pleas, as "are either contradicted by his own admission, or contradictory to each other; and this after delaying the plaintiff, perhaps, seven years by an appeal? It is, I conceive, impossible to foresee all the inconveniences which will probably ensue from such a practice, if indulged; but the delays which it must occasion are obvious. Nor must it be forgotten that pleading double is at the peril of the pleader.

I was, indeed, for some time inclined to doubt whether the protestation, with which the defendants have introduced their demurrer to the declaration, had not saved to them the benefit of the two pleas above noticed, even though the judgment on the demurrer should be against them. But, looking into the precedents, I find the judgment, in this case, being an action of debt for money due by bond, must be final; and that there is no instance (as far as I can find) of a respondeas ouster being awarded where the demurrer is in bar, as in this case. My present impressions are different upon this point; and the proper judgment to be entered in this court, as a court of error, and not of original jurisdiction, (where amendments are often very properly indulged, if asked in reasonable time,) seems to me to be for the debt and damages, without any writ (1) to inquire of the lands, tenements, or hereditaments descended, pursuant to the 7th section of the act against fraudulent devises. The record furnishes a further reason, I conceive, 99 why this court ought *to pronounce such judgment as I have just mentioned. The defendants, in their sixth plea, plead, that the plaintiffs brought suit, and recovered a judgment on the same bond, in the district court of Richmond, against William Fleming, executor of John Fleming, the obligor; and that the said judgment determines the specialty, so that the heir of the obligor is no longer bound. To this plea the plaintiffs de-

murred; and the defendants joined in the demurrer. That the law is for the plaintiffs upon this demurrer, seems clear from the authority in Plowd. 439; Dyer, 204, pl. 2, Galton v. Hancock, 2 Atk. 430, and the cases cited in 3 Bac. Abr. p. 468, (Gwill's ed.) (c) for the obligee has his election to sue either the heir or the executor; but a judgment against the executor (if he have not assets wherewith to satisfy the judgment) is no bar to an action against the heir; and it is not averred in this plea, that the executor had assets, or that the judgment hath been satisfied. Upon this demurrer, then, I conceive, the court is bound to give final judgment against the defendants. For the statute is express, that, if judgment be given against the heir by confession of the action, without confessing the assets descended, or upon demurrer, or nil dicit, it shall be for the debt and damages, without any writ to inquire of the value, as before mentioned.

JUDGE ROANE. The first plea filed in this cause being withdrawn, and a judgment upon inspection being rendered upon the second, which does not appear to have been erroneous, the judgment now in question was only founded upon the demurrer to the declaration. On the 100 *trial of that demurrer, it was sustained by the court below, and judgment was rendered thereupon for the defendant. The 3d, 4th, and 7th and 8th pleas, however, on which the parties are at issue, have not been tried; nor has the court below decided upon the demurrer, joined upon the 6th plea tendered by the defendants.

As to the decision upon the demurrer, I am of opinion that the court below erred in sustaining it. A view of the authorities upon this subject evinces, that it is not indispensably necessary to be stated how the defendant is heir in a case like the present; as that may not be within the plaintiff's knowledge: nor is it a fatal defect in a declaration after a verdict, (and therefore it shall not prevail on demurrer, not being assigned as a cause thereof,) that the defendants are charged in the detinet only. (d) I am, also, of opinion, that the declaration was sufficient in stating a copy of the bond; the principle of the common law being that, where a deed is remaining in one court, it may be pleaded in another, without showing forth; for "lex non cogit ad impossibilia;" (e) especially as the defendant in this case has not insisted upon oyer of the original, but has accepted oyer of a copy, (thereby waiving the necessity of the production of the original,) and has pleaded to the action. (f) The judgment of the district court, sustaining the demurrer, was, therefore, erroneous. That demurrer ought to have been overruled; and, such being now the opinion of this court, and that the judgment of the district court should be reversed, a question is made by the judge who preceded me, under the clause of the act directing

(1) Note by JUDGE TUCKER.

"In debt on the ancestor's bond, leave to withdraw a demurrer and plead issuably, on payment of costs, after plaintiff had lost a trial, being in case of an heir who had pleaded riens per discent, and by mistake of his counsel had demurred to the plaintiff's replication, and judgment would be given for plaintiff on the demurrer, which would be to recover his whole debt against the defendant, though he had very little assets descended to him, and was willing to satisfy plaintiff's demands, as far as assets had descended to him, which might be tried on the issue of riens per discent." 1 Barnes' Notes, 108, citing Harrison's Prac. in Ch. p. 261, (edit. 1761.) "Note. The general practice is, that, after a trial is lost, the court will not permit a demurrer to be withdrawn." (a) "Leave to withdraw a demurrer, and plead the general issue, denied: the plaintiff having, by defendant's demurring, lost a trial at the assizes, though the defendant offered to pay costs." (b) But in the case of Hunt v. Puchmore, first cited, being so particular a case, and the circumstances therein so hard on the defendant, it was more reasonable to give leave to withdraw the demurrer, than to suffer a manifest injustice to fall on the heir at law." Harrison's Prac. ubi sup.

(a) 1 Burr. 321, where LD. MANSFIELD said, as no case, of such an amendment after a trial, had been cited, he took it for granted that none exists.

(b) Sutton v. Lacon, Prac. Reg. in Chan. p. 153.

(c) See also 14 Vin. 264, pl. 17.

(d) 3 Bac. 464, (Gwill's edit.) Esp. N. P. 241.

(e) Co Litt. 331.

(f) 1 Wash. 253, Taylor v. Peyton.

such judgment to be given, by this court, as the court below ought to have rendered, (where the judgment is not reversed in the whole,) whether that judgment in this case ought to be peremptory for the plaintiffs, disregarding the other pleas and demurrer; or whether the cause ought to be remanded for the purpose of trying all the remaining pleas and demurrer?

101 *My opinion is, that the latter course ought to be adopted. The English statute of 4 and 5 Anne, c. 16, provides, that a party may, by leave of the court, plead as many several matters, as he may think necessary for his defence. (a) It has been held, indeed, upon the construction of this statute, that you cannot plead and demur to the same part of the declaration, because it is said the defendant ought not to draw the decision to different judicatures. (b) In such case the inconvenience aforesaid induced the courts, upon the construction of the statute, to refuse leave to a defendant to plead and demur to the same declaration. Our acts of 1748 and 1753, also, (edit. of 1769, p. 172, and 299,) in admitting a defendant to plead as many several matters as he may think necessary for his defence, not only omit to add the emphatical expression, "whether of law or fact," which is contained in the present act, but have a positive restriction, on the other hand, that the defendant shall not be admitted to plead and demur to the whole. These old acts seem to have adopted the construction of the English courts upon the statute of Anne, in this particular; but they have been changed by the act of 1792, (Rev. Code, 80,) which was re-enacted from the act of 1786, c. 67. This last-mentioned act is much more broad and extensive than either the English acts aforesaid, or our former acts of 1748, and 1753, on this subject. It provides that "the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence." In doing away the necessity of obtaining the leave of the court to put in the pleas, it demolishes the foundation on which the aforesaid construction of the judges was erected: it overrules the objection as to the constructive inconvenience of carrying the case to different judicatures, by allowing a defendant, in the most emphatical and unequivocal terms, to plead as many several matters "whether

102 "of law or fact" as he shall think necessary. The insertion of these last words "whether of law or fact" in this act, and the omission of the restriction, contained in the former acts, against pleading and demurring to the whole, is conclusive to show that that restriction is abandoned by the modern acts upon this subject. It is extremely fair to say, that the law will permit a party to try every plea which it permits him to plead; and there is no restriction in the present act against his pleading anything.

There is nothing unreasonable in this construction; even were the words of the

act less positive than they are. It is only giving to a demurrer, under the act, the effect of a protestation, as existing under the ordinary rules of pleading; by which a party pleading one plea may avoid the implied admission of another.

I understand this construction of the act to have been settled, or at least, within my memory, it was admitted, in the case of *Stone v. Patterson*, (MS. spring, 1806,) in this court; and, again, in the case of *Lyme v. Griffin*. (c) With respect to the 7th section of the act concerning fraudulent devises, (d) in which it is provided, that a judgment on demurrer shall be for the debt and damages, the answer is, that this section is to be confined, in the construction, to cases in which there is a demurrer only, and not other pleas also.

My opinion, therefore, is, that the judgment of the district court sustaining the demurrer is erroneous, and ought to be reversed; and, proceeding to give such judgment as the court below ought to have given, I am further of opinion that the cause should be remanded, for the purpose of trying the remaining pleas and demurrer: but the other judge, while he concurs as to a reversal of the judgment, differing with me in opinion as to the ulterior measures to be taken in the cause, I am of opinion that no further judgment can be given in the case.

I presume that the judgment now
103 to be entered in *this case must be, in effect, like the first judgment rendered in the case of *The Commonwealth v. Beaumarchais*, (e) viz. "That the judges of this court being agreed in opinion, that the judgment of the court below is erroneous, and ought to be reversed, do reverse the same: but, being equally divided in opinion on the question, whether a peremptory judgment should be rendered, for the appellant, on the demurrer to the declaration, or the cause be remanded, to be proceeded in as to the remaining pleas and demurrer existing in the cause, no further judgment can be rendered; the case not being provided for by the act of assembly."

The court being thus divided in opinion, it was proposed by Judge Tucker, and agreed to by Judge Roane, that the case should lie over for further consideration by the then judges, or until a change should take place in the court. After the accession of Judge Brooke, the case was again called up, on the 4th of March, 1811; when Judge Tucker suggested the propriety of a new argument; but Brooke was not disposed to trouble the bar until he should have looked into the case. He therefore took the record; and, on Monday, March 11th, delivered the following opinion.

JUDGE BROOKE. Coming into the court since this cause was argued, and concurring with my brother judges, on the first point, that the judgment of the district court must be reversed, I shall make no remarks upon it, but proceed to state, as briefly as I can, the grounds of my opin-

(a) 5 Bac. 447.

(b) *Ibid.* 457.

(c) 4 H. & M. 277.

(d) 1 Rev. Code. 40.

(e) 8 Call. 175.

ion on the second point, on which there is a difference of opinion in the court. I do not deem it necessary to notice minutely all the changes that the rules of pleading have undergone by the adjudications of the English judges, upon the statute 4 Anne; nor under the operation of the acts of 1748, and 1753, which seem to have followed up the afore-mentioned adjudications.

104 *I shall only remark, by way of illustrating my exposition of the act of 1792, the last on the subject of pleading, that, though the former acts of 1748, and 1753, relaxed the rule of the common law, they still restrained a defendant from pleading and demurring to the same matter in the declaration: the rule laid down in both of these acts is, that the plaintiff in replevin, and the defendant in any other action, may plead as many several matters as he shall think necessary for his defence; so as they be not admitted to plead and demur to the whole. With these acts before them, the legislature passed the act of 1792; upon a correct construction of which, the points under consideration must be decided: by that act it is declared, that the plaintiff in replevin, and the defendant in any other action, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence. The expression "so as they be not admitted to plead and demur to the whole," in the two former acts, is dropped; and, for the purpose of showing more clearly the intention to change the rule, the words, "whether of law or fact," are inserted in the same clause. The design of the legislature to me is obvious: the restriction in the two former acts was intended to be taken off, and the plaintiff in replevin, and defendant in any other action, admitted to plead and demur to the same matter in the declaration. The argument against this admission (ab inconvenienti) I shall not now examine. My impression is, that, under a reasonable application of the rule, it may be made to produce despatch rather than delay in pleading. However that may be, the act of 1792, in my opinion, settles the rule, that the defendant may demur and plead to the same matter; and, when I see distinctly what the law is, I am not at liberty to depart from it. I am, therefore, of opinion that the cause be sent back for the trial of the issues, and the other demurrer, on which the district court did not decide.

105 *JUDGES TUCKER and ROANE adhering to their respective opinions formerly pronounced; the judgment of the district court, upon the demurrer to the declaration, was reversed, and the cause remanded to be proceeded in as to the remaining pleas and demurrer.

Clay v. Williams and Others, and
The Same v The Same.

Tuesday, March 5th, 1811.

v. Executors*—Bond for Fictitious Debt—Equitable Relief.†—If an executrix. (Without being subject to any

*Executors.—See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt 6.

†Equitable Relief—Transactions to Defraud Creditors.—See foot-note to Austin v. Winston, 1 Hen. & M. 33.

compulsion, or undue influence.) for the fraudulent purpose of protecting the estate of her testator from the demands of creditors, give her own bond as executrix, for a fictitious debt, and confess a judgment: she is not entitled to relief in equity: neither will the court give its aid to the obligee, but will leave him to his remedy at law. Yet if he be entitled (independently of the transaction in question) to an account of assets, the court will decree such account, and allow him what may be justly due, not exceeding the amount of the judgment; the rule, in such case, being, that he is bound by his own fraud, so far as it operates against him.

2. Same—Composition of Claims—Equitable Aid.—A court of equity will not assist in carrying into effect compositions of claims by executors, or other fiduciaries, unless the party praying it will first unfold and disclose all the circumstances of the case, that the court may see there has been no fraud, and that every thing was fair.

3. Bond—Fraudulent Purpose†—Witness—Scrivener.—Quære, whether the evidence of a person employed, by both parties, as an attorney, or scrivener, to write a bond for a fraudulent purpose, be admissible to prove the fraud?(1)

4. Administration—Claimant under Marriage Contract—Decree against Administratrix and Distributees—Rights of Creditors.—Property claimed, by a son-in-law, under a marriage contract with a decedent in his lifetime, and recovered, by a decree against the administratrix and distributees, is not in any manner responsible to the creditors of such decedent: unless it appear that such decree was obtained by fraud and collusion between the parties.

5. Chancery Practice—Production of Papers—Interrogatories Respecting Same.—If a defendant, called upon to account for sales of certain public securities, deny that he ever received them: yet aver that the proceeds were accounted for to the plaintiff, "as would appear by the accounts and receipts annexed to his answer," he ought to produce such accounts and receipts, or answer to interrogatories respecting them, if required so to do.

6. Same—Decree in Favor of Legatee—Terms.—A legatee is not entitled to a decree, but on the terms of giving bond and security (if demanded by the executor) to refund, in case it be needful, for the payment of debts.

Upon appeals from two decrees of the late judge of the superior court of chancery for the Richmond district, pronounced the 16th of May, 1804; by the first of which a bill exhibited, by Matthew Clay, and Mary his wife, against Sarah Williams, executrix of Joseph Williams, and administratrix of Robert Williams and others, defendants, was dismissed with costs; and, by the second, the equity of a cross bill, exhibited by Sarah Williams, executrix and administratrix aforesaid, against Clay and wife, was sustained.

The primary object of the first-mentioned bill, (filed September 10, 1795,) was a discovery of assets to satisfy a judgment confessed, in Pittsylvania county court, on a bond for 7,500l. given by Mrs. Williams, as executrix of Joseph Williams, to Matthew Clay.

The plaintiffs alleged that Robert Williams, second husband of the defendant, Sarah, had wasted and appropriated to his own use large sums belonging to the estate of Joseph Williams, for which he never accounted; that the plaintiff Mary was the only child of the said Joseph, and entitled, under his will, to a very considerable part of his estate, which was now in the possession of the defendant, Sarah, and of the other defendants, distributees of the estate of Robert

†Fraud.—See monographic note on "Fraud" appended to Montgomery v. Rose, 1 Pat. & H. 5.

(1) Note. It seems from BROOKS's and TUCKER's opinions in this case, that they considered such testimony admissible. ROANE is pointedly contra: and FLEMING said nothing upon the point. Ideo quære?—Note in Original Edition.

Williams. They prayed, therefore, a settlement of the executorship of Robert Williams; "that Sarah Williams might show what estate she had, as executrix of her first, and administratrix of her second husband; that the other defendants might show what estate of Robert Williams they had in their possession; that all proper accounts might be taken, and a proper decree made."

To this bill Mrs. Williams put in, successively, two answers. The first (which was sworn to February 25, 1796,) admitted the recovery against her in Pittsylvania court, (without making any objection on the ground of fraud,) rendered, partly, an account of the executorship of the estate of Joseph Williams by Robert Williams; (referring for more complete information to the books of the said Joseph and Robert;) and as to the estate of Robert Williams, referred to the inventory; observing, that part had been appropriated in discharge of debts, and part allotted to the distributees. She did not admit that any waste of the estate of Joseph Williams had been committed by Robert Williams.

A second answer, filed September 24, 1796, ("but no rule or order allowing it appears to have been entered,") sets forth sundry additional circumstances relative to the executorship; particularly, that all the payments to Robert Williams, of debts due to the estate of Joseph Williams, were in paper money; part of which (as Robert Williams informed the defendant) was offered by him to be paid into the treasury of North Carolina, according to the laws

of the said state, in discharge of
107 *British debts, and was rejected, because no person had been appointed with authority to receive it; and the same, so offered and rejected, (together with the balance of the said paper money,) depreciated, and became of no value, in his hands; that, since the death of Robert Williams, the defendant had received only sixty dollars as executrix of Joseph; that many debts were still due to the said estate, but the defendant believed that very few could be collected at this late period; many trials having been made in vain. She did not deny "that the complainants had obtained a judgment against her in Pittsylvania court for the sum of 7,500l.; but conceived them not entitled (if there be no error in the said judgment) to receive the same, except as far as the assets of the estate of the said Joseph Williams, which had and might hereafter come to her hands, should extend, after payment of the yet unsatisfied debts: she had declared to the said Matthew Clay her willingness to pay him his share of the said assets, provided he would give her bond and security to satisfy a proportional part of such debts as might arise to charge the said estate; to which proposal he had refused to accede." As to the estate held by the defendant, as legatee of her first husband, she stated her right to hold it as being the same by which the complainants hold a part of the same estate; that commissioners were long since appointed, who divided the land, negroes, and other property on the land, according to the will of Joseph Williams, between the defendant

and the complainant Mary her daughter; and the complainants could, therefore, have no right or title to any part of the property so held by the defendant; although the same (as well as the share of the complainants) might be liable to creditors.

To this answer, the defendant added a demurrer to so much of the bill as demanded an account of her administration of the estate of Robert Williams; 108 observing "that his estate was not bound to pay the debts or legacies of Joseph Williams, until it be proved that the estate of the said Robert was justly indebted to that of Joseph; but expressing her willingness, if the complainants could establish that circumstance, (which she thought they could not,) to render such account, when hereafter lawfully called upon.

John Call, one of the defendants, (whose wife Lucinda, was one of the daughters of Robert Williams,) relied on a marriage contract by which he became entitled to all the property he had ever received from his estate, and had obtained a decree for it, in the county court of Pittsylvania, in a suit against the widow and distributees. His answer, moreover, (sworn to the 13th of August, 1796,) suggested, that the plaintiff Matthew Clay, and defendant Sarah Williams, had combined together to defraud the respondent and his wife, and the creditors of the two estates; that (as the respondent verily believed) the judgment obtained by the complainant, for 7,500l. was collusive; for "that Matthew Clay told the respondent that he the said Clay had told the said Sarah Williams a method of securing him, and keeping a good living herself, but that she would not consent to it; and that she was wrong, for, if he did not get the estates, Hamilton" (a British creditor) "would;" "and asked the respondent why he (as a friend to her and her children) did not advise her to such measures as he supposed would enable her to secure herself against the claims of Hamilton? The respondent verily believed, the complainants, and the defendant Sarah, never had any settlement of their accounts; (if they had, it is presumable that she called upon some person to assist her, by whom the complainants could prove it;) that the complainant Matthew, in order to prevail on the defendant Sarah to confess the judgment, promised her to let her keep what she had in possession, and to permit her children to keep theirs

also, provided he prevailed in the
109 *present suit; that, a few weeks only before the judgment in question, the respondent was at the house of the complainant Matthew, in company with him and the defendant Sarah, and a proposal was made for her to give him the said Matthew a judgment; that she said she would do it willingly, if the estate of Robert Williams would not be injured by it;" and the respondent "heard the complainant Matthew Clay tell her it would not, and ask, how can it? The respondent understood that, in a few days after the aforesaid conversation, the defendant Sarah passed her note to the complainant for 7,500l. and, at the

next quarter session court for Pittsylvania county, confessed the judgment." The respondent further said that he "heard the defendant Sarah Williams, tell her son-in-law John Williams that the complainant Matthew Clay had offered to take from her Judge Williams's bond due the estate of Joseph Williams, for six hundred pounds, debt, and interest, or thereabout, and give her a full discharge against all claims from him on account of his wife's estate; to which the said Williams advised her; but she replied, she would not, for she was convinced that, on a fair settlement of accounts, the said Clay would fall in her debt."

Nathaniel Washington Williams and others, distributees of Robert Williams, in their answers, (sworn to the 21st of August, 1800,) averred, that they believed the said Robert Williams conducted himself fairly, honestly and honourably in all his transactions relative to the estate of Joseph Williams; that, after the intermarriage of the complainants, there was an order of the county court of Pittsylvania, made on the motion of Clay and wife, summoning the said Robert Williams to render an account of his guardianship of the complainant Mary; that, thereupon, a full, fair and final settlement of the accounts of the said Robert Williams's guardianship took place; showing a balance of only 3l. 6s. 8d. due

from the said Robert Williams; that, 110 after his death, the complainant *Matthew Clay had constant access to his books, as well as those of Joseph Williams, and, therefore, probably acquired all the information necessary to form a judgment whether any thing was due to his wife or not; yet he suffered the estate of Robert Williams to be divided amongst his family, and never once endeavoured to prevent it, although he lived within two miles of the place, and was well acquainted with the intention of the administratrix to make a distribution of the estate. Upon the whole, the defendants explicitly stated their belief that nothing was due from the estate of Robert Williams to that of Joseph. They also charged the judgment to have been obtained by fraud; setting forth that they were informed and believed "it was a scheme contrived by the complainant Matthew Clay to circumvent and injure the defendants to this suit, at the very time that he was imposing on the credulity and confidence of Sarah Williams, by making her believe that it was a step which was necessary for preserving the estate of the said Robert Williams from the British creditors of the said Joseph Williams, who (the said Matthew had contrived to make her believe) would have a right to come upon the estate of the said Robert Williams for satisfaction, and that the only means of preventing it would be by suffering him to get it, through the channel of a fictitious claim, and that he would give his bond, to secure it to the family of the said Robert Williams after he had secured it against the aforesaid creditors of the said Joseph; that there was nothing due to the complainants from the said Sarah Williams, as executrix of the said Joseph Williams, or in any other capacity, and that the sum mentioned in the note, on which the said

judgment is founded, was altogether fictitious and pretended; and although the said Sarah Williams, in her answer to this suit, hath not stated the fraud, that is owing to part of the same system of imposition which the complainant had been practising on her during the lifetime of the 111 *complainant Mary, who died on or about the 26th day of March, 1798; that, according to his promise aforesaid, the said Matthew, on receiving the said note, gave his bond, to restore the estate of the said Robert Williams to his family after he had secured it against the creditors of the said Joseph Williams, deceased; which bond, together with all the books and papers of the said Robert Williams, were unfortunately destroyed, on or about the 28th day of October, 1798, by the accidental burning down of the mansion-house and office of the said Robert Williams, deceased; after which, the complainant Matthew appears to have conceived that, by the loss of those important evidences, he should have it in his power to mature his fraud and defeat the claims of the representatives of the said Robert Williams, and therefore he now pretends that the said note was given for a just debt, and is endeavouring to compel payment of the said judgment from the estate of the said Robert Williams."

On the 10th of September, 1800, Mrs. Williams filed her cross bill, (which does not appear to have been sworn to,) charging Clay with fraud in obtaining the note of hand and judgment, by taking advantage of the confidence she reposed in him, as having married her daughter; by playing upon her fears of a recovery by John Hamilton & Co. against her, of very large sums, for which suits were pending in the federal court; by making her believe that the estate of Robert Williams (who had been guilty of no malversation) would be liable to satisfy those demands, instead of the estate of Joseph Williams, which she had since discovered was the true debtor; and thereby persuading her to give him the note for a fictitious sum which should be equal to all the estate of Robert Williams, on which he would afterwards sue, and, having absorbed the whole estate in satisfaction of the judgment, would afterwards restore it to the family.

112. *The cross bill further stated, that Clay, in order to preserve the appearance of good faith, gave, as he had previously promised, a bond, obliging himself to restore the estate in manner aforesaid; "but the same was lately destroyed, with all the books and papers of the said Robert Williams, by the accidental burning down of his mansion-house;" that Clay and wife, "afterwards, according to the plan which he had proposed, exhibited their bill demanding satisfaction of the judgment out of the estate of Robert Williams; to which she put in an answer, drawn by counsel employed by Clay, and in which the circumstances aforesaid were purposely omitted; that she still confided in Clay, and believed he would perform his engagement, until after the burning of the house aforesaid, when, having found out that his bond was burnt, he began to show his real

intentions, and immediately claimed the whole amount of the judgment; that Clay's conduct was the more oppressive, as Hamilton & Co. had recovered judgments against her as executrix of Joseph Williams, to satisfy which she had no assets; and the property of that estate, which was delivered to the said Clay, ought to be restored to her for the purpose of discharging those judgments; (a suit she had brought to compel him to give security to refund, having been dismissed, in consequence of the said arrangement agreed upon between them;) and, moreover, that in the year 17, she delivered sundry public securities or certificates belonging to the estate of Robert Williams, to the said Clay, to make sale thereof, for which he had never accounted. She, therefore, prayed an injunction to prevent all further proceedings on the judgment for 7,500l.; an account of the proceeds of sales of said certificates, and general relief."

Clay, by his answer, "passing over the obloquy which the plaintiff attempted to throw upon him, denied that he endeavoured to alarm her by any representations of the liability of the estate of Robert

113 Williams; averring, that *he never gave to the plaintiff any bond for refunding; that the dismission of the suit which the plaintiff had brought against him was not to be ascribed to any other cause than the settlement with her, founded upon a conviction in her that the sum of 7,500l. was really due, even without interest;" as evidence of which, he stated that, "in the lifetime of Robert Williams, he had sued him and Mrs. Williams, for an account of the executorship, and a decree was entered against them, in North Carolina, for 10,000l. proclamation money, with liberty reserved to make known any credits at the succeeding term; (before which the said Robert Williams died, and the suit continued against her alone;) that he then made oath to the amount of his claim, and bail was demanded of Robert Williams by authority to the amount of 20,000l. He also denied that the plaintiff's answer to his bill was drawn by counsel employed by him. As to the public securities or certificates mentioned in the cross bill, he observed, that Henry Clay (and not himself) had the power of attorney from Mrs. Williams to dispose of them; which was done, and the proceeds accounted for to her, as would appear by the accounts and receipts hereunto annexed." But it does not appear that any such accounts and receipts were filed.

The deposition of Theodorick B. M'Robert (taken May 6th, 1801,) stated, that "some time about the year 1794, or 1795, he was requested by Matthew Clay, or Sarah Williams, either one or both of them, to attend at the house of the said Clay to transact some business interesting to both parties; that, on his arrival, after some conversation with the parties, he was requested to write a bond, from Sarah Williams, as executrix of Joseph Williams, for the sum of 7,500l. (as well as he recollects) to Matthew Clay; that, at the time of executing the said bond, the deponent understood, and was informed by both parties, that a certain Hamilton

114 claimed a British *debt of the estate of Joseph Williams; that an effort had been made to discharge this debt under the law of the state of North Carolina, authorizing payments into the state treasury in discharge of such debt; and that the whole, or a considerable part, of this debt had been paid or tendered, at the treasury of North Carolina; that the parties, doubting as to the liability of Joseph Williams's estate to the payment of Hamilton's debt, (the decision of the federal court on such payments being unascertained, or, at least, it not being certainly known, at that time, by the parties, how far that court had gone, or would go, in sustaining or rejecting such payments,) some plan was thought right and necessary to shelter the estate from a claim considered by both parties to be unjust, inasmuch that Joseph Williams's estate ought, in equity, to be entirely exonerated; that, to accomplish this plan, the bond aforesaid was given, judgment confessed, under a representation made by the said Clay, that Mrs. Williams must and would find herself safer in the hands of said Clay than in the power of a British creditor; that bonds were interchangeably executed by the parties; the condition of which, as this deponent believes, (trusting to his best recollection,) stipulated the mutual dismission of suits then depending between them; one by Mrs. Williams against said Clay in Pennsylvania court, to compel him to refund the property received by him as a legatee of Joseph Williams's estate; the other, in some court in North Carolina, against the said Sarah Williams, as executrix of the said Joseph, by Matthew Clay; and that nothing was inserted in the said bonds respecting Hamilton's claim, and the arrangement on that subject, because the thing was fully understood between the parties, and it was thought more prudent not to reduce any thing of that kind to writing; that the mutual dismission of the suits above referred to did not (as this deponent understood) form any part of the consideration of the bond on which the judg-

115 ment was confessed; and *that the proceedings on this bond were designed to answer no other purpose than to protect the estate of Joseph Williams from Hamilton's debt: this deponent knows of no settlement between the parties, of the accounts of Joseph Williams's estate, although the bond for 7,500l. expresses, upon a settlement," &c.; but he was requested to write the bond in that style, as best adapted to the nature of the transaction, and to guard against any impression that might arise from an inspection of the bond that it was a loose, random transaction; and he was at the same time assured by the parties that there had been no previous reference to the books of Joseph Williams, or any liquidation, final or otherwise, of the accounts relative to Joseph Williams's estate, and that the spirit and design of the transaction was to defeat Hamilton's claim, not to furnish evidence of a bona fide debt to Matthew Clay; and the sum specified in the bond was assumed as sufficient to shelter Joseph Williams's estate completely. This deponent further states, and he understood it as agreed by Matthew

Clay, that the transaction should in no shape affect the estate of Robert Williams, either in the hands of his administratrix, or of his children; and that an assurance to that effect being required by the said Sarah Williams, was given by the said Clay, (as this deponent firmly believes and is persuaded,) previous to, or at the time of, signing the judgment bond, and thus a difficulty removed which might otherwise have prevented the signature of the said bond by the said Sarah Williams."

On the 6th of November, 1802, the deposition of the same witness was taken over again to the same effect, with these additions, that, being asked whether he knew that the dwelling-house and office of Robert Williams were burnt? he answered, "I know that they were, and since the transactions referred to in the foregoing deposition;" and being asked, "Do you recollect any other stipulation in the condition of the bonds interchangeably
116 "given?" he answered, "Having seen (since I gave my first deposition) a bond in the possession of Mr. Clay, which I believe to be one of the bonds above referred to, I think the condition contains a stipulation to rectify any mistakes that might be found in the settlement."

Sundry other depositions proved declarations by Mrs. Williams, (when Clay was not present,) of circumstances corresponding with the statement in her cross bill.

The chancellor, on a hearing, dismissed the bill of Clay and wife, and awarded an injunction to restrain him from proceeding to obtain satisfaction of his judgment until further order; decreeing, moreover, "that Clay should seal and deliver to Mrs. Williams his obligation, in the penalty of 2,000*l.* with condition to be void if he shall refund so much of the estate of the said Joseph Williams, received by him, as he ought to contribute towards discharging the debts of that testator; and that the cross bill be dismissed, as to the public securities, or certificates, thereby demanded; the receipt of which by him is denied, and not proved;" from which decrees Clay and wife appealed.

Peyton Randolph and Botts, for the appellants.

Call, for the appellees.

Thursday, March 21st. The judges pronounced their opinions.

JUDGE BROOKE. If, as was contended by the counsel for the appellees, the judgment confessed, in Pittsylvania court, upon the note, which is alleged, in the cross bill, to have been executed by the appellee Sarah Williams, for the purpose of defeating the claim of a bona fide creditor of Joseph Williams, her testator, were the only ground on which the appellant entitled
117 himself to the aid of the court of

chancery, he having exhibited no *settlement of accounts, or other document for the amount of which the note was given, I should be of opinion the aid of that court ought not to be afforded him; because a court of equity will not assist in carrying into effect compositions, of claims, by executors or other fiduciaries, unless the party praying it will first unfold and disclose the whole circumstances of

the case to the court, that it may see there has been no fraud, and that every thing was fair; as is in effect said by Lord Maclesfield, in the case of Pollen v. Huband; (a) but, as it appears by the bill, answers, and exhibits in the first suit, that the complainant Clay, in right of his wife, the only daughter of Joseph Williams, is entitled to a considerable proportion of the large estate of which he died possessed; no administration account of which has been rendered, either in the lifetime of Robert Williams, the second husband of the appellee Sarah Williams, or by her, since his death; I am of opinion the appellant is entitled to an account thereof, unless something appears in the cross suit by which he has forfeited that title. If the deposition of M^r Robert, aided by some circumstances which do not appear to me very weighty, be considered as outweighing the positive answer of the appellant, and, of consequence, as establishing the allegation in the cross bill, that the note on which the judgment was confessed, was executed by the appellee Sarah Williams, in pursuance of a plan preconcerted by the parties to defeat the claim of Hamilton & Co. upon the estate of her testator Joseph Williams, she then brings herself completely within the rule that in "*pari delicto potior est conditio possidentis*," or that the possession must stand for the right in a controversy between parties equally guilty of a fraud. Nor is there any thing in this case, which can entitle her to the benefit of the exception to this rule, laid down in the case of Austin v. Winston, in this court. she was in no danger of being oppressed
118 by the appellant; he had no execution hanging over her; it was her *own voluntary act, against which she ought not to be relieved by a court of chancery.

If, however, on the contrary, (as I am inclined to think is the case,) the deposition of M^r Robert, aided as before mentioned, does not outweigh the positive answer of the appellant, corroborated by the circumstance, that the appellee Sarah permitted several years to elapse (during which the charge of a fraud, practised in obtaining the note by the appellant, might have been exhibited in some one of her answers to his bill) without having even noticed it, and also by the inconsistencies in the cross bill, relative to the counter bond, and the burning of the house of Robert Williams, then the allegations in the cross bill are totally unsupported by proof, and it ought to have been dismissed. But pursuing the rule before stated, relative to compositions by executors; and it appearing that the appellant has received a part of the estate of Joseph Williams, and that there are outstanding debts to be satisfied; I am of opinion that the appellant, before he has the aid of the court of chancery, ought to give the security required by the chancellor in the cross suit; and that (waiving his judgment until an account shall come in) he then will be entitled to an account (not exceeding his judgment in amount) of the estate of Joseph Williams, deceased, according to the principles

(a) 1 P. Wms. 761.

of the decree, which has been agreed upon by this court. I am, therefore, of opinion, that both the decrees be reversed.

JUDGE TUCKER. These causes, as between the appellant Clay, and the appellee Sarah Williams, are cross suits. The complexion which the deposition of Theodorick B. M'Robert (the lawyer who was employed to draw the bond, and to obtain the judgment alluded to in the original suit, and complained of in the cross suit) gives to the transaction between those parties, seems to me to afford to neither any claim to the aid of a court of equity.

119 *My opinion in the case of Austin v. Winston, (a) to which I still adhere, will save me the trouble of repeating my reasons in this case. The opinions of some of the judges delivered on that occasion, in support of the decree which was pronounced, operate, perhaps, in favour of a widow, who states that she was imposed upon by a son-in-law, in whom she had confidence; (though circumstances appeared to disprove the latter part of that allegation;) and the uncertainty of the public mind upon the much agitated question respecting the recovery of British debts, in the federal courts, (which possibly was not then decided,) may afford some apology for both, for wishing to avoid the payment of such a debt, by every lawful means; but cannot, in my opinion, sanction the plan which that deposition discloses, which (though denied by the answer of the defendant in the cross suit) stands uncontradicted in the original suit. I therefore think the chancellor would have decided rightly in dismissing both suits, if there had been no other object than what relates to that transaction: but as Clay, in right of his wife, appears to be entitled to an account, I am of opinion that, instead of dismissing the plaintiff's bill in the original suit altogether, the chancellor ought to have retained it for a settlement and adjustment of the accounts of the estate of Joseph Williams, deceased, not only with his executrix Sarah Williams, one of the appellees, but with the other executors of that testator or their representatives, (who ought, for that purpose, to be made parties to the original suit,) and with the representatives of Robert Williams, the second husband of the said Sarah, who acted in her behalf, as executor of Joseph Williams, from the time of his intermarriage with her. And if, upon that settlement, it shall appear that the estate of Robert Williams is, in justice and equity, indebted to that of Joseph Williams, the representatives of the former ought to contribute their several proportions to

120 the payment thereof, *according to the value of the property they may respectively have received from his estate, since his death; except so much thereof as may have been received by John Call, in virtue of the decree of the court of Pittsylvania county; liberty being reserved to the plaintiff in the original suit to show, if he can, that such decree was obtained by fraud and collusion between the parties to that suit: and that so much of the decree in the cross suit as directs the appellant to give

bond to contribute towards the discharge of the debts of Joseph Williams, and as is not contradicted by the decree which has been agreed on, be affirmed; and the remainder of both the decrees reversed.

JUDGE ROANE. This is a bill brought by Clay and wife, against the appellee Mrs. Williams, as executrix of Joseph Williams, her first, and administratrix of Robert Williams, her last husband, and against the children of Robert Williams, who are the distributees of his estate. Though not very formally or technically drawn, it prays the aid of the court of equity, to assist them in getting the benefit of a judgment obtained against Mrs. Williams, by confession, in the court of Pittsylvania county, for 7,500l.; and, as conducive thereto, prays an account of the administration of Joseph Williams's estate by Mrs. Williams, and by Robert Williams acting in her right; and of Robert Williams's estate, who is charged with having wasted the estate of Joseph Williams, and whose estate is, consequently, alleged to be responsible therefor; as also a discovery, from the distributees of R. Williams, of the portions of his estate, which have severally come to their hands.

The bill was exhibited on the 10th of September, 1795. On the 26th February, 1796, Mrs. Williams, the principal defendant, answered this bill, but set up no ground of fraud to impeach the judgment on which the bill of Clay is predicated. On the 24th of

121 September, 1798, she *exhibited another answer, (without any order or leave of the court for that purpose,) which, like the former, while it is full upon the subject of the administration of the estate of Joseph Williams, is silent upon the subject of fraud. It was not until the 10th September, 1800, five years after the institution of the suit in question, that she set up this ground of defence by a cross bill; thus endeavouring to avail herself of a defence, by the testimony of others, which her conscience was probably too tender to allow her to set up, upon her own oath as defendant, and which she was possibly urged to set up by the importunities of the other defendants, and by the increasing pressures which were advancing upon her.

In taking this ground of defence, in her cross bill, (which is flatly denied in all its parts, by the answer of the defendant thereto,) she comes with a very ill grace into a court of equity. She comes alleging her own turpitude and fraud, in a case in which she was influenced by no duress or coercion whatever, and in which her colleague in the fraud had her not in his power, further, at least, than his just claims against the estate, of which she was executrix, would extend.

This case is, therefore, widely different, in this respect, from that of Austin v. Winston, in this court; and the appellee now in question stands, on this point, entirely in the situation of a person not to be received or countenanced in a court of equity. While she stands so, upon the general principle, the strength of that principle is greatly increased against her,

by the before-mentioned consideration, that she is endeavouring to avail herself of a defence by the testimony of others, which she did not dare to set up, by her own oath, in the character of a defendant.

The sole witness, whom she opposes to the answer of Mr. Clay to the cross bill, is Mr. M'Robert. He was an attorney confidentially employed, according to his
122 *own account, by both the parties, to transact the business between them. He was an attorney; for although this is not said by him or others in detailing the circumstances of that particular transaction, (no question being asked him upon that point,) yet, very shortly afterwards, he got a judgment upon the bond, as the attorney of the plaintiff, as appears by the record; but he was at least the scrivener who acted confidentially between the parties, in drawing the bond in question.

The settled law upon this subject is, that counsel or attorneys, so far from being obliged, are not permitted, to give evidence of such matters as come to their knowledge in the way of their profession; that this principle extends even to scriveners acting as attorneys in any particular transaction; nay, even to interpreters going between the attorney and his client; that this is not the privilege of the counsel, &c. but of the client; without which it would be impossible that any business could be done with safety; that a court will even stop a witness of this class seeming desirous or disposed to reveal confidential communications; and that courts of equity will refer the depositions of such witnesses to a master, to expunge so much thereof as shall be found to be of this character. (Such reference was not necessary in the case before us, as the whole of the testimony contained in the deposition is of that character.) All these positions are to be found in 2 Bac. 579, and the cases there cited: they are bottomed upon the soundest propriety, and go to the utter exclusion of the testimony of Mr. M'Robert in the case before us. As to any supposed waiver of this objection, on the part of the appellant, it is neither seen that he cross-examined the witness: was present at his examination; or knew that that particular witness was to be examined; nor, if it were otherwise, would such waiver be justly inferred therefrom.

In 2 Bac. 579, it is said, that by the practice of the courts, if a witness be produced and sworn by the plaintiff *or
123 defendant, being once sworn, the other may examine him to any thing whatsoever, though he be the solicitor of the party who produces him; but this is with an exception of matters confidentially communicated to him by his client.

Again, this same idea seems to be admitted by the before-mentioned authority, which states that a court will stop a witness of this class being desirous to reveal confidential communications.

This doctrine would seem to hold, a fortiori, in relation to examinations before commissioners, who have not power, as the courts have, to reject a witness who is produced for examination; and, consequently, it behooves the adverse party to make the testimony as little adverse to him

as possible, lest his objection to the admissibility of the deposition should fail him, when it comes to be decided on by the proper tribunal. This position seems to have been taken by this court in the case of *Blincoe v. Berkeley*, 1 Call, 412. There is, on the other hand, no great utility resulting from a party's objecting to a deposition on a ground which is equally manifested to the court upon the face of the deposition itself. As, therefore, Mrs. Williams can neither be received to allege the fraud herself, which she sets up in this case; nor her sole witness be admitted to testify thereto, without overturning the best established principles of the law; the answer of Mr. Clay stands entirely unimpeached in the point in question, and all further inquiry upon this topic is entirely unnecessary. While I say this, I am by no means prepared to admit that that answer would be outweighed by the opposing testimony, were the deposition of Mr. M'Robert not to be excluded. Although there may be some slight circumstances (throwing the conversations of Mrs. Williams out of the question) seeming to support that deposition, there are others, on the other hand, equally strong to corroborate the answer. These, or most of them,

have been stated by the appellant's
124 *counsel, to whose view of the case I beg leave to have a particular reference. (1) They are not necessary to be repeated and analyzed by me, in the view I have taken of this subject. I go by the well-established principles of law and equity, and the rules of evidence; (any private surmises, or conjectures of my own, or of others, touching this particular case, to the contrary notwithstanding;) as being the only safe and proper guides by which a court of justice can be governed. On the ground of the fraud alleged in the cross bill, therefore, the claim of the appellant cannot be affected; especially, as

(1) Note by the Reporter. The circumstances chiefly relied upon, for the appellant, in support of his answer to the cross bill, were. 1. That charges of fraud and improper conduct were exhibited by him and Mrs. Williams, against each other in their respective suits in Granville. (North Carolina,) and Pittsylvania. (Virginia,) which proved that no friendship or confidence existed between them, sufficient to produce any undue influence on the part of Clay; 2. Those suits were reciprocally dismissed upon her giving the bond for 7,500l. which, therefore, appears to have been the effect of a compromise; 3. Her two answers to Clay's bill in the original suit, did not charge him with obtaining that bond by fraud; 4. That bond is alleged in the cross bill to have been intended for the protection of the estate of Robert Williams; yet it was given by her as executrix of Joseph Williams; and, 5. The original suit was brought by Clay and wife four years before the burning of her mansion-house and papers; yet she says in the cross bill, that after finding that his bond was burnt, he determined to enforce the judgment against her.

On the other side, it was observed that Clay's answer was not expressly responsive to one of the most material allegations in the bill: it comes very near, but cautiously avoids, a direct denial of the allegation, that the sum of 7,500l. was an assumed sum without any real settlement. He talks about a settlement, but does not assert it. On the contrary, he says the amount of Hamilton's claim against the estate, (which he avers is the "only one he ever heard of.") was not ascertained; how, then, could there have been a settlement? The answer is a *felo de se*. It was also contended that if Mrs. Williams was participant in the fraud attempted by Clay, the estate of Joseph Williams (which she only represented as executrix) ought not to be affected by it.

he has stated that the bond was preceded by a settlement of the accounts; and that in consideration thereof, he dismissed a suit, brought by him, against the appellee Sarah Williams, in a court of equity in North Carolina, by which he had a prospect of recovering as large, or a
125 *greater sum, from her, as the executrix of Joseph Williams.

But the appellant coming here for the aid of the court, relies upon a composition of a debt by an executrix; and that without showing the particulars on which such composition is founded. I entirely concur with Judge Brooke, that such compositions are not favoured in equity, save when they are beneficial to those for whom the executors are acting: all compositions of an opposite character are discountenanced in a court of equity; and, in favour of the cestui que trust, the creditor, having obtained an advantage thereby, will be curtailed and brought down to the proper standard; especially, where (as in this case) we can get at him, upon the ground of his applying for the aid of the court of equity. He shall not have that aid, unless he will do what is just and right, which is to give up his advantage, (at least so far as it affects those for whom the executor was acting,) and abide by the result of a fair account and settlement. In support of the above ideas, upon this point relative to compositions by executors, I refer, among others, to the cases of *Blue v. Marshall*, (a) and *Pollen v. Huband*. (b) The result, as applied to the case before us is, that while the appellant shall never recover more than the amount of his bond with interest, (for he was acting in his own right, and entirely competent to make even an injurious compromise for himself,) he shall be limited in his recovery, on the other hand, by the sum to which, upon an account, he can show himself to be justly entitled. My opinion is, therefore, that the decree in the original suit ought to be reversed, and an account directed of the administration of Sarah Williams, and of Robert Williams, acting in her right, of the estate of Joseph Williams; of Sarah Williams's administration upon the estate of her husband Robert Williams; and of the property received by the appellees (children of Robert Williams) from his administratrix; (excluding
126 the appellees *John and Lucinda Call, the decree in whose favour, in Pittsylvania court is conclusive to show, that there was a marriage contract with Robert Williams, and competent to bind the co-distributees, who claim as volunteers under him; liberty being at the same time reserved to the appellant to show, if necessary, that their exemption should not prejudice him, who was no party to the decree aforesaid;) and, upon such account being taken, that the balance thereby found justly due to the appellants from the estate of Joseph Williams, or from the estate of Robert Williams in consequence of his mismanagement of the same, so far as such balance does not exceed the amount of the judgment recovered in Pittsylvania court, as aforesaid, with interest thereupon, shall be

decreed to them, to be paid out of the assets of Joseph Williams's estate, or out of Robert Williams's estate, so far as he shall be found to have been justly indebted thereto; to which payment, if necessary, the distributees of the said Robert Williams (John and Lucinda Call being excepted as aforesaid) shall be held contributory. As to the decree on the cross bill, I am of opinion that it should be also reversed, so far as it perpetuates the injunction to the judgment aforesaid, and be reformed so as that judgment shall remain enjoined only until the account decreed in the other suit shall be taken, after which, the same shall remain perpetually enjoined for so much thereof as shall exceed the sum found due to the appellants, with legal interest, and be dissolved for the residue. I am therefore of opinion, that both decrees be reversed, with costs, and the cause remanded to the superior court of chancery, to be finally proceeded in according to the principles now stated.

JUDGE FLEMING. There being no difference of opinion among the judges as to any points of essential importance, the following is to be entered as the opinion and decree of this court.

"If the sole object of these suits
127 which, as between *the appellant, Matthew Clay, and the appellee, Sarah Williams only, may be considered as cross suits between those parties, had been, on the one hand, to compel a discovery of the assets of Joseph Williams, deceased, in the hands of the appellee Sarah, his executrix, to satisfy the judgment confessed by her on a note given to the appellant for the purpose stated in the deposition of Theodorick B. M'Robert in the first suit, and charged by the appellee Sarah, in her cross bill, and, on the other, to be wholly relieved from that judgment, as obtained by fraud and imposition, and a collusion between those parties to defeat a just claim against the estate of the said Joseph Williams; this court would have approved of the dismissal of the appellant's original bill, and would have considered the appellee Sarah as little entitled to the favour of a court of equity, on the grounds mentioned in her cross bill, (although the facts therein alleged had been fully proved,) and would have left both parties in the situation in which they had placed themselves; but, as it appears to this court that the appellant, in right of his wife, is well entitled to an account and settlement of the estate of the said Joseph Williams, deceased, not only in the hands of the appellee Sarah, his executrix, but in those of the other executors named in the will of the said Joseph, (who, for that purpose, ought to be made parties to the original suit brought by the appellant,) and also in the hands of Robert Williams, the second husband of the said Sarah, (who acted in her behalf, as executor of the said Joseph from the time of his intermarriage with her,) or his representatives or distributees, the original bill ought not to have been dismissed as to that object, but retained for the purpose of such an account and settlement; in which account, the appellant ought to be charged with such part and

(a) 3 P. Wms. 381.

(b) 1 P. Wms. 751.

proportion of the estate of the said Joseph Williams, as the guardian account settled between the said Robert Williams and the appellant, (by virtue of an order of Pittsylvania county court, made at 128 *the instance of the said appellant,) shows to have been accounted for, and delivered to the appellant, in right of his said wife, by the said Robert in his lifetime. And if, upon a just and equitable settlement and adjustment of such accounts, it shall appear that the estate of the said Robert Williams, in the hands of his administratrix, or of his distributees, is indebted to the estate of the said Joseph, the said administratrix, out of the assets in her hands to be administered, or the several distributees, respectively, according to the portions of the said Robert's estate which they may have received since his death, ought to satisfy and pay to the appellant the amount of his just proportion of the said Joseph's estate, after payment of all his just debts, not exceeding seven thousand five hundred pounds, Virginia currency, the amount of his judgment against the administratrix; from which account of the estate of the said Robert Williams, in the hands of his distributees, is to be excluded whatever may have been recovered and received by John Call, as the marriage portion of his wife Lucinda, in the lifetime of the said Robert, or by virtue of the decree of the court of Pittsylvania county, for that account, since his death; liberty being reserved to the plaintiff in the original bill to controvert the validity of such marriage contract, or to show, if he can, that such decree was obtained by fraud and collusion between the parties to that suit, if necessary for the discharge of his claim against the said Robert's estate.

"This court is further of opinion, that the said Matthew Clay, the defendant in the cross bill, having, by his answer to that bill, so far admitted that he possessed a knowledge of the disposal of the certificates belonging to the estate of the said Robert Williams, in the cross bill charged to have been delivered to him to make sale of, as to have the accounts and 129 receipts respecting the *same in his hands, (which he refers to in his said answer as exhibits, but does not appear to have produced them,) he ought to produce such accounts and receipts, or to answer to interrogatories respecting them, if required so to do.

"And this court, approving of so much of the decree in the cross suit as directs that the appellant shall give bond to contribute towards the discharge of the testator Joseph Williams's debts, affirmeth the same; and, reversing so much of both decrees as is not approved of by this decree, the suits are remanded to the said superior court of chancery to be proceeded in, according to the principles of this decree."

Roberts's Widow and Heirs v. Stanton.

Argued Wednesday, May 30th, 1810.

1. *Infants—Decree against—Appointment of Guardian ad Litem.*—It is error to enter a decree against in-

fant defendants, without assigning them a guardian ad litem; and though the infancy did not appear in the original proceedings, yet, if it be alleged in a petition for a rehearing, (the decree being interlocutory,) a guardian ad litem ought to be appointed.

2. *Chancery Practice—Profits of Land—By Whom Ascertained.*—It is not error in a court of equity to direct commissioners instead of a jury, to state and report an account of the profits of land.

3. *Land—Rents and Profits.*—Rents and profits of land, the possession of which was unlawfully withheld by the ancestor in his lifetime, and by his heirs after his death, ought not to be charged against his executors and heirs jointly, but be apportioned among them according to their respective interests.

4. *Wills—Power to Sell Land—Defect in Execution—Equitable Relief.*—As far as circumstances will permit, a court of equity will supply any defect in the execution of a power given by a will, to executors or trustees, to sell lands for payment of debts or legacies. A conveyance, therefore, by one executor or trustee only, (instead of three,) but in all other respects conformable to the intention of the testator in creating the trust, will be supported in favour of a purchaser for a valuable consideration; and this, notwithstanding it be provided by the will, that if one or more of the executors, or trustees, should die before the object of the trust was accomplished, others should be appointed, by the survivors, jointly with them to finish the execution of the trust.

5. *Ancient Deeds—Proof of Execution—Sufficiency of.*—A deed of above thirty years' standing requires no further proof of its execution than the bare production, where the possession has gone according to its provisions, and there is no apparent erasure or alteration.

6. *Patent—Unregistered—Effect against Purchaser with Notice.*—A patent, though not registered, is good in equity against a purchaser having notice. And quære, is it not also good at law?

7. *Same—Same—Sufficiency of Notice.*—In such case, information of the existence of the patent, by neighbourhood report, and from a person declaring he had seen it, together with knowledge of possession and cultivation by tenants of the patentee, is sufficient notice, to bar the laying a warrant upon the land as waste and unappropriated.

8. *Same—Same—Effect against Purchaser without Notice.*—Quære, is a patent, not registered, good, either at law, or in equity, against a purchaser without notice; no proof appearing of visible possession, or cultivation, by the patentee in person, or by his tenants?

In November, 1797, William Stanton filed his bill in the superior court of chancery for the Richmond district, 130 *against Wilson Miles Cary, executor of George William Fairfax, deceased, Bataille Muse and Joseph Roberts, defendants; charging, in effect, (among other things,) a purchase by the plaintiff, in or about the year 1791, of a tract of land, in Culpeper county, supposed to belong to the estate of the said Fairfax, which, under his will, was left to be sold by his executors; that Cary was the only acting executor in this country, and Muse, being his agent with unlimited powers, had sold the land and procured a deed to be made by Cary only; upon which the plaintiff gave bond and security for the purchase-money; that Roberts, under a pretence that Fairfax's title was not good, (his grant from Lord Fairfax, late proprie-

ad litem.—It is error to enter a decree against infant defendants without assigning them a guardian ad litem. *Alexander v. Davis*, 42 W. Va. 400, 26 S. E. Rep. 292.

It is right and proper that a guardian ad litem should be appointed for infant defendants in ejectment at the proper time; and the plaintiff in such action should see that such guardian ad litem is appointed to the proper time, and the infant should appear and defend by guardian ad litem. *Campbell v. Hughes*, 12 W. Va. 306, citing the principal case. See further, monographic note on "Infants" appended to *Caper-ton v. Gregory*, 11 Gratt. 505.

†*Profits of Land—By Whom Ascertained.*—See foot-note to *Eustace v. Gaskins*, 1 Wash. 188.

**Infants—Decree against—Appointment of Guardian*

tor of the Northern Neck, dated in 1747, having not been recorded in the proprietor's office,) had entered and surveyed the same land as waste and unappropriated, obtained a grant from the commonwealth, and taken possession; that the plaintiff had frequently applied to the said Muse for Fairfax's grant for the purpose of instituting a suit against Roberts, but had never been able to get it, Muse always evading compliance with his request; that he had also often proposed to vacate the contract, upon discovering the original title to the land was so defective, and that he could not obtain possession thereof, or the means of prosecuting a suit to try the title; which proposals were refused; that suit had been brought in the district court of Dumfries, and judgment obtained against him upon his bond for the purchase-money. He therefore prayed an injunction to stay proceedings on that judgment; a discovery and delivery of the title papers in the hands of Cary and Muse; that Roberts should answer particularly, as to his knowledge of Fairfax's patent, before his own entry; and be decreed to render up his grant to be cancelled; that by a decree of the court the plaintiff's title to the land might be perfected, and he quietly possessed thereof, or the said judgment perpetually enjoined, &c.

131 *Wilson Miles Cary, by his answer, admitted that he was the executor of George William Fairfax in the bill named; that, by virtue of powers vested in him by the will, he empowered Bataille Muse to sell the land for the best price that could be obtained; that he had no doubt that the same was purchased by the plaintiff, to whom he executed a conveyance; but, as to the pretended objections to the title, he was an entire stranger.

The separate answer of Bataille Muse admitted the sale by him as agent; declared that no part of the land was disputed at that time; that Stanton, at the time he received his deed, was fully informed as to the title in every respect, and appeared contented as to the survey, only observing that, in case the original deed was lost, there might be a difficulty in keeping the title, or defending the land against state warrants; whereupon, he agreed to take Ferdinando Fairfax's bond of indemnity, which was given; that he several times saw the deed granted by Lord Fairfax to G. W. Fairfax, and was informed that the patent was not recorded, owing to neglect in the office, as the pages called for were left blank.

Roberts's answer admitted that he obtained a grant for a tract of land which the complainant claimed under his purchase; that his patent issued, in 1795, for 1,732 acres, (less by 574 acres than Stanton purchased,) which he entered under an impression that the same was vacant, and never before granted; that, afterwards, he heard that Fairfax had a patent for the land, which was in the hands of his executors; and that his executors had made an attempt to procure an act of assembly to cure some defect in it, but failed; that the defendant then insisted on Stanton's entering a caveat to his grant; but this he declined.

General replications were filed to the answers; and, in December, 1799, the cause was set for hearing on motion of the defendant W. M. Cary. In June, 1801, the suit abated, as to Joseph Roberts, by 132 his death. Subpoenas to revive were awarded against his widow and executrix, and eight children his heirs at law; which being returned executed, the cause came on to be heard, September 27, 1804, on the bills, answers and exhibits; whereupon the court decreed that the injunction be dissolved; that the defendants, Sarah Roberts, &c. resign to the plaintiff possession of the land in question, "and account for the profits from the time the said Joseph Roberts came to the possession thereof;" to state and report which account certain commissioners were appointed.

From this decree an appeal was prayed by counsel, on behalf of the representatives of Roberts, and allowed; but, during the same term, a petition for a rehearing, in nature of a bill of review, (for it is called a bill,) was presented to the chancellor; stating, among other things, that many of them were infants, and incapable of conducting their cause; and that, owing to circumstances stated in the affidavit of John Strode, which is annexed to, and prayed to be taken as part of their bill, they were completely surprised at the trial. The court (observing that the former decree was interlocutory) awarded commissions to the parties for taking examinations of witnesses, to be read at the final hearing; saving to the plaintiff exceptions to that order. Commissions were accordingly issued, and several depositions taken, in the presence of John Strode, who is styled "agent for the representatives and heirs of Joseph Roberts;" and, at the final hearing, (March 26, 1805,) the court affirmed its former decree. But it nowhere appears in the record which of the children of Roberts (if any) were infants at the time of the decree; nor is there any person named, either as their testamentary, or statutory guardian, in the proceedings; nor was any guardian, ad litem, appointed by the court to defend them; nor is there any day given them, after they come of age, to show cause against the decree.

133 *The defendants, representatives of Roberts, appealed to this court.

The general effect of the exhibits and depositions sufficiently appears in the following opinions, pronounced on Monday, April 1, 1811. But it is proper to mention that Roberts was proved, by sundry depositions, to have been informed, (before he made his entry,) by neighbourhood report, and a person, (though not a party interested in the title,) who told him he had seen it, of the existence of Fairfax's patent. Many years possession and cultivation by tenants of the patentee was also proved, which must have been known to Roberts, who lived in the neighbourhood.

Botts, for the appellants.

Williams and Warden, for the appellee.

JUDGE TUCKER, after stating the case. The suggestion in the bill of review, that the defendants in the original suit were infants, and incapable of defending their

cause judicially, was, I conceive, a sufficient ground for the court to have inquired into that fact; and, if they had no guardian already appointed, a guardian, ad litem, ought to have been assigned them by the court. I therefore think the cause ought to be remanded to the court of chancery, that a guardian may be there assigned to the infants, (if such there are now,) and such further proceedings had, as may be thought necessary and proper for their full defence, as in the case of *Lees v. Braxton*. (a)

If it be necessary at this time to say any thing on the merits of this cause, I would observe a circumstance not noticed by the counsel in the cause, which occurs upon inspection of Lord Fairfax's grant or patent to George W. Fairfax. From some cause or other, it hath an impossible date, for it bears date on the eleventh day 134 of December, *in the thirty-third year of the reign of George II. anno domini one thousand seven hundred and forty-seven. This latter year corresponds with the twenty-first year of that king's reign, and not with the thirty-third. The patent is alleged not to have been recorded in Lord Fairfax's office, but that there is a blank leaf referred to at the foot of the patent, as the place of registration. On this circumstance great stress was laid in the argument, as creating a presumption of fraud, in respect to this patent. The two circumstances of the date, and of the omission to record it, make it proper, in my opinion, (if the chancellor should entertain any doubt upon the subject,) that a jury should be empanelled at the bar of the court of chancery, to try an issue, to be made up between the parties, whether this grant or patent, be the deed of Lord Fairfax, or not. Perhaps it may be found to have been recorded in the record books corresponding with the 33d year of George II.

With regard to the exception taken by a member of the court to the conveyance from Wilson Miles Cary to Stanton, the complainant in the original bill; (he being only one of three trustees, named in the will of George W. Fairfax; the other two (though long since dead) not appearing by the record to have renounced the trust, nor, indeed, to be dead;) I conceive that a court of equity ought to supply any defect in the execution of the power given by the will, as far as circumstances will permit; it not being controverted that the conveyance to Stanton was for a good and valuable consideration, and (in all other respects) conformable to the intention of the testator, in creating the trust. (b) For this purpose, I think, the proper course will be to direct the residuary devise of the real estate of George W. Fairfax, in Virginia, to be made a party defendant in this suit, to show cause, if any he can, against the validity of that conveyance.

JUDGE ROANE. In this case several objections are *taken on the part 135 of the appellants; some of which go

to the merits of the case, and others to the form of the proceedings.

As to the merits, it is first objected that the evidence of the grant to George William Fairfax was inadmissible, and not sufficient; the witness having never seen Lord Fairfax write, and only judging of his signature by comparison of the hand-writing. It is unnecessary to go into the general doctrine upon this point, as it is held, (c) that a deed of above thirty years' standing requires no further proof of its execution than the bare production, where the possession has gone according to the provisions thereof, and there is no apparent erasure or alteration upon the face of it. In the case before us, this possession is proved, to my satisfaction, by several witnesses, to have existed in favour of George William Fairfax, under whom the appellee claims.

2dly. It is said that, if the unregistered patent of George William Fairfax can prevail against the patent of Roberts, the question is purely legal, and cannot be relieved on by a court of equity. The answer is, on the contrary, that, admitting that George William Fairfax's deed cannot avail him at law for want of registration, it must avail him in equity, on the ground, which is fully proved, that Roberts knew of the existence of that patent, and of the possession of George William Fairfax by his tenants, before he made his entry; that, therefore, a registration was, as to him, unnecessary, and he proceeded, consequently, against conscience, to locate granted land which he knew belonged to another. (1)

136 *3dly. It is said that this omission to register the deed arose from the act of George William Fairfax, who himself was a principal clerk in Lord Fairfax's office; that it was a fraud in him, and, therefore, the patent should not avail him. The answer is that it is not proved that George William Fairfax was the clerk. It is only stated (by D. Field) that William Fairfax, who was probably the father of George William Fairfax, was the principal clerk about the time of the emanation of the patent in question.

4thly. It is objected that the sale by Cary alone, without the concurrence of the other

(c) Peake on Ev. 110. Bull. N. P. 256.

(1) Note by the Reporter. As to this point, Botts contended that Roberts had not such knowledge of Fairfax's patent as would bind him; notice not having been given, by actually showing him the patent, nor by a party interested in the title, nor in the course of his proceedings to get his patent from the commonwealth; all which circumstances must concur, to make the notice obligatory; in support of which position, he cited Sugden's Law of Vendors, p. 490; 1 Vern. 286; 3 Ves. Jun. 478; Jolland v. Stainbridge, 2 Eq. Cas. Abr. 682; 3 Atk. 294, 292; 2 Atk. 242, 275, and 2 Vesey, 308.

Williams, contra. Insisted that Roberts's knowledge, before he made his entry, of the existence of Fairfax's patent, and of the possession by his tenants for many years, was amply sufficient on every principle. Besides, the doctrines relative to notice to purchasers in general, do not apply to the case of a person taking up land, which, at the time, is settled and granted: for he is not authorized to lay his warrant on any land of that description.

It was contended, too, by Williams and Warden, that a patentee is not responsible for the clerk's or register's neglecting to record the patent, in which respect it differs from a common deed, the holder of which is bound to have it recorded.

(a) MS. April. 17, 1806.

(b) 1 Pomb. c. 1. s. 8. note (n). and c. 4. s. 25, note (h). and Powell on Powers, p. 160, 163, 165, 170, 187, 204, and the cases there referred to.

executors, (or, to this purpose, trustees,) was not valid.

As to this point, the doctrine seems to be that there is a distinction between powers given to executors in their official characters, and to A., B. and C., who are also made executors; that, in the first case, all the executors who qualify answer the description, and may execute the power; but that, in the last case, a part of them cannot act, because a personal confidence was reposed in them, only in conjunction with the others. This point seems to have been taken by counsel, arguendo, in 1 Wash. 340, *Watson v. Alexander*; and in the case of *Johnson v. Thomson*, (a) it was decided in this court, that a sale by one executor under a power in a will was not good; it not being found that the other executor was dead or refused to act.

In the case before us, the power to sell is granted, it is true, in the original will of George William Fairfax, to his executors, and then he goes on to name seven persons as his executors; but in his codicil the testator revokes and makes void the devise last mentioned, and devises the same land to George Washington, George Nicholas, and Wilson Miles Cary, by name, as trustees to sell, &c. and also appointed these three gentlemen his executors in the United States. Wilson Miles Cary only conveyed the land in question, and only qualified as executor in America; and it is not shown that the others were dead, or had refused to take upon them the execution of the will of the testator. If, therefore, Mr. Cary had acted in this case merely under a general power to executors to sell, it would be at least doubtful whether, under the decision in *Johnson v. Thomson*, it ought not at least to have been shown that the other executors were dead, or had refused to act; but, in this case, Mr. Cary was emphatically one of the trustees under the codicil of George William Fairfax. As to trustees, it is said, 2 Fomb. 184, that "there is a difference between them and executors; for that trustees have all equal power, interest and authority, and cannot act separately, as executors may, but must join, both in conveyances and receipts," &c. On the general principle, therefore, the law is clear against the validity of this conveyance; and that principle is greatly strengthened, in the present case, by the consideration that the testator has taken unusual pains in his codicil to provide, that, if one or more of his trustees should die before the trust is fully accomplished, then others should be appointed by the survivors, who jointly with them should finish the execution of the trust. This, then, is emphatically a case in which one of the trustees only was not competent to act; and I am sorry to be obliged to be of opinion to reverse the decree on this ground, as the merits seem clearly, in other respects, with the appellee.

138 *As to the power of a court of chancery to aid a defective execution of a power; while that is readily admitted, I do not think it extends to a case like the present, where there is a want of com-

petency in the person acting, to execute the power, except in conjunction with others.

Some minor objections were made, which I will now briefly notice; though my opinion on the point just mentioned renders it unnecessary.

It is objected that the decree is erroneous in decreeing the heirs and widow of Roberts to account for the profits of the land in the lifetime of the husband and ancestor. When it is recollected that his widow stood also in the relation of an executrix to him, I should incline to understand this decree distributively, and that each of the appellants are decreed pro ut their several and respective characters.

Again, it is objected that the decree is erroneous in directing commissioners, instead of a jury, to state an account of the profits of the land, and report it to the court.

It is true, that in the case of *Eustace v. Gaskins*, 1 Wash. 188, it is said that the profits of the land, being in the nature of damages, should have been ascertained by a jury, and not by commissioners. But in *Kennedy v. Baylor*, (ibid. 162,) a decree of the court of chancery, affirming one of the county court of Berkeley, was affirmed by this court, although it was objected by counsel, and admitted to be the fact in the report of the case, that damage and injury done to the land while in the possession of the plaintiff was valued by commissioners instead of a jury. This is a much stronger case, against the solidity of the objection now taken, than either the case of *Eustace v. Gaskins*, or the case now before us: and, upon the whole, I am inclined to think that, if the general practice and usage of the court does not in general go the length of the principle decided in 139 *Kennedy v. Baylor*, (and, I think, ought not,) yet that that usage and practice is in conflict with the principle decided in *Eustace v. Gaskins*: such practice, too, is attended with great convenience and utility. I can see no difference, as to this point, between the profits of land, and of negroes; and the profits of the latter are always estimated, and reported upon, by commissioners, and not by a jury.

As to what is said respecting the proceeding against such of these defendants as are infants, without appointing them a guardian; I concur that it was irregular. Had their interests been attended to in this particular, the whole testimony and merits of the case might have been varied in their favour.

On these grounds, I am of opinion that the decree should be reversed, and the bill dismissed; but without prejudice to any other suit which the appellee may be advised to institute to perfect his title; as his case is probably a hard one, and probably the consideration he paid has enured to the benefit of George William Fairfax's representatives.

JUDGE FLEMING. In giving my opinion in this case, I must premise that, with respect to the patent of George W. Fairfax bearing an impossible date, to wit, the 33d year of the reign of Geo. II. anno domini 1747, I think it immaterial, as the

(a) Fall Term, 1804, Call's MS.

date with respect to the day of month and year of the christian era is correct.

A number of authorities have been cited to show that, although equity will not supply the non-execution of a power, yet it will supply any defect in the execution of a power, provided the same be for a good or valuable consideration. In the case before us, the trust or power was imperfectly executed; the conveyance of the land in question having been executed by one trustee only, instead of three; but it being for a valuable consideration, a court of equity may, I conceive, with propriety, supply the defect; so far, at least, as respects
140 the appellants, *who (we all agree) have no right to the land in controversy. The title, then, must either be in the appellee Stanton, or in the residuary legatees of George W. Fairfax; and, by making them parties to the suit, neither injustice nor inconvenience can, in my apprehension, arise to any person or persons interested in the decision of the cause.

On these grounds, a majority of the court have agreed that the following decree shall be entered:

"The court is of opinion that the said decrees are erroneous, in this, that it appears, by the bill for the rehearing of the cause, that some of the defendants, representatives of the said Joseph Roberts, deceased, were infants, and against whom the said decree, of the twenty-seventh day of September, 1804, was final as to the merits, and no guardian ad litem had been appointed to defend them: therefore, it is decreed and ordered, that the same be reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And it is ordered that the cause be remanded to the said court of chancery, that a guardian ad litem may be assigned to such of the defendants as may now appear to be infants; and that the residuary legatee, or legatees, under the will of the said George W. Fairfax, (in the proceedings mentioned,) of his real estate in Virginia, be made a party, or parties defendants, to show cause, if any they can, against the validity of the conveyance executed by the defendant William M. Cary, to the said William Stanton, the complainant in the original bill, for the lands which are the subject of this controversy; and that payment of the rents and profits of the said lands be apportioned among the widow and children of the said Joseph Roberts, according to their respective interests claimed therein; provided the right to the land in controversy be finally decreed against them, in favour of the appellee William Stanton."

141 *David Ross v. James Keewood. The Same v. Michael Hoofacre, and The Same v. George Smith.

Thursday, March 7, 1811.

1. Land Commissioners—Authority of.—The land commissioners appointed under the act of May, 1779, c. 12, had full power to determine without ap-

*The principal case is cited in French v. Successors of the Loyal Co., 5 Leigh 666, 676.

peal the rights of persons claiming as settlers, or by purchase from settlers, or others, under the authority of the Loyal and Greenbrier Companies, and to direct patents to be issued from the land-office of the commonwealth, to persons so entitled, and this as well before as after the decision of the court of appeals, in May, 1783, establishing the rights of those companies.

2. Same—Judgment of—Remedy of Persons Aggrieved Thereby—Caveat.—The remedy of persons aggrieved by decisions of those commissioners was by caveat in the general court, to prevent the patent from emanating: and if a party had such an equity as would, on a caveat, have entitled him to a preference, it was no ground for a bill in equity to set aside the patent, unless he was prevented by fraud or accident, from prosecuting a caveat.

3. Same—Same—Sufficient Compliance with.—Where a judgment of the commissioners was that the claimant should obtain a patent upon paying the surveyor's fees and purchase-money to the company or their agent, on or before a subsequent day, with interest until payment, and that otherwise the land should revert to the company, a tender to the company's agent within the time limited, was sufficient to prevent the forfeiture.

4. Same—Same—Same.—In such case, upon refusal of the company's agent to receive the money, the person making the tender was not responsible to the company or its assignee, for interest after the day. (1)

These three appeals, from decrees of the superior court of chancery for the Staunton district, were argued and determined together; the facts and points in controversy being similar.

The appellant filed his bills, claiming, of the appellees, respectively, certain tracts of land in the county of Washington; relying on titles by derivative purchasers, under the Loyal Company, and grants from the commonwealth, issued thereupon, (the 31st of January, 1788,) to him as assignee of Thomas Walker, their agent; in which grants the lands were described as part of an order of council, "granted to the Loyal Company, to take up and survey 800,000 acres, which said order was established and confirmed by a decree of the court of appeals, made on the 2d day of May, 1783."

That decree was in the following words: "The several claims of Thomas Walker, Esq. on behalf of himself and the other members of the Loyal Company; and 142 of *Thomas Nelson, Esq., on behalf of himself and the other members of the Greenbrier Company, to grants of all the lands surveyed under several orders of council, bearing date the 12th of July, 1749, the 29th of October, 1751, the 14th of June, 1753, and the 16th of December, 1773; came on to be heard yesterday, and this day; and, thereupon, the arguments of the counsel for the claimants, and of the attorney-general for the commonwealth, having been fully heard and considered, it is the opinion of the court, and accordingly decreed and ordered, that all surveys made by a county surveyor, or his deputy, properly qualified according to law, previous to the year 1776, and certified to have been made by virtue of the orders of council to the Loyal and Greenbrier Companies, or either of them, ought to be confirmed; and that the register be directed to issue patents upon all such surveys as shall be returned and so certified."

(1) Note. On this subject, see acts of May, 1779, c. 12, Ch. Rev. p. 90-94; October, 1779, c. 27, *ibid.* p. 113; May, 1780, c. 9, *ibid.* p. 122; October, 1780, c. 12, *ibid.* p. 132; May, 1781, c. 23, *ibid.* p. 142; c. 29, *ibid.* p. 149; May, 1782, c. 49, *ibid.* p. 169; October, 1782, c. 24, *ibid.* p. 179; c. 45, s. 8, *ibid.* p. 183; and October, 1783, c. 29, *ibid.* p. 217.

The statement, made in each bill, was, in substance, that by the rules and regulations of the said company, settlers were enabled to acquire titles to the lands seated by them, on paying the surveyor's fees, and three pounds for every hundred acres contained in their surveys; that the defendants, and those under whom they claimed, (though settlers, and holding by surveys,) had not paid the surveyor's fees, or any part of the purchase-money; that Thomas Walker, one of the members of the company, and the person to whose management their affairs were intrusted, appointed one William Inglis an agent in that part of the country where those lands lay, and gave public notice, that those persons who had procured lands to be surveyed should be confirmed in their titles on paying the surveyor's fees and purchase-money within a limited time; that in the year 1768, the said Walker authorized Inglis to sell the lands, on which the surveyor's fees had not been paid, to such persons as would discharge them, and agree to pay the original price so soon as the company could make them a complete title; that in September, 1768, Joseph Scott and Stephen

143 Trigg *paid to William Inglis the surveyor's fees on the lands in question, and obtained a receipt for the same; that, on the 16th January 1773, the said Scott transferred all his right to the said Trigg; and, on the 18th of August, 1775, the complainant purchased of Trigg; that the defendants being in possession, the complainant's claim was discussed "before the court of commissioners appointed under the act of assembly, in such case made and provided," who were of opinion that their claims were prior to his; and that grants should issue to them, on their paying the surveyor's fees and purchase-money to the company, on or before the 23d day of February, 1782; otherwise, the titles should revert to the said Loyal Company; that the defendants had never complied with the terms on which their titles were declared valid by the commissioners; and, if they had done so, the complainant did not admit that the decision of the said commissioners would have any authority in this case; that, in order to defeat his claim, the defendants had destroyed the ancient landmarks, so that the boundaries could not be ascertained, and had surreptitiously and fraudulently obtained grants of prior dates to those of the complainant. He therefore prayed a discovery of the situation of the original landmarks called for in the surveys, possession of the lands, account of the profits, and general relief.

The defendants relied on the decisions of the land-commissioners as conclusive in their favour; averring that, within the limited time, they had, respectively, tendered the fees and purchase-money to Thomas Walker, who refused to receive them, in consequence of the pendency of the controversy between the commonwealth and the company, which, being at that time undecided, prevented his making titles; and denying the charges of fraud, they prayed to be dismissed. The judgments of the commissioners, bearing date

144 the 23d of August, *1781, were, that

Keewood, Hoofacre and Smith, respectively, were entitled to the lands in question; "provided that they do pay or cause to be paid to the said agent, or the said company, the sum of five pounds specie, with interest thereon from the 22d day of February, 1762, till paid, for each hundred acres contained in the surveys, on condition that the said agent, or the said company, do make good titles in fee-simple to the said lands; or that, if the defendants shall pay the surveyor's fees in specie, with interest thereon from the 22d day of February, 1762, till paid, and also all other fees incident and necessary for obtaining grants for the said lands, then the defendants were to pay the sum of three pounds specie for each hundred acres, with interest from the said 22d of February, 1762; and if the defendants should fail to pay the said purchase-money, and interest, on or before the 23d day of February, 1782, then the said tracts of land should revert, and become vested in the said company."

The tenders and refusals charged in the answers were fully proved by depositions.

The chancellor was of opinion, "that, though the right to the lands in controversy was in the Loyal Company, provided the surveys under their authority were such as would have been established under the decision or order of the court of appeals of the 2d of May, 1783, yet, it was but a qualified right, which the company was bound to confer on the first actual settler on certain conditions; no sale, or reservation, having been made previous to settlement; and the commissioners who had competent jurisdiction to decide upon settlers' claims having decided in favour of the defendants, as the first actual settlers; (which decision remains unreversed;) and, the defendants having tendered the money in conformity with their sentence, the Loyal Company were bound to convey to them the lands, and were not at lib-

145 erty *otherwise to dispose of them."

He therefore decreed that the defendant should pay the complainants the purchase-money and surveyor's fees, with lawful interest thereon, from the 23d day of February, 1762, to the 22d of February, 1782; and that, as to other matters, the bills be dismissed with costs.

Williams, for the appellant. The commissioners had no jurisdiction to decide in a case of this description. Their powers under the act of May, 1779, c. 12, (a) and the subsequent acts on the same subject, (b) extended only to vacant lands; not to such as were appropriated by the Loyal Company; to determine interfering rights of settlers, but not the validity of a title claimed by purchase. Ross was a derivative purchaser from the company, and therefore not bound by the decision of the commissioners. It was evidently, moreover, the intention of the legislature to vest in the court of appeals alone the power of deciding the rights of the company. (c) After the court of appeals should have settled the controversy between the company

(a) Ch. Rev. 90.

(b) Ibid. 113, 122, 123, 149, 160.

(c) Ibid. p. 94, s. 10.

and the commonwealth, the commissioners were empowered to take up the subject of claims under the company's authority; but not until then. Their judgments in the cases now in question were void, being rendered before the decision by the court of appeals.

Peyton Randolph and Call, on the other side, considered the acts of assembly as clearly bestowing on the commissioners full powers to determine the rights of all persons claiming under the company, as settlers, or as purchasers of settlement rights.

The court of appeals were only to decide between the commonwealth and the company. The commissioners were not to wait to see whether the company would carry the question before the court of appeals; but patents were to issue immediately, "as they should adjudge. The law as to lands of this very description was settled by the act of October, 1783, c. 29.(a) The case of Stephens v. Coburn, 2 Call, 446, is decisive of the present question.

If Ross had any ground for preventing Hoofacre and others from obtaining patents, he might have resorted to a caveat in the general court;(b) and not having done this, he is not entitled to relief in equity.(c) But, if all these objections were out of the way, the cause is against him upon the merits. Persons who had the first actual settlement were (according to the acts of assembly) to be preferred. But, to defeat their rights, he relies on a forfeiture, and comes into a court of equity to enforce it!

Williams, in reply. Ross had a right to come into equity to set aside the patents illegally obtained, and to have them given up and cancelled.

But if the chancellor's decrees were right in other respects, they were wrong in not giving the plaintiff more interest on the money decreed. The allowance of interest should have been continued after February, 1782.

JUDGE BROOKE. I have not been able to see any thing in the objections, to the chancellor's decrees, that have been urged by the counsel for the appellant. Upon a strict examination of the act of 1779, entitled "An act for adjusting and settling the titles of claimers to unpatented lands under the present and former government previous to the establishment of the commonwealth's land-office," and the subsequent acts on the same subject, I am satisfied, that there is no distinction between vacant, and company lands, that can have any influence on the decision of these cases; and that the appellant, having submitted his claims to the commissioners under the act of 1779, first-mentioned, is bound by their decision, according to the case in this court, of Stephens v. Coburn, 2 Call, 440.

147 *The objection, that the appellant had not been allowed as much interest as he is entitled to on the money paid to the Loyal Company, I think also unfounded.

After the payment by the appellant, the company had no claim upon the appellees, nor would the appellant, at any time, have received the money, though tendered to him by the appellees, previous to the chancellor's decrees.

I am therefore of opinion that the decrees, by which the bills are dismissed, be affirmed.

JUDGE TUCKER. These cases (which all depend upon the same question) appear to me to fall completely within the provisions of the act of May, 1779, c. 12, s. 7, 8, and 9.(d) The former of these sections regulates the manner in which settlements made by certain persons, upon lands surveyed for sundry companies, (of which the Loyal Company was one,) by virtue of orders of council, without specific agreement, but yet under the faith of the terms of sale offered by such companies, should be adjusted, and the title of settlers confirmed, and patents from the land-office of the commonwealth, obtained by such settlers, for the lands to which they were thus entitled.

It must here be remembered that the companies here spoken of had never obtained patents for the lands intended to be granted to them, so that their title, as well as that of the settlers, was inchoate only; the legal title being still in the commonwealth.

Sect. 8th establishes a court of commissioners for the adjustment of the preceding claims, (and some others,) whose judgment is declared final; and has been accordingly so decided in the case of Stephens v. Coburn;(e) that is, no appeal or writ of error could be brought to reverse their judgment. But any person, thinking himself aggrieved thereby, might sue out a caveat, from the general court, upon which the claims of the

caveator and caveatee might be re-considered, and "a patent was to be granted to the party prevailing in the caveat. But if this were neglected until a patent should be actually obtained by the person in whose favour the commissioners should decide, I presume it was afterwards too late to sue out a caveat; the object of which is not to repeal a patent, but to prevent the emanation of one.(f) And, even if the party thinking himself aggrieved had such equity as would, on a caveat prior to the grant, have entitled him to a preference, it would be no ground for a bill in equity to set aside the patent, unless he was prevented by fraud, or accident, from prosecuting a caveat.(g) Here, then, had Mr. Ross his remedy, if he conceived himself aggrieved by the judgment of the commissioners. But he has totally neglected it, and shown no cause whatever for such neglect, and, consequently, is bound by their judgment.

On the ground of error in respect to interest, I concur with the judge who has preceded me, upon that point, as well as that in which I have spoken to; and am therefore of opinion, that the decrees be severally affirmed; the appellees, as far as

(d) Ch. Rev. 92-94.

(e) 2 Call, 440.

(f) 1 Wash. 40, Wilcox v. Calloway.

(g) Johnson v. Brown, 3 Call, 269, and Depew v. Howard, 1 Munf. 293.

(a) Ch. Rev. 217, 218.

(b) Ch. Rev. 94, 132.

(c) Depew v. Howard, 1 Munf. 293.

in them lay, having complied with the terms on which they were to obtain their patents.

JUDGES ROANE and FLEMING were of the same opinion, and the decrees were unanimously affirmed.

Richardson's Executor v. Hunt.

Monday, March 18, 1811.

1. Parties—Division of Residuum of Estate.—All the residuary legatees, or distributees, ought to be parties to a suit for division of a residuum.
2. Evidence—Witnesses—Persons Interested.—A person acknowledging that he considers himself interested in the event of a suit, is not a competent witness, though in fact not interested.

Elijah Hunt, and Sarah, his wife, one of seven residuary legatees in the last will of Turner Richardson, deceased, brought suit in the superior court of chancery for the Richmond district, against John 149 Richardson and *Samuel Richardson, acting executors of the decedent, (John being also one of the legatees,) to recover her share of the estate; without making the other five legatees parties. Elizabeth Ellis, one of the legatees, was examined as a witness for the complainants, and her deposition seems to have been regarded as evidence by the commissioner upon an order of account; notwithstanding, upon being questioned, she acknowledged that she considered herself interested in the event of the suit. The clause in the will, under which the plaintiffs claimed, directed the residuary part of the testator's estate to be valued by three neighbours to be chosen by the executors; that his three daughters, Sarah Hunt, Elizabeth Ellis and Ann Hunt, should receive their parts in money, (to be raised by a sale of the property, by the executors,) and that the remainder should be equally divided among John, Turner, Martha and Rebecca, in negroes and other estate, according to such valuation.

The court of chancery, on the 4th of June, 1805, decreed, in favour of the plaintiff Sarah Hunt, (the suit having abated, as to her husband, by his death,) against Samuel Richardson, the surviving executor, that the defendant, out of the goods, &c. in his hands to be administered, do pay unto the plaintiff 235l. 14s. 3d. with interest on 144l. 6s. 3d. (which was one seventh part of the sum at which the whole residu-

*Parties—Suit by Distributees to Obtain Shares.—In general, one distributee cannot obtain a suit to recover his distributable share without making the other distributees parties. *Sillings v. Bumgardner*, 9 Gratt. 373, citing the principal case.

While a legatee whose legacy has been consented to by the executor may sue the executor for it at law without joining the other legatees, still, where the fund out of which the legatees are to be paid proves insufficient or is subject to debts which require a proportional abatement from each legatee, all the legatees must be parties. *Rexroad v. McQuain*, 24 W. Va. 35, citing the principal case.

The principal case is distinguished in *Moore v. George*, 10 Leigh 238, 246, and a foot-note to this case contains the grounds for the distinction.

Chancery Practice—Want of Parties—Objection in Appellate Court.—To the point that, where the want of parties appears on the face of a bill in chancery, the objection is fatal in the appellate court though not taken in the court below, the principal case is cited in *Sillings v. Bumgardner*, 9 Gratt. 273; *Dabney v. Preston*, 25 Gratt. 838; *Dower v. Church*, 21 W. Va. 50.

*Evidence—Witnesses.—See monographic note on "Witnesses" appended to *Clalborne v. Parrish*, 2 Wash. 146.

ary estate was valued,) from the first of September, 1803, till payment, and also the costs of suit; from which decree the defendant appealed.

Wirt and Wickham, for the appellant.

Peyton Randolph, for the appellee.

Monday, April 22. The judges pronounced their opinions.

JUDGE BROOKE. In this case, two points are insisted on by the counsel for the appellant: 1st. That all the parties *are not before the court; and, 2d. That the testimony of Elizabeth Ellis ought not to have been received by the commissioners. On the first point, I think there is no difficulty: the rule is, that all persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties, if within the jurisdiction of the court: (a) the legatees of the residuary estate are all concerned in the demand, and may be affected by the extent of the relief granted in this case: depending on the residuary estate for the amount of their legacies, they are all materially concerned in the administration of that fund, and will all be, more or less, affected by the quantum which may be accorded by the court to the appellee: as, for example, if there has been a mala fide valuation of the property, or an irregular sale of it, so as to lessen its real value to the legatees, they would all be affected by the decree. In the case in *1 Vesey, jun.* (b) relied on by the counsel for the appellee, Lord Thurlow decided under the idea that the legacy was a specific legacy, but reserved that point for consideration. The position, that the legacy, in the case under consideration, became a specific legacy, by the valuation and sale of the property, according to the directions of the will, for the payment of the money legacies, begs the question! It is predicated on the position that the valuation and sale were perfectly correct; a position that all the parties interested ought to have an opportunity of questioning, and, of consequence, ought to be in court for that purpose.

On the second point, I am of opinion that the testimony of Elizabeth Ellis was improperly admitted by the commissioner: when asked the question, she professed herself to be interested in the decision of the suit. The policy of the rule of law on this point is, to exclude persons who have a strong bias on their minds from being placed in a situation where their interest may induce *them to depart from the truth; 1 Peake, 144. The case of *Fotheringham v. Greenwood*, (c) there cited, was a stronger case than the present: in that case the witness felt himself under an honorary engagement to make good a loss, and was held incompetent. I am of opinion the decree must be reversed, and the cause sent back; that proper parties may be made. (1.)

(a) *Mitford's Pleadings*, p. 39, and the cases there referred to.

(b) *Wainwright v. Waterman*, 811. 514.

(c) 1 *Strange*, 129.

(1) Note. According to the authorities cited in argument, the distinction, as to parties, seems to be that a specific legatee may sue the executor without making the other legatees parties; because, as Wickham observed, it is presumed that the execu-

JUDGES ROANE and FLEMING assented.

The decree was therefore reversed, and the cause sent back for all the legatees to be made parties, and direction was given that, on the hearing of the cause, the deposition of Elizabeth Ellis be not read in evidence; she being an interested witness.

Cooke v. Piles.

Thursday, April 4th, 1811.

Court of Appeals—Jurisdiction—Subject in Controversy.—Where a complainant is appellant from a superior court of chancery, the court of appeals has no jurisdiction, unless the subject in controversy be a freehold or franchise, or amount to one hundred and fifty dollars, exclusive of all costs, incident to the original judgment, or arising from injunctions, or appeals, subsequent thereto.

In this case a judgment at law in the county court of Fairfax, was obtained by Piles against Cooke for ninety-nine dollars, and costs of suit; to which an injunction was granted by the same court, but afterwards dissolved, on a regular hearing, and the complainant decreed to pay the costs.

The bill had stated, *inter alia*, that a forthcoming bond was taken, but did not set forth the amount, nor whether it was forfeited. Cooke appealed to the superior court of chancery, for the Richmond district, by which the decree was affirmed; whereupon, he appealed again, to the court of appeals.

Botts, for the appellee, moved a dismissal of the appeal, on the ground that this court had no jurisdiction, the original subject of controversy being less than one hundred and fifty dollars, exclusive of costs. The motion was opposed by Call and Wickham, for the appellant.

Thursday, April 11th. The court, consisting of judges Fleming, Roane and Cabell, unanimously dismissed the appeal. The following observations were made by Cabell and Roane.

JUDGE CABELL. This is a motion to dismiss an appeal, on the ground of want of jurisdiction. The appeal, in this case, having been granted to the complainant in the court of chancery, the question will

tor has assets to pay legacies, unless he make the objection that he has not: but, in a suit by a residuary legatee, all the co-legatees must be parties; to make an end of the subject, and prevent multiplicity of suits. See 3 Bro. 266, Parsons v. Nevill: Ibid. 229; Sherrett v. Birch, Wyatt's Prac. Reg. 308; 2 Ch. Cases, 124; 1 Ves. jun. 311, 315; Coop. Eq. p. 39. —Note in Original Edition.

***Court of Appeals—Jurisdiction—Subject in Controversy.**—If a judgment of a county or corporation court, being for less than one hundred dollars, exclusive of costs, be reversed by a superior court of law, upon a writ of *superadeas*, whereupon judgment is entered that the plaintiff take nothing by his bill, etc., he cannot appeal to the court of appeals; notwithstanding his declaration demanded a larger sum than one hundred dollars. Henry v. Elcan. 2 Munf. 541.

See further, monographic note on "Appeal and Error" appended to Hill v. Salem, etc. Turnpike Co., 1 Rob. 263.

Judgment—Satisfaction—Forthcoming Bond.—In Lusk v. Ramsay, 3 Munf. 454. JUDGE ROANE said he entirely concurred in the opinion of JUDGE CABELL in the principal case, that a forthcoming bond is no satisfaction of a judgment, until the forfeiture; and JUDGE ROANE further expressed the opinion that, until such satisfaction has taken place, the lien created under the judgment is not extinguished.

See further, monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

turn altogether on the construction of the second section of the "Act for reducing into one act, the several acts concerning the court of appeals and special court of appeals," which passed in 1792; (a) and no regard can be had to the act entitled "An act concerning granting appeals from decrees in chancery," which passed in 1794; (b) this latter act being confined to cases where the appeals shall be granted to defendants. According to the act first mentioned, this court shall have jurisdiction on appeals from the court of chancery, if the matter in controversy be equal in value, exclusive of costs, to 150 dollars. It was admitted by the counsel for the appellant, that, whenever a suit, either at law or in equity, shall maintain or preserve its original character, in a course of appeal, that, there, it is the original judgment or decree only to which we must resort in order to determine whether this court has jurisdiction, and that, in our estimate, all the costs, of

153 *every court, must be excluded. But he contended for a difference, where, as in the case now before the court, the original judgment was at law, but has been enjoined by the intervention of a court of equity, and the appeal is taken from the decree of the court of equity. In such a case, he contended that we are not to exclude the costs of the court where the judgment was originally obtained, but only the costs of that court from whose decree the appeal is taken. I do not perceive any foundation for such a distinction; for where an injunction has been obtained, as in the present case, to a judgment of a court of law, what is, in the language of the act of assembly, the matter in controversy between the parties? Unquestionably the judgment itself; and that must be of the value of 150 dollars, exclusive of costs. The legislature intended to exclude all costs; and it would have been difficult for them to have adopted stronger language. I do not perceive that this case is varied by the mere statement in the bill that a delivery bond had been executed. The answer is silent as to the fact; nor is it established by any testimony in the cause, although no fact would be more susceptible of proof; it cannot, therefore, enter into the consideration of the court. But, admitting a delivery bond to have been given; its amount not appearing, must the court necessarily infer, that it was at least 150 dollars; and, even admitting that it did amount to that sum, must the court presume, without proof, that the bond was forfeited? Certainly not; and, until a delivery bond shall have been forfeited, I presume it would not be considered as a discharge of the original judgment, or even as changing its character. I think, therefore, the appeal should be dismissed.

JUDGE ROANE. By the 2d section of the act concerning the court of appeals, (c) jurisdiction is given to this court upon appeals from final decisions in the high court of chancery, "if the matter in controversy be equal in value, exclusive of costs," to 150 dollars, where

(a) Rev. Code, vol. 1, p. 60.
(b) Rev. Code, vol. 1, p. 318.
(c) Rev. Code, v. 1, p. 60.

the judgment sought to be reversed shall have been rendered in the general court, or high court of chancery, or be a freehold or franchise. The matter in controversy in this case, was a judgment in a county court for the sum, exclusive of costs, of only 99 dollars; and the question made both in the county court in chancery, and in the high court of chancery, from whose decision this appeal is taken, was whether that judgment should be enjoined, or suffered to take its course. Nothing, therefore, can be clearer than that this appeal is taken from a decree of the court of chancery, respecting a matter the value whereof, exclusive of costs, is below the standard which gives jurisdiction to this court.

In the case of *Hepburn v. Lewis*, (a) which was an appeal from the judgment of a district court refusing to enter judgment, upon a verdict for less than thirty pounds, where the writ was for fifty pounds, it was decided that this court had no jurisdiction of the appeal, which was therefore dismissed, on the ground that "the verdict was for less money than the law allows appeals to this court for, and was below the jurisdiction of the court."

The principle in that case is decisive of the case before us, and the appeal must be dismissed.

• **Hite's Executor v. Paul's Heirs.**

Monday, April 1st, 1811.

1. **Realty—Rents and Profits—Liability for.**—Where defendants holding lands by a joint title are decreed to surrender possession, and pay rents and profits, they are not jointly and severally, but only jointly liable.

2. **Executors—Decree against—Form.***—A decree against an executor, for rents and profits received by the testator, ought expressly to direct that he pay the sum in question out of the assets in his hands to be administered: otherwise, it is to be understood as against him personally, and, therefore, erroneous.

Margaret Paul, in the year 1794, exhibited her bill, in the late high court 155 of chancery, against , defendants; stating that "many years past, a certain Joist Hite sold to a certain Thomas Hart a tract of land, supposed to contain about acres, lying in the now county of Berkeley, and known by the name of , being part of a large quantity of land which the said Hite and others claimed under certain orders of council; that Hart sold part of the said land to a certain John Miles, of Pennsylvania, and received the purchase money; that John Miles, after the purchase, to wit, on the 2d of May, 1747, by his will, devised the same to the plaintiff, and soon after died; that she, after the death of her father, the testator, intermarried with a certain Paul, who is now dead; that she and her father always resided in the state of Pennsylvania; that, after the purchase made by John Miles, Thomas Lord Fairfax having claimed the land, so sold, together with a much larger quantity, as part of the Northern Neck of Virginia, of which he was proprietor, he granted the greater part, or the whole, of

the said land to his brother or near relation George William Fairfax, and to some others; that a suit in chancery was instituted, in the former general court of the then colony of Virginia, by the said Joist Hite and others, against the said Thomas Lord Fairfax, for the said lands, which came on finally to be heard in the court of appeals, when the lands were decreed to the complainants, but the rights of purchase under them were preserved; that, under this decree, the representatives of the said Joist Hite and others, obtained possession of the land in question, and refused to convey it to the plaintiff, who, therefore, (referring to the proceedings in the said suit as part of her bill,) prayed that the proper parties be decreed to convey to her the land aforementioned, and to account for the profits," and for the proper relief.

A subpoena to answer this bill was sued out against a number of persons as heirs, devisees and executors of 156 *Joist Hite, of Robert M'Coy the elder, of William Duff, and of Robert Green the elder, deceased.

An answer was filed, jointly and severally, by Isaac Hite, (one of the sons and executors of Joist Hite,) Andrew M'Coy, (eldest son and heir of Robert M'Coy, who was eldest son and heir of Robert M'Coy the elder,) and James Williams, (who married Eleanor only daughter and heir of Moses Green, deceased, who was one of the sons and devisees of Robert Green the elder, deceased,) the other defendants not appearing, and no further proceedings against them being set forth in the transcript of the record.

The respondents jointly said "they are utterly ignorant of the matters stated in the said bill, nor do they know any thing of the said plaintiff, or her pretended claim, and, therefore, can by no means admit it to be true, and pray that she may be decreed to make ample proof thereof. Isaac Hite moreover stated that he had understood from his brother Jacob in his lifetime, that his father, Joist Hite, sold about 12 or 1500 acres of land to a certain Hart, and executed a bond for the conveyance thereof; but when Fairfax brought suit, or, rather, entered his caveat against the issuing grants to the ancestors of the respondent, the said Jacob Hite went to the said Hart, who was indebted to Joist Hite, and proposed to him, that, if he would give up the said bond and cancel it, he the said Jacob Hite would relinquish a part, or all the debt, which Hart agreed to do, whereupon the bond was cancelled, and a discharge given agreeably to the contract; but the respondent knew nothing of this, of his own knowledge. The respondents further answering jointly, objected against the plaintiff's claim, the length of time which had elapsed before it was exhibited. They relied also upon the decree in the suit Hite and others against Fairfax; contending that, since that decree had been duly served upon the tenant in possession, (Giles 157 Cook, tenant to George W. *Fairfax,) who stated his claim which, upon a hearing, was dismissed, the plaintiff ought not now to be at liberty to proceed against the respondents; all persons, who did not

(a) 2 Call. 497.

*See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

state their claim within a reasonable time, being bound by the decree."

To this answer the plaintiff replied generally; sundry depositions and exhibits were filed, by which the plaintiff's title to the land claimed by the bill was established, and it was proved that she had always resided in the state of Pennsylvania. There was no evidence, however, on either side, as to possession of the land by the defendants. The cause came on to be heard, the 12th of September, 1797, when the court of chancery was of opinion that the plaintiff's remedy to assert her title was not precluded by the decree in the case of Hite and others against Fairfax; because that decree was not served upon her; nor by the length of time; because the plaintiff, when her title accrued, was, and ever since had been, not resident within the limits of this commonwealth. The court, therefore, decreed, that the defendants do convey to the plaintiff, at her costs, the two hundred acres of land part of thirteen hundred acres, on Elk Branch, sold by Joist Hite to Thomas Hart, and surveyed for the said Thomas Hart, which two hundred acres of land were sold by the said Thomas Hart to John Miles, father of the plaintiff; that the defendants resign to the plaintiff possession of the said two hundred acres of land, to be ascertained by a survey, and pay unto the plaintiff the profits of the same from the 4th of February, 1791, when the subpoena in this cause was sued forth. Upon an appeal to the court of appeals this decree was affirmed; after which, the orders of survey and account of profits were carried into effect, and reports made thereupon to the superior court of chancery for the Staunton district. The commissioners who took the account were of opinion, that the rents and profits were worth

189 dollars annually, since the year 1791: *but, 'at the request of the defendants' counsel, they stated that they had understood from hearsay, or common report, that Giles Cook, sen. held the said land, by lease from George W. Fairfax, a number of years prior to the year 1791, and continued in possession until the year 1799, and then sold his lease to John Dixon, Esq. who held it until the year 1801, when General William Darke got possession of it under purchase from Margaret Paul the plaintiff. They farther stated, upon the knowledge and information of Abraham Shephard, one of their body, that neither the defendants, nor any one claiming under the defendants, ever had possession of said land."

The suit abated, as to the defendant Isaac Hite and the plaintiff, by their deaths, and was revived, on the motion of Thomas Paul and Margaret Paul, heirs of the plaintiff, against Isaac Hite, executor of that defendant, and against the other defendants by consent. It afterwards abated as to the defendant Andrew M'Coy by his death, and a scire facias against his executors and heirs was awarded, but does not appear to have been executed.

On the 8th day of April, 1805, the cause came on to be heard as to the other defendants, on the bill, answer, exhibits, depositions, report of the commissioners and

exceptions thereto, filed by the counsel for the defendants, on two grounds;

1. "Because the rents and profits were valued too high;" (in support of which exception, however, no testimony was exhibited;) and, 2d. "Because the report was uncertain, in not clearly expressing whether the year 1791 was to be included or excluded in the aggregate estimate, and it did not appear when Paul's right ceased, so as to ascertain when the profits were to cease." The court of chancery overruled the exceptions; and, "Being of opinion that the defendants were severally, as well as jointly liable to the plaintiffs for the rents and profits of the lands decreed to be conveyed by the order of September 12, 1797, adjudged, ordered and decreed that the defendant do pay to the complainants the sum of 1872 dollars; that being, according to the valuation of the commissioners, the amount of the rents and profits of the land from the 4th of February, 1791, to the 1st of January, 1801, about which time, as appears, the possession of the said land was yielded to a purchaser under the plaintiff's ancestor: but the court suspended the pronouncing of any final decree as to the conveyance of the land until the cause should be revived against the representatives of Andrew M'Coy."

From this decree the defendants appealed.

Williams, for the appellants, among other points, made the following:

1. That the chancellor should not have proceeded to a hearing until all the parties who represent the rights of Joist Hite, Robert M'Coy, William Duff and Robert Green, (the original plaintiffs against Fairfax, &c.) were before the court.

2. That a decree for rents and profits ought not to have been entered against Isaac Hite alone, but the other defendants also.

3. That he should not have been compelled to pay the rents out of his own estate, but de bonis testatoris.

4. That, as Isaac Hite and others never were in possession of the lands in controversy, no rents and profits ought to have been decreed against them, or any of them.

Hay, on the other side, relied on the decree of the court of appeals affirming that of the chancellor dated September 12th, 1797, as precluding the 1st and 4th objections now taken. There were 15 or 20 defendants originally; only three of whom answered. No notice was taken of the rest. Yet this court affirmed the decree, and thereby declared that all proper parties were before the court. In like manner the 160 defendants must *have been considered as having been in possession of the land; otherwise, the decree making them liable for the profits would have been reversed.

As to the 2d point, the very principle, according to which the chancellor has decided, was assumed in the case of Yancey v. Hopkins, 1 Munf. 425, and sanctioned by this court; no discrimination being made between the defendants Hopkins and Faria, but both considered responsible for all the profits.

The only question in the cause is, whether the decree, against Isaac Hite, the executor,

(being general, that he should pay so much money,) is to be satisfied out of his own goods, or out of the goods of his testator. In one breath, the suit was revived against him as executor, and it was decreed that he should pay. The decree, then, must be understood to be against him as executor, and payable out of the assets in his hands. This is a mere formal error, and not sufficient to set aside a decision substantially right.

Williams, in reply. I do not understand any of my objections to be precluded by the opinion of this court. The decree of September, 1797, declared the plaintiff's right to two hundred acres of land, but did not say where situated. This court, then, never passed upon the location of the 200 acres; but considered that as proper to be ascertained by survey. Upon the survey's coming in, and not until then, could this court know that the boundaries claimed by the plaintiff might interfere with the rights of persons not before the court; which has turned out to be the case. The same observation applies to the question concerning the rents and profits. That subject was not before this court. It did not appear that the land which should be laid off to Margaret Paul might not be in the possession of these defendants. The 161 *report of the commissioners has since shown that they never were in possession.

The case of Yancey v. Hopkins is an authority directly against Mr. Hay. In that case Faria was the tenant in possession, and was decreed to pay the profits, together with Yancey, with whom he was particeps criminis. But here Isaac Hite (who never was in possession) is alone decreed against, exempting all the other defendants.

To determine the 3d point, the record alone must be consulted; and it does not appear that Isaac Hite had received a cent of assets. He was brought before the court, merely by a scire facias, to show cause why the suit should not be revived against him as executor; not by a subpoena to answer the bill. He might think the chancellor would not decree against him, when it appeared that his testator had never been in possession of the land. He, therefore, made no defence.

Monday, April 29th. JUDGE ROANE pronounced the following opinion of the court.

"The court is of opinion, that the said decree is erroneous in this, that the court below, being of opinion that the defendants are severally, as well as jointly, liable to the plaintiffs for the rents and profits of the land ordered to be conveyed by the decree of the 12th of September, 1797, ordered that the defendant Isaac Hite, executor of Isaac Hite, who was executor of Joist Hite, deceased, do pay to the complainants the sum of 1872 dollars, the amount of the rents and profits of the said land from the 4th day of February, 1791, until the 1st day of January, 1801; whereas, by the said decree of the 12th of September, 1797, which was affirmed on an appeal to this court, the defendants are, jointly, and not jointly and severally, ordered to pay to the plaintiff the said rents and profits. The decree is also erroneous in ordering the said rents

and profits to be paid by the 162 *said Isaac Hite, instead of ordering them to be paid by the said defendant de bonis testatoris."

Decree reversed with costs, and suit remanded to the court of chancery, "for proper parties to be made, and for further proceedings to be had therein agreeable to the principles of this decree."

Holliday and Wife v. Coleman and Wife.

Argued Monday, March 25th, 1811.

Res Adjudicata*—Application of Doctrine—Case at Bar.

—A decree, by a court of competent jurisdiction, dismissing a bill, upon the ground that the deed under which the complainant claimed was fraudulent, is a complete bar to another original bill to try the validity of the same deed: the proper remedy, if such decree be erroneous, being by appeal, writ of error, supersedeas, or bill of review, and not by original bill.

Chancery Practice—Life Tenant of Personalty—Security for Return—Matter of Discretion†—The power of a court of equity to rule a tenant for life, of slaves, or other personal property, to give security that the property shall be forthcoming at his or her death, is to be exercised, not as a matter of course, but of sound discretion, according to circumstances.

In this case, after argument by Call and Wickham, for the appellants, and Warden, Botts and Williams, for the appellees, the following statement was made, and opinion of the court pronounced, by the president, on Monday, the 24th of June.

In the year 1786, Robert Spilsby Coleman, and Mary his wife, exhibited their bill against Lewis Holliday, and Betty his wife, and stated that the said Betty, mother of the complainant Mary, was the daughter of Zachary Lewis, and intermarried with James Littlepage, by whom she had two children only; that the said Zachary Lewis departed this life, having first made his

*Res Adjudicata.—See monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 455.

†Chancery Practice—Life Tenant of Personalty—Security for Return—Matter of Discretion.—Although it is a matter of course for a remainderman of personal chattels to file a bill against the tenant for life, for an account and inventory of the property, yet the court will not rule the tenant for life to give security to have the property forthcoming at his death, unless there appear some danger of its being wasted, or put out of the way. Mortimer v. Moffatt, 4 Hen. & M. 508.

To the point that the power of a court of equity to rule a tenant for life of slaves or other personal property to give security, that the property shall be forthcoming at his or her death, is to be exercised not as a matter of course but of sound discretion according to circumstances, the principal case is cited in Amis v. Williamson, 17 W. Va. 679. In this case (Amis v. Williamson) it was held that where personal property is by the will left to the control of an executrix, to whom individually the interests and profits are given for life, and the property is to go to another, and the will directs that no bond shall be required of the executrix, the remainderman has such an interest, as would authorize him, under § 11, ch. 234 of the Acts of 1872-3, to move the court to require a bond of the executrix under the will.

In Houser v. Ruffner, 18 W. Va. 251, 352, JUDGE PATTON, announcing the opinion of the court, said: "I know of no law, which requires a life-tenant to give security for the return of money or other property upon the termination of the life-estate, unless those in remainder or reversion show such special circumstances, as call for the intervention of a court of equity by bill of *quia timet*. Chisholm v. Starke, 3 Call 25; Holliday v. Coleman, 2 Munf. 162; Mortimer v. Moffatt, 4 H. & M. 508; Frazer v. Beville, 11 Gratt. 9; Dunbar v. Woodcock, 10 Leigh 628; Weeks v. Weeks, 5 N. H. 878; Scott v. Price, 2 Serg. & R. 50." As to bills *quia timet*, see monographic note on "Bills Quia Timet" appended to Devries v. Johnston, 27 Gratt. 805.

last will and testament, whereby he bequeathed to the said Betty an eighth part of his slaves and personal estate, and a negro girl over and above an eighth, for the term of her life, and after her death to go to her children by the said James Littlepage; that, after the death of the said Zachary Lewis, the said James Littlepage also departed this life, leaving the complainant Mary, and Lewis, his only children by the said Betty, who, being possessed of a considerable number of slaves, her absolute property, and being about to marry a second husband, executed a deed of trust to her brother John Lewis, whereby she settled two negroes named Jenny and Sylvia, upon the complainant Mary, after her death; re-
 163 serving to herself *a right to deliver them up to her daughter at any time; and soon after intermarried with the defendant Lewis Holliday; and charging that he intended to remove, with the negroes, out of the state, the complainants prayed that he immediately deliver up (under a promise of the said Betty) the said slaves Sylvia and Jenny, or other slaves in lieu of one of them, (whom the said Betty wished to retain in her possession,) and give bond and security not to remove the said slaves claimed under the will of Zachary Lewis, or any of them, out of the state, and to have them forthcoming at the death of the said Betty: and that a ne exeat be awarded, &c. until he should give such security.

To this bill the defendants first demurred, for want of equity, and then fully answered it. For cause of demurrer, they stated that the promise, to deliver the negroes Jenny and Sylvia, or four others in the room of Sylvia, was (if made at all, which they expressly deny) charged by the plaintiffs to be a verbal promise made by the said Betty whilst a feme covert, and therefore not binding; and, as to the deed of trust made to the said John Lewis, it was, by the plaintiffs' own showing, made without the consent or knowledge of the said Lewis Holliday, after he was engaged to be married to the said Betty; and not recorded until nine years thereafter; and, therefore, fraudulent as to him, and not binding.

The defendants then filed separate and lengthy answers, wherein they expressly deny most of the principal charges in the bill, and charge complainant Robert Spilsby with great misconduct and ill behaviour; and pray to be dismissed with their costs, &c.

On the 25th of May, 1790, the chancellor decreed "that the deed of settlement, under which the plaintiffs claimed immediate possession of the slaves therein mentioned, was fraudulent as to Holliday the second husband; and for that cause allowed the demurrer; and, as to the security required to be given that the slaves,
 164 *which the plaintiff Mary, or her representatives, may be entitled to on the death of her mother, shall be forthcoming, (all proper parties not being before the court,) he ordered that the bill be dismissed with costs, without prejudice to any bill that might thereafter be brought for such security."

On the — day of May, 1798, the said Rob-

ert Spilsby Coleman, and Mary his wife, exhibited their bill against John Carter Littlepage, Lewis Holliday, and others, suggesting the death of Lewis Littlepage, beyond sea, and stating a variety of matter immaterial to be noticed here; and, in March, 1800, they filed a supplemental bill, making other defendants; but the principal object of which was (as far as it respected the appellants) to establish the deed of trust to John Lewis, dated the 14th of March, 1774, in the proceedings mentioned: (1) to which bill the defendants Lewis Holliday and wife demurred, for the same causes as are stated in their demurrer to the former bill; and, by way of answer, deny
 165 *the death of Lewis Littlepage; insist on their demurrer; and say that the deed of trust was, in a former suit, between the plaintiffs and the said Lewis Holliday and wife, declared fraudulent; the decree in which suit they plead in bar. (2)

In March, 1803, the same complainants filed a second supplemental or amended bill, stating the death of Lewis Littlepage, and making his principal legatee, and act-

(1) Note. The bills filed in the last suit were not bills of review, but original bills. The counsel for the appellees contended that the subject, as to the validity of the deed, might be re-examined in this shape, and upon the evidence filed in the first suit; according to which, they argued that the deed was made with Holliday's knowledge, and therefore good, under the authority of the cases of *Hunt v. Matthews*, 1 Vern. 408; *King v. Cotton*, 3 P. Wms. 367, 674, and *Strathmore v. Bowes*, 2 Bro. Ch. 345, in which last-mentioned case it was said to be held, (as a general proposition,) that a woman before her marriage, and without the privity of her intended husband, (if she does not deceive him by an express misrepresentation,) may convey her property to trustees for her separate use, and that, by such conveyance, it is placed beyond the reach and control of her husband. But the circumstance that Holliday knew of the deed, before the marriage, was not satisfactorily made out by the testimony; and the case of *Strathmore v. Bowes*, as reported in *Vesey*, *jun.* 25-29, does not go the length contended for; the deed in that case having been executed before the treaty of marriage commenced, and without any fraud upon the person who afterwards became the husband. See 1 Foub. c. 2, s. 6, n. (O), p. 107, 108. Also c. 4, s. 11, p. 200. The rule, deducible from all these cases, seems to be, that a settlement by a woman, even in favour of her children by a former husband, is a fraud upon the marital rights of the second husband, if made without his knowledge, and after the commencement of the treaty of marriage.—Note in Original Edition.

(2) Note. It was insisted, by counsel here, that the former decree was not a bar; because the opinion pronounced by the chancellor, that the deed was fraudulent, was only given by him as a reason for his decree dismissing the bill. A distinction was attempted to be taken between reasons assigned by the chancellor for a decree, and the decree itself. The reasons might be erroneous, and yet the decree be correct. It was said, too, by Botts, that a decree dismissing a bill is not absolutely a bar to a subsequent bill for the same thing. In a decree for dismissal, the chancellor merely refuses to act; he only denies the plaintiff his aid. The court will, generally, refuse to examine the same subject again: but, in particular cases, will use discretionary power. A decree for relief is different: for there the court acts and determines the matter in controversy: such a decree may therefore be an absolute bar.

These distinctions, however, were not regarded, or were considered insufficient to prevent the decree in question from being an absolute bar. It seems, indeed, very evident, that the grounds or reasons expressly assigned for any decree, where they declare the opinion of the court upon any point actually in controversy in the suit, must be considered as part of the decree itself, and as settling such point between the parties, until a court of competent authority, before which the question is regularly brought, shall determine otherwise.—Note in Original Edition.

ing executor, Waller Holliday, a party defendant; and after his answer, and sundry other proceedings were had in the cause, which (having abated, as to the defendant Benjamin Lewis by his death, and being no further prosecuted, except against the defendants Lewis Holliday and wife) came on to be heard on the bill, answers, demurrer, &c.; on consideration whereof, the court, overruling the demurrer, decreed, "that the defendant Lewis Holliday give security in the penalty of five thousand pounds, that the slaves in his possession, as well the negro girl and her descendants devised by the testament and last will of Zachary Lewis to his daughter Betty

166 *Littlepage for life, and, after her death, to her children then living, as the slaves Sylvia and Little Jenny, mentioned in the indenture, made the fourteenth day of March, 1774, between Betty Littlepage, of the one part, and John Lewis, of the other part, and the increase of the said Sylvia and Jenny shall be forthcoming after the death of the said Betty, agreeably to the will and deed aforesaid."

Which last decree the court is of opinion is erroneous, and ought to be reversed; and I am directed to report the following as the opinion of this court:

"The court is of opinion that the decree is erroneous, so far as it relates to the slaves Little Jenny and Sylvia, and their increase; inasmuch as, by a decree made the 25th day of May, 1790, in a suit between the same parties, the deed of settlement made the 14th day of March, 1774, in which the said slaves Little Jenny and Sylvia are mentioned, was declared fraudulent, as to the appellant Lewis Holliday, and the bill of the appellees dismissed with costs; which this court considers a complete bar to any claim of the appellees under the said deed of settlement. And, as to the slaves claimed by the appellees under the will of Zachary Lewis, this court discovers no sufficient ground to rule the appellant Lewis Holliday to give bond and security for their forthcoming after the death of Betty Holliday." (1)

Decree reversed, and bill dismissed with costs.

167

*Lovell v. Arnold.

Wednesday, April 3d, 1811.

1. Writ of Right—Declaration—Count—Certainty.—A count upon a writ of right describing the land de-

(1) Note. The plaintiffs demanded, in the suit in which the decree of May 25, 1790, was made, security for the forthcoming of the negroes; and a variety of testimony was taken on the subject of Holliday's intention, at that time, to remove to Georgia, but, in the last suit, there was no demand of such security, in either of the bills; nor any evidence that Holliday intended to remove.—Note in Original Edition.

*Writ of Right—Declaration—Uncertainty of Count—Effect of Joining the Mise.—Where, in a writ of right the boundaries of the land are defectively set out in the count, and the tenant joins the mise, he cannot afterwards complain of the defect. The principal case is cited in *Bolling v. Mayor, etc.*, of Petersburg, 3 Rand. 584, as proving this point.

At the common law, the tenant, by waiving view, and joining the mise, took upon himself a knowledge of the land demanded in the count; and, under the statute (4 Hen. St. at Large, 402), by joining the mise, he waives all objection to the description of the land demanded in the count, if it be sufficient to give notice to the parties of the controversy on which the mise is joined, so that the judgment or

manded as a certain number of acres, part of a larger tract, and setting forth the boundaries of such larger tract, is sufficiently certain after verdict.

2. Land—Tracing Title—Evidence—Decree between Other Parties.—In tracing a title to land in controversy, a decree in a suit between other parties, is not evidence, against a person claiming under neither of them, that one of those parties was, in fact, as therein described, eldest son and heir of a former proprietor: it being incumbent upon the party, wishing to avail himself of such fact, to prove it by evidence aliunde, but such decree may be received (as a link in the chain of evidence) to prove the fact that it was rendered.

3. Judicial Sale—Deed—Effect of.—Quære, whether a deed to a purchaser, at a sale directed by a decree, conveys any title, without a subsequent decree confirming the sale?

4. Bill of Exceptions—Description of Documents Referred to.—Quære, how far ought documents, referred to in a bill of exceptions, to be described to make them properly part of the record?

On a writ of right, sued out of the district court holden at Franklin court-house, on behalf of Elisha Arnold against Markham Lovell, the count demanded "a tenement containing sixty acres of land with the appurtenances, in the county of Franklin, and within the jurisdiction of the district court of Franklin, held at Franklin court-house, and which said sixty acres of land are included in a larger tract of eight hundred and fifty acres, and which eight hundred and fifty acres, so including the said sixty acres, are bounded as followeth, to wit: beginning," &c. setting forth the boundaries of the larger tract. The tenant in his plea described the land precisely as it was in the count; and issue was regularly joined. An order of survey was made, and a plat and certificate of survey returned to the court showing the quantity of land, in the tenant's possession, claimed by the defendant, to be fifty acres, and delineating the boundaries of those fifty acres particularly. The jury found a verdict for the defendant "for the fifty acres of land with the appurtenances in the count mentioned, and which said fifty acres are delineated and described in the surveyor's report by the black line marked A. 6, 7, B. and the dotted line marked C. D."

On the trial of the cause a bill of exceptions was signed and sealed in the following words: "Be it remembered that, on the trial of this cause, the defendant, in deducing his title to the land in controversy,

introduced in evidence a decree of the high court of chancery, "in these words, , and also a deed from Andrew Ramsey, in these words, ; to the admission of which, the tenant's attorney objected, as the decree was betwixt different parties from those now in court,

the verdict would be a bar to another writ for the same matter. *Snapp v. Spengler*, 2 Leigh 5, citing as authority, the principal case, *Turberville v. Long*, 3 Hen. & M 309; *Bolling v. Mayor, etc.*, of Petersburg, 3 Rand. 583.

But it seems that, if no boundaries are set out in the count, and nothing occurs in the progress of the cause, to supply the defect, and enable the court to give judgment, and the sheriff to deliver possession, the court might refuse to give judgment, and send the cause back for a repleader, the issue being immaterial. *Bolling v. Mayor, etc.*, of Petersburg, 3 Rand. 583.

To the point that the want of description in the count may be supplied by the finding of the jury, the principal case is cited in *Bolling v. Mayor, etc.*, of Petersburg, 3 Rand. 586; *Kolner v. Rankin*, 11 Gratt. 420; *Hitchcox v. Rawson*, 14 Gratt. 526; *Holliday v. Myers*, 11 W. Va. 291; *Moore v. Douglass*, 14 W. Va. 726, the two latter cases quoting from *Hitchcox v. Rawson*, 14 Gratt. 526.

and also because it was improper, by said decree, to prove that Andrew Ramsey was the heir at law to Patrick Ramsey, there being no other evidence to prove that fact: the said deed was also objected to, there being no evidence that a sale was made in pursuance of the decree; but these objections were overruled, and the said exhibits admitted to go to the jury as evidence; to which opinion the tenant excepts," &c.

The court gave judgment according to the verdict; whereupon the tenant appealed. The transcript of the record contained copies of a number of documents appearing to be the title papers of the demandant; none of which, however, were properly made part of the record, by being referred to in the bill of exceptions. According to these exhibits, the demandant's title to the whole tract of eight hundred and fifty acres was regularly deduced from a patent granted to Obadiah Woodson in 1751, through several intervening conveyances, in January, 1774, to a deed, purporting to be absolute, from Archibald Gordon to Patrick Ramsey. The next exhibit was a decree of the high court of chancery bearing date the 15th of May, 1792, in a suit between Archibald Gordon, plaintiff, and Andrew Ramsey, eldest son and heir of Patrick Ramsey, an infant, by Elizabeth Ramsey, his guardian," and others, defendants; according to which decree two conveyances from Archibald Gordon to Patrick Ramsey were considered as securities for money lent; a certain time for redemption was allowed; a sale by commissioners in case of failure to redeem was directed; and Archibald Gordon, and Andrew Ramsey, when he should attain his full age, were ordered to convey to the purchasers the subjects sold. The last exhibit was a deed from "Andrew Ramsey, eldest son 169 and heir of Patrick Ramsey, *deceased, to Elisha Arnold, dated June 5, 1797; reciting the decree, in substance; setting forth that Archibald Gordon having failed to pay the money according to the terms thereof, the said tracts of land had been, in obedience thereto, exposed to sale at public auction, and the said Elisha Arnold had, under the said sale, become entitled to demand and have a conveyance made to him of that tract of land containing eight hundred and fifty acres: the said indenture "therefore witnessed that the said Andrew Ramsey, in obedience to the said decree, and for the consideration of three hundred and fifty pounds current money by the said Elisha Arnold to the said commissioners in hand paid, and also of one dollar to him the said Andrew Ramsey in hand paid by the said Elisha Arnold, had granted, bargained and sold," &c.; concluding with a clause of special warranty against himself and his heirs, and all persons claiming under him.

Wickham, for the appellant. 1. The boundaries of the land were not sufficiently described in the count, as required by the act for reforming the method of proceeding in writs of right; (a) the limits of the sixty acres claimed by the demandant not being mentioned at all. The very land in contro-

versy should be designated, in order that the judgment may be a bar, and the sheriff may know of what land to deliver possession.

2. The decree in the suit between Gordon and Ramsey could not be evidence against Markham Lovell, who was no party to it; and if it was evidence at all, it was only of the point decided, not of the fact that Andrew Ramsey was heir of Patrick Ramsey. Suppose any other person had been the heir; he might controvert it notwithstanding the decree. The same objection applies to the deed from Andrew Ramsey; there being no proof that he was heir of Patrick Ramsey.

170 *Wirt, contra. 1. The description of the boundaries in the count was as full as it could be; more minute, indeed, than is to be found in any book of forms either in England or this country. The counts, in England, refer to the writ, without containing in themselves any specification of boundaries. (b) The first object of a count is to give notice of the land demanded. Now here the tenant has not demurred, but, in his plea, shows he understood the description given; for he copies it exactly. The second object is to enable the sheriff to give possession; and surely the description in this count is sufficient for that purpose. But, if it was vague in the count, the report of the surveyor and verdict of the jury, minutely finding by metes and bounds the land in controversy, removed the difficulty.

Our act of assembly does not require the boundaries to be precisely set forth; and in *Turberville v. Long*, 3 H. & M. 309, it was settled accordingly.

2. As to the second objection, the bill of exceptions has not brought it before the court in such form as for the court to decide upon it. The decree and the deed should have been set forth; otherwise the court could not judge. The bill of exceptions, drawn as it is, presents a mere abstract question whether a decree in any case between different parties from those now in court could be evidence. But suppose, though different parties, they were privies, would not the decree be evidence? It was the duty of the exceptor so to state the question as to enable the court above to decide upon it.

[Here Judge Roane called the attention of Mr. Wirt to the case of *Carr's Executor v. Anderson*, 2 H. & M. 361. Mr. Wirt observed that the document in that case was sufficiently described as "the inventory of Barbara Carr's estate;" but in this case the decree and deed are not described at all.]

171 *But admitting the decree was incorporated in the bill of exceptions, it ought to have been received as evidence. As introduced, it is only a link in the chain of our title; it was not offered as affecting Lovell's title, which was not at all involved in that suit in chancery.

Wickham, in reply. I rely on the act of assembly as changing the common law

(b) *Fitzh. N. B. p. 1, Coke's Ent. 183, a. and b. Rast. 239. a. under No. 8.* In some of these entries the parish only is mentioned; in that last referred to, parts unascertained are demanded.

rule. The count might be good at common law, but the act requires the boundaries to be set forth.

The case of *Turberville v. Long* was not like this. There the order of survey was made before the count was filed, which afterwards referred to the lines in the survey returned; but here the count has no reference to the lines of the land demanded; and the subsequent specification in the verdict could not have given the tenant information how to defend himself.

As to the 2d point, I should be willing to admit that the bill of exceptions is imperfect; for, if so, the judgment must be reversed. (a) But if this court should be of opinion (as I think they will be) that the decree and deed are sufficiently incorporated in the exceptions, then I contend the decree should not have been received as evidence.

The decree itself was only that a sale be made, and is no evidence that a sale was made. A decree should have appeared confirming the sale. I admit it was admissible as a link in the chain of evidence of the plaintiff's title; but it was not sufficient to prove more than the fact that such decree was rendered; not other facts to prove which parol evidence should have been produced.

Friday, May 3d. The judges pronounced their opinions.

JUDGE BROOKE. In this case two points were made. 1. The tenement demanded is not described with sufficient
172 *certainty; 2. The decree and deed objected to, in the bill of exceptions, were not admissible evidence, to prove all the facts for which they were introduced.

In the count, sixty acres of land, "part of eight hundred and fifty acres," are demanded: The eight hundred and fifty are described and set forth by metes and bounds according to the form prescribed by the act of 1786, entitled an act for reforming the method of proceeding on writs of right. The objections are, first, that the sixty acres are not so described; and, secondly, they might be located in any part of the eight hundred and fifty acres. Upon a demurrer to the count, it is possible these objections would be entitled to great consideration; but the tenant admits the description to be sufficiently certain by his plea; which puts in issue the quantity and locality of the tenement demanded. The objections of this kind that were urged in the case of *Turberville v. Long*, in this court, were much stronger, and yet they were overruled.

On the second point, I am of opinion that, though the decree, if necessary in tracing the title of the demandant, might have been offered in evidence, (in connection with proof of the sale under it, and the deed to the purchaser,) to prove, as far as it would go, that the title to the land in controversy had passed from Patrick Ramsey to the purchaser, yet it was not evidence to prove that Andrew Ramsey was the heir at law of Patrick Ramsey; that was a deduction of law, from facts which might or might not have been before the chancellor, and which it did not belong to the jury to make from the decree; facts

which, if proved by proper testimony, rendered the decree and proceedings under it unimportant to the demandant, inasmuch as, if Andrew was proved to be the heir at law of Patrick Ramsey, he derived his title to the land by descent, and the deed from him to the demandant was sufficient to pass the title to him. I am therefore of opinion the judgment must be reversed.

173 *I have said nothing relative to the sufficiency of the bill of exceptions to identify the deed and decree referred to; because I thought it best to decide the points in it, however informally presented to the court.

JUDGE ROANE. As to the sufficiency of the count in this case, I am inclined to concur in the opinion just delivered, upon the authority of the decisions of this court in the cases of *Turberville v. Long*, 3 H. and M. 309, and *Beverley v. Fogg*, 1 Call, 484.

With respect to the sufficiency of this bill of exceptions in relation to its identifying the decree and deed contained in the record to be the very paper therein referred to, I cannot but have some doubts upon the subject. As, however, the question may be very important, in reference to the actual practice of the several clerks of this commonwealth, who frequently omit, either to copy into the bills of exceptions, the documents intended to be made a part thereof, or to certify (as is the case here) that a given paper is the one referred to in the bill of exceptions, that question is reserved (so far as my opinion goes) for future decisions: In the view I have taken of this case, the question need not be decided at present.

The bill of exceptions exhibits the appellee as offering in evidence the decree and deed therein mentioned, generally, viz. to prove every thing they were extensive enough to prove. On the part of the appellant, the decree was objected to both generally, as being inadmissible evidence, it having been rendered between other parties, and particularly, as being incompetent to prove that A. Ramsey was the heir of Patrick Ramsey. I understand this objection as amounting to a substantial, though informal, application to the court, either to withhold that decree from the jury altogether, or, at least, to instruct the jury that it was incompetent to prove the fact

of A. Ramsey's heirship; and I also
174 understand the *decision of the court, as amounting to a refusal to do either, and as permitting that decree to go to the jury to prove, inter alia, that A. Ramsey was the heir of Patrick Ramsey. The propriety of this decision of the district court is now to be examined.

While it is admitted that that decree, though between other parties, was proper to prove any matters depending merely upon reputation, (including, perhaps, the fact that A. Ramsey was the eldest son of Patrick Ramsey,) and also was proper to be exhibited in this case as a link showing how the title was deduced from Gordon to the present appellee, it was not proper evidence to prove, as between the present parties, the substantive fact of the heirship of

A. Ramsey. * That being a legal inference depending upon a point of fact, viz. the time of the death of Patrick Ramsey, and upon the construction and time of commencement of the act of descents of 1785, (however clear and plain,) it was the privilege of the appellant not to be bound thereby, unless he had had (by being a party to the suit) the liberty to controvert the same. It is not for this court to say, that it was unnecessary for the appellee, resting upon the conveyance under the decree, to prove the fact of the heirship as a substantive fact in the present case. He has chosen to do so; and the doctrine is, "That illegal or improper evidence, however unimportant it may be to the case, ought never to be confided to the jury, for if it should have an influence upon their minds, it will mislead them, and if it should have none, it is useless, and may, at least, produce perplexity." (a)

The establishment of this fact, however, in the case before us, might not have been altogether useless, in the event that the deed of A. Ramsey, contained in the record, should (from whatever cause, as to which, however, I give no opinion in this case) be deemed insufficient to convey a perfect title to the appellee, as under the decree, yet, as Gordon's deed to Patrick Ramsey
175 was *in itself an absolute one, and this deed, (though possibly insufficient under the decree,) conveying the right of A. Ramsey to the appellee, he might have considered that his title, in this aspect, would be complete by proving that A. Ramsey was the heir of Patrick Ramsey; and having no other evidence of that fact, introduced the decree aforesaid to prove it; and thus (which, however, is not necessary to maintain my proposition, that the decision of the district court on this point was erroneous) a real utility might have resulted to the appellee from exhibiting the decree to prove that fact; a fact, too, as to which there was no other testimony offered.

My opinion is that the judgment be reversed, and the cause remanded, with directions that the district court should, on the future trial, if necessary, give an instruction to the jury corresponding with the ideas now stated.

JUDGE FLEMING. The counsel for the appellant stated two points in the cause to prove the judgment erroneous; first, that the count is defective, and not cured by the plea, or verdict; and, secondly, that the decree and deed, referred to in the bill of exceptions, were not admissible evidence to prove the matters for which they were introduced.

With respect to the first point, the count demands a tenement containing sixty acres of land with the appurtenances, in the county of Franklin, and within the jurisdiction of the district court of Franklin; which said sixty acres are included in a larger tract of 850 acres, the bounds of which are accurately described. The defendant in his plea, after describing the land precisely as stated in the count, "putteth himself on the assise, and prayeth

recognition to be made whether he hath greater right to hold the tenement aforesaid, with the appurtenances, as he now holdeth it, or the said Elisha Arnold
176 *to have it, as he now demandeth it;" and issue thereupon in due form; which seems to me a sufficient acknowledgment of the identity of the land in controversy. But this is not all; the jury expressly find for the demandant (not sixty) but fifty acres of land, with the appurtenances in the count mentioned, "being part of 850 acres also in the count mentioned;" and which said fifty acres are particularly delineated and described in the surveyor's report, made by virtue of an order of the district court of Franklin. And the appellee traced his title, from the date of the patent to Obadiah Woodson, in the year 1751, down to the time of instituting his suit.

In the case of *Turberville v. Long*, in this court, (b) the count neither stated the county in which the land in controversy lay, or that it was within the jurisdiction of the district court of Fredericksburg, where the suit was brought, and yet the court held the count sufficient to maintain the action, and gave judgment accordingly.

With respect to the second point, it seems attended with more difficulty. This court, in the cases of *Keel & Herbert v. Roberts*, 1 Wash. 203, and of *Wroe v. Washington* and others, 1 Wash. 357, decided against the doctrine of taking a bill of exceptions for a demurrer to evidence, and considered the two modes of proceeding as being totally dissimilar; and that the one could not answer the purposes of the other. In a demurrer, the evidence is admitted to be legal and true; but not sufficient to maintain the issue; the whole evidence being stated in the demurrer, the court may refuse to compel the other party to join; and may either direct the jury as to the sufficiency of the evidence, or, in a clear case, may leave the jury to decide upon it. And, in a doubtful case, the usual mode is, either to withdraw a juror, or for the jury to find a verdict, subject to the opinion of the court, upon the sufficiency or insufficiency of the evidence to maintain the issue.

177 *In an exception to evidence, it is denied to be legal, or competent, and, therefore, ought not to be admitted to go to the jury for any purpose whatever.

In the case before us, the exceptions seem vague and uncertain; they are, that "the demandant, in deducing his title to the land in controversy, introduced, as evidence, a decree of the high court of chancery in these words: ; and also a deed from Andrew Ramsey, in these words: ; to the admission of which the tenant's attorney objected, as the decree was betwixt different parties (though not named) from those now in court; and also because it was improper, by said decree, to prove that Andrew Ramsey was the heir at law of Patrick Ramsey, there being no other evidence to prove that fact. The deed was also objected to, there being no evidence that a sale was made in pursuance of the decree.

(a) Per PENDLETON, President, in the case of *Lee v. Tapscott*, 2 Wash. 281.

(b) 8 H. & M. 809.

Take the appellant's objections as exceptions to the evidence, the question is, whether the decree and deed were admissible evidence to go to the jury for any purpose? It seems to me that they were admissible; being a link in the chain by which the appellee deduced his title to the land in controversy, from the patentee down to the commencement of his suit; and, if they prove Andrew Ramsey to be the eldest son, it appears to me they also prove him to be the heir of Patrick Ramsey; or so they style him in the same sentence; and we ought, I conceive, to reject, or take, the whole together. The suit in which the decree is rendered, was instituted by Alexander Gordon against Andrew Ramsey, by him styled to be the eldest son and heir at law of Patrick Ramsey, to be relieved against his own absolute deed, executed to the said Patrick Ramsey the father; of which deed further notice will be taken hereafter. The time of Patrick Ramsey's death does not appear; but I presume, from the circumstances above stated, that it 178 was *prior to our act of assembly directing the course of descents, which took effect on the first day of January, 1787.

Consider the objections as a demurrer, it admits the evidence to be legal and true in all its parts; but denies its sufficiency to prove the facts for which it was introduced. Our act of assembly, to simplify the proceedings in writs of right, directs the form of both count and plea; differing the proceedings from those in England in many respects; and allows any matter to be given in evidence which might have been specially pleaded. Upon the same principle, I conceive, the decree and deed might have been given in evidence on the part of the demandant, (which he might in a special count have stated, as a link, in tracing his title, had not a particular form been prescribed by the act of assembly.) The fact, that Andrew Ramsey was the heir of Patrick Ramsey, seems the only purpose for which the proceedings in chancery need be used; for the deed from Gordon to Patrick Ramsey being absolute, without a defeasance; but for the interference of the court of chancery (which, from some equitable circumstances, not to us disclosed, considers that it should operate between the parties as a mortgage) the absolute right would have descended to Patrick Ramsey's heir, (unless otherwise disposed of by the will,) who might have sold, and conveyed, to whomsoever he pleased.

As to the circumstance of there being no direct proof that the land was sold in pursuance of the decree; its being so stated in the deed from Andrew Ramsey to Arnold, and that the latter became the purchaser, is sufficient evidence to satisfy me of the fact; as the former thereby divested himself of all right to, and interest in, the premises. If the decree is not evidence, why is proof required that a sale was made in pursuance of it of the land in controversy? the title to which is clearly 179 *deduced from the patentee, who obtained a grant for the same from the crown, under the legal government, in the year 1751, down to Patrick Ramsey,

in the year 1774. And none, I conceive, could be interested in, or affected by, the sale, except the purchaser, and those who claimed under Patrick Ramsey, and (except the possession) not a shadow of title appears in the appellant.

I have still, however, some doubts on the subject; and it being an invariable rule with me never to reverse a judgment, or a decree, unless thoroughly convinced that it is erroneous, I am of opinion that the judgment ought to be affirmed. But a majority of the court being of a different opinion, it is to be reversed, and the cause remanded to the superior county court of Franklin, for a new trial to be had therein.

Judgment reversed, and new trial granted; with a direction that, on such trial, the court do not permit the decree, mentioned in the bill of exceptions, to be given in evidence to prove that Andrew Ramsey was the heir of Patrick Ramsey.

Grantland v. Wight.

Wednesday, April 8d, 1811.

1. **Public Auction—Sale of Land—Deficiency—Compensation.**—A piece of ground being sold at public auction, expressly according to certain metes and bounds, (then and there shown to the purchaser before he became the highest bidder,) be the same more or less; he is not entitled to any compensation for a deficiency: although the previous advertisement described the tenement as containing more than the actual quantity: neither is the case varied by subsequent articles of agreement under seal, (written by the purchaser, and signed by the vendor, for the purpose of binding the vendor to make a title,) in which the terms of the sale are referred to, but the quantity of ground mentioned in the advertisement is specified, omitting the words "more or less." The vendor is not precluded by such articles from proving the terms of sale by parol testimony.
2. **Appellate Practice—Correction of Error.**—In such case, it seems, however, that if the chancellor decrees a compensation to the purchaser, and the vendor does not appeal, the court of appeals will not correct the error to his injury, upon an appeal by the other party.
3. **Sale of Land—Judgment for Purchase Money;—Injunction.**—An injunction, to a judgment for purchase-money, ought not to be dissolved until a good and sufficient deed for the land be tendered by the vendor.

This was a suit in the superior court of chancery for the Richmond district, on behalf of Michael Grantland against Hezekiah L. Wight, executor of John Joy, and of John Prentiss, deceased, for a title to 180 a tenement, being *part of a lot, in the city of Richmond, sold at public auction by the said executor, and purchased

***Sale of Land—Deficiency—Compensation.**—On this subject, many notes have been written in this series of reports. See *foot-notes* to Chinn v. Heale, 1 Munf. 68; Bierre v. Erskine, 5 Leigh 62; Keytons v. Brawfords, 5 Leigh 41; Watson v. Hoy, 28 Gratt. 698; Pendleton v. Stewart, 5 Call 1; Quesnel v. Woodlief, 6 Call 218; Jolliffe v. Hite, 1 Call 301; Blessing v. Beatty, 1 Rob. 287, and other notes cited in these notes.

The principal case was cited on the subject in Cabell v. Roberts, 6 Rand. 563; Caldwell v. Craig, 21 Gratt. 132; Allen v. Shriver, 81 Va. 188; Crislip v. Cain, 19 W. Va. 518, 527, 549; Depue v. Sergeant, 21 W. Va. 333, 338.

For sequel of principal case, see Grantland v. Wight, 5 Munf. 295. The principal case is also cited in Stockton v. Cook, 3 Munf. 74.

†**Appellate Practice.**—See monographic note on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.

‡**Judgments.**—See monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

§**Injunctions.**—See monographic note on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

by the complainant; and also for compensation for a deficiency in the quantity of ground. It appeared from the bill, answer, and depositions, that the tenement was advertised, before the sale, as containing fifty feet in front; but that on the day of sale, it being publicly suggested that it did not contain as much, the quantity within certain metes and bounds, (specially shown to Grantland,) be the same more or less, was sold and purchased for the sum of 442l. 10s. Some time after the sale, when Grantland gave his bond for the purchase-money, he proposed that Wight should sign a memorandum of the agreement, for the purpose of binding him to make a title; to which Wight assented, and accordingly signed articles of agreement written by Grantland; reciting that the said Michael Grantland having become the purchaser "of all that tenement on the main street, lately occupied by William Hodgson, containing fifty feet front, and running one hundred and sixty feet back, and the said Michael Grantland having, according to the terms of the sale of the said property, given bond with approved security for the payment of the purchase-money, to wit, the sum of 442l. 10s." &c. "The said Hezekiah L. Wight, executor as aforesaid, in consideration of the premises, hath agreed," &c.

By a survey made in the cause, the tenement was ascertained to contain only forty-three feet ten inches in front.

The late chancellor having granted the plaintiff an injunction to stay proceedings on a judgment obtained against him on his bond, dissolved it, on the final hearing, as to 388l. 15s. 2d. and the interest thereupon, and made it perpetual as to the residue of the principal and interest; decreeing that the defendant Hezekiah L. Wight pay to the plaintiff the costs by him expended in

181 prosecuting this cause; but made no provision relative to the title to the tenement in question. From this decree the plaintiff appealed.

Hay, for the appellant. The decree is evidently wrong upon two grounds; 1st. The chancellor has erroneously adopted the standard, furnished by the price agreed on for the whole, to fix the compensation for the part lost. (1) If a purchase (for example) should be for a quantity of ground sufficient to build a house on, the loss of one half of the ground would be, obviously, more than equal to half of the price. The value of the damage sustained by the appellant ought to have been ascertained by a jury.

2. The court ought to have ended the subject of controversy by decreeing a conveyance on payment of the purchase-money.

Copland, for the appellee. The decree is erroneous in being more favourable to the appellant than it ought to have been. There should be no deduction from the purchase-money; the sale having been made according to certain boundaries marked out, though the number of feet and inches was not ascertained. The writing which

he afterwards obtained ought not to put him in a better situation than he was entitled to according to the terms of sale. And, as to the want of a title, the payment of the money and delivery of the conveyance ought to be simultaneous acts.

Wickham, in reply. Mr. Copland admits the agreement, under hand and seal, is against him. This was after the sale. Parol testimony could not be admitted against it, unless fraud had been proved. The weight of such testimony may be in his favour; but we (having the deed) 182 *were not compelled to take depositions to support it. Besides, a new bargain, made after the sale, might have been the inducement to the deed.

Wight (though an executor) had a right to warrant the title, if he chose it; and, in this case, he has agreed to make an indefeasible title. Suppose he is unable to make such title. In no case, of a suit in equity for a title, has it been deemed necessary for the plaintiff to tender the money. The decree should have been that the injunction be dissolved upon the defendant's depositing a conveyance as an escrow.

Saturday, April 20th. The judges pronounced their opinions.

JUDGE CABELL. The written agreement in this case ought to be considered as referring to the terms of the public sale, and therefore the decree of the chancellor, making a deduction from the price for which the property was sold, at the public sale, was erroneous. But, as the appellee has not complained of that deduction, it will not now be noticed. The decree appears also to be erroneous in dissolving the injunction before the appellee had made a title to the land. I am therefore of opinion that the decree be reversed, and that the cause be sent back to the court of chancery; that the injunction be reinstated and remain in full force until a deed, good and sufficient in the estimation of the chancellor, shall be executed, and then that it be dissolved as formerly directed by the decree now reversed.

JUDGE BROOKE. The claim of the appellant to a deduction from the amount of his bond appears to me entirely unfounded. The depositions concur in proving the terms of the sale. Though the advertisement described the lot of ground as containing fifty feet in front, yet the depositions of the auctioneer, and of

183 two other *witnesses, prove expressly that it was publicly proclaimed by the auctioneer that the lot was sold as containing between forty-four and forty-six feet in front, more or less, by metes and bounds, which were specially shown to the appellant. He does not himself, either in his original or supplemental bill, insinuate that the articles of agreement were executed by the appellee in pursuance of any other contract or transaction than the sale; nor is there the slightest evidence to that effect in the record. I infer, therefore, that the words "more or less," in the terms of the sale, were omitted in that instrument by mistake. The appellant, coming into a court of equity to ask relief, insists with a bad grace on the legal effect of a deed so obtained. However, as the decree is not

(1) Note. See on this subject, 1 Munf. 380-388: Hull v. Cunningham's Executor, and *ibid.* 500: Humphrey's Administrator v. McGlenachan's Administrator.—Note in Original Edition.

complained of by the appellee, it will not now be corrected as to the deduction from the amount of the bond; but the appellant was certainly entitled to a conveyance of the property before he paid the purchase-money; the want of it was the exclusive complaint in the original bill; yet the chancellor has been silent on that subject. I am therefore of opinion that the decree be reversed, the cause sent back, and the injunction reinstated, until the appellee shall tender a good and sufficient deed, in the opinion of the chancellor; and then to be dissolved, as before decreed.

JUDGE ROANE. Nothing can be clearer, upon the testimony in this case, than that the purchase was of the entire lot, by specified metes and bounds, and that the appellant was not only publicly and formally apprized of those terms, at the time of sale, but was also informed of the probable deficiency by a rough admeasurement of the premises. These circumstances are entirely competent to do away the effect of the advertisement, which represented the lot as containing fifty feet in front. If, therefore, we are authorized to test this case by the actual circumstances of the contract on the day of sale, 184 the appellant *is entitled to no abatement whatever, from the gross sum he contracted to give for the lot.

We are so authorized, unless prevented by the agreement of November 3d, 1801. The bill states the purchase of the lot at public sale; and that the appellant entered into the agreement, last mentioned, with the appellee; and prays that the said contract may be carried into effect. It does not allege a rescission of the contract by the sale at auction, and the making a new agreement by the writing of November 3d, 1801; but, on the contrary, it rather admits that the original sale was not rescinded, by stating the consummation, without also averring the rescission of it. The bill, at least, submits the construction upon this subject to the judgment of the court; and, if we were now to decree that the original bargain was rescinded and given up on the 3d of November, 1801, we should, I think, go beyond the allegations of the bill, and take a ground not taken by the complainant himself. Let us now examine the agreement itself. The agreement does not purport an abandonment of the former contract; on the contrary, it recognises its existence, by reciting that Grantland had become the purchaser of all that tenement, &c. and had given bond for the payment of the purchase-money, according to the terms of the sale; and by agreeing to make him a title to the tenement purchased as aforesaid, in consideration of the premises, which premises are, his having purchased the lot at public sale, and given bond for the purchase-money according to the terms of that sale. Thus far there is not an iota of the agreement which seems to look towards a rescission of the former contract, and setting up a new agreement; but what is now relied upon is, that, in reciting the fact of the purchase at auction, the lot is said to contain fifty feet; and this false recital is supposed both to demolish and surrender

the contract on the original purchase, and to narrow down the effect of an agreement, which was then entered 185 *into merely for the purpose of effectuating and finally settling the former contract. The answers to this idea are, 1st. That if the lot is, in this part of the recital, said to contain fifty feet in front, that recital also admits that he purchased only "all that tenement lately occupied by W. Hodgson," and that this part of the recital will narrow and control the effect of the former; 2dly. That this construction is abundantly supported by the agreement, taken in a general view as aforesaid; and, 3dly. That a false recital of a fact or contract does not in all cases amount to a grant or contract. In the case of wills it is clear that a false recital does not amount to a devise; (a) and the construction, I presume, will be the same in relation to a grant or deed, unless the circumstances are so clear as to amount to an admission to be bound by the fact or document recited, as in the case of *Annandale v. Harris*, 2 P. Wms. 433, where a man having, in a deed poll, recited that he had given a bond for 2,000l. to a woman whom he had seduced, and the bond could not be proved, it was held that the recital in the deed was sufficient evidence of there having been such a bond, as it was a confession by the obligor himself under hand and seal, and was stronger than a verbal confession. The case before us falls very far short of this standard; for so far from this recital amounting to an agreement to warrant the lot to contain fifty feet, it is not only a *felo de se* in itself as aforesaid, but the converse is evinced by all the foregoing considerations. I should be entirely of this opinion, did the parties in this case stand upon precisely equal ground: but that is not the case; for the appellee has got the law on his side, and is not to be deprived of the benefit thereof, unless his adversary will give up his claim to avail himself of a trick practiced by him in relation to an immaterial omission in the recital of an agreement written by himself.

As to the proposed variation in the 186 decree, nothing can *be more just than that a purchaser should not be compelled to part with the purchase-money until he has obtained a title for his land. I concur, therefore, in reversing the decree, and in modelling it in the manner proposed by Judge Brooke.

Judgment reversed, and "cause remanded to the court of chancery, for the injunction to be reinstated until the appellee Hezekiah L. Wight shall tender a good and sufficient deed in the opinion of the chancellor, and then to be dissolved as before decreed by the chancellor."

Monday, April 22d. The judges (except Judge Brooke) declared that, in this case, they did not mean to decide the question generally, whether, on reversing a decree to the injury of the appellant, the court can moreover correct an error operating to the injury of the appellee, but left it open for argument whenever the point should again occur.

(a) *Bamfield v. Popham*, 1 P. Wms. 54, and *Wright v. Wyvill*, 2 Vent. 56.

October 2d, 1811. The Court established a general rule on this subject, for which see 1 Munf. p. 460, note.

Saturday, November 9th. Copland renewed a motion, formerly made by him, for a reconsideration of this case. His object was to obtain a correction of the error which operated to the injury of the appellee.

Cur. adv. vult.

Monday, November 11th. The president reported that, on reconsidering the case, the court saw no good ground for disturbing the decree entered the 20th of April last.

187 *Jones v. Robertson.

Thursday, April 4th, 1811.

1. **Deed of Gift—Mistake—Fraud—Evidence.**—What evidence of circumstances prior and subsequent to the date of a deed of gift, are sufficient to set it aside, on the ground of mistake on the part of the donor, and fraud on the part of the writer.
2. **Same—Same—Same—Same—Declarations of Donor.**—Proof of subsequent declarations and acts of the donor, (though not admissible taken singly,) may be received (under total absence of testimony applying to the time of the contract, and in connection with corroborating circumstances) to show that the writing was misunderstood, or misrepresented at the time of signature.

This was a suit in chancery, in the county court of Nottoway, on behalf of Mary Robertson, (otherwise called Wilkinson,) against Richard Jones, jun. and others; for the purpose of annulling, on the ground of fraud, a deed of gift executed, by the plaintiff, to the said Jones as trustee for the other defendants, which, on his motion, had been duly recorded.

The plaintiff in her will alleged that she called on the said Richard Jones, jun. to write her last will and testament; that, accordingly, he came to her house, (as she expected, to do the same,) but wrote an instrument, which she, then, and until very lately, thought was a will, and signed and sealed as such in due form; but, to her utter astonishment, and contrary to good faith, he fraudulently wrote what he termed a deed of gift, constituting sundry persons, (some of whom were his own children,) who were all absent, and totally unacquainted with the circumstances, parties thereto, and making himself trustee for their benefit; that the said deed was executed without any consideration, and her property thereby extorted from her, in a manner by which she never had the smallest intention of conveying it; and that the distribution, as therein made, was not agreeable to her intentions even by will.

The defendant, Richard Jones, jun. in his answer, among other allegations, said "that he received a message from the complainant, some time prior to the date of the deed, to come to her house, in order to do some writing for her, relative to the dis-

tribution of her estate; that he went, agreeably to her request, in some short time; and, after being there, was informed by her that she wished to give her estate to her children in a different manner from that in which she had willed

188 *it some time before, and declared that she did not think she was in her perfect senses at the time she made the said will, as she had done so much injustice to her daughter and daughter's children. This respondent then asked her to inform him in what manner she wished to give her estate, and he would take a memorandum of it, and draw a deed of gift for her, agreeably to the memorandum, and would, on the day mentioned in the said deed, come to her house with it, and bring witnesses to attest it. He accordingly went the day appointed, which was the day the said deed bears date, and carried with him W. Peter Robertson, William Jones and Daniel Robertson. After being there some short time, the aforesaid witnesses left the room, in order that she might read the deed, and make herself acquainted with its contents. This respondent offered her the deed of gift, on the witnesses' going out, and, at the time, called it a deed of gift. She requested him to read it to her, which he did: she said it was right: he then asked her to read it herself also, as she could read his writing very well. She did so, and a second time said it was right; and then requested this respondent not to say anything to her children about the deed of gift, and also to ask the witnesses not to mention it; for, if it was known to her children in what manner she had given her estate, some of them would plague her to death about it. The witnesses were then asked to come into the room, where she signed, sealed and acknowledged her hand and seal; and being asked by this respondent if she also delivered it as her act and deed, she replied she did. The witnesses then attested it in her presence. And this is the fraudulent manner by which the deed aforesaid was obtained. As to her directing this respondent to write a will, at the time he went to the house at her request; he positively denies receiving any such instructions from her, or as to what kind of instrument he was to write;

189 but she wished to give her property in the manner stated *in the deed, and asked him to do the writing for her; he informed her he would draw a deed of gift, which he did, and presented it to her at the time aforesaid, by which name he then and at all other times called it; and at no time of the business was ever a will mentioned by him, or the complainant, as he recollects, except the one she complained of."

The other defendants, by their answers, denied any knowledge of the fraud alleged, and insisted upon their rights under the deed.

A witness proved that Mrs. Comer, (one of those defendants,) on hearing a person say that he firmly believed the complainant thought, at the time she executed a certain instrument of writing called a deed of gift, (now the subject of controversy between the parties,) that she had only executed a

***Deed of Gift—Mistake—Fraud—Evidence.**—See monographic note on "Gifts" appended to Barker v. Barker. 2 Gratt. 344; monographic note on "Deeds" appended to Flott v. Com. 12 Gratt. 564; monographic note on "Fraud" appended to Montgomery v. Rose, 1 Pat. & H. 5; monographic note on "Evidence" appended to Lee v. Tapscott, 2 Wash. 276.

†**Deeds—Evidence—Declarations of Grantor.**—Parol declarations of a grantor previous to the execution of a deed, and at the very moment of executing it, are admissible to explain the intention with which it was made. Land v. Jeffries, 5 Rand. 211, 214, citing the principal case.

will, replied "that she believed so too, because her mother (the complainant) at that time desired her to request Mr. Comer to go to Major Jones, and ask him to make or alter her will; which message she accordingly delivered to Mr. Comer, who went to Major Jones." Two of the subscribing witnesses to the deed stated the circumstances relating to its execution much in the same manner as set forth in Richard Jones's answer; but neither of them swore that Mrs. Robertson actually read, or heard it read; or that it was called a deed of gift in her presence.

It was also proved, that the complainant appeared much astonished at being informed that the writing she had executed was a deed; declaring that she had never executed but one instrument respecting the distribution of her estate; and that was a will; and a farther circumstance was in evidence; that she had made another will, after the date of the writing in question. One of the subscribing witnesses deposed that the defendant observed to them, as they went to the house of the complainant, that he must enjoin them to secrecy
190 by her request; *but that witness did not hear the complainant make such a request.

The deed exhibited purported to be a conveyance of the whole of the complainant's estate, "both real and personal, and of every denomination whatsoever," to be possessed and enjoyed by the donees, after her death; reserving the full possession and enjoyment to herself for life.

The county court was of opinion that the deed was executed, under circumstances of mistake and misapprehension, on the part of the plaintiff, and of fraud on the part of the defendant Richard Jones; and that, as the complainant intended only to make a will, the said deed is revocable as other wills are. The court, therefore, adjudged the deed aforesaid null and void, and decreed that it be set aside accordingly.

Upon an appeal to the superior court of chancery for the Richmond district, the late chancellor affirmed this decree; whereupon Richard Jones appealed, again, to this court.

Call, for the appellant.

Hay, for the appellee.

The next day after the argument, the judges pronounced their opinions.

JUDGE CABELL. The appellee having made her will, and becoming dissatisfied with some of its arrangements, was desirous to change the particular distribution of her property, but not to change the nature of the instrument by which it had been made; and, independently of all other evidence in the cause, the answer of the appellant incontestably proves, that he received no instructions to prepare a deed. The appellee still wished to make a will,

191 although different in its dispositions from the one *she had before made; and she executed the deed prepared by the appellee, without a knowledge of its real nature, and in the belief that it was a will. This case is not analogous to that of Conolly v. Lord Howe, and the Countess of Buckinghamshire v. Conolly. (a) There

the only evidence relied upon, to defeat the deed, was the subsequent declarations of the grantor that she had been imposed upon; and it was very properly rejected, particularly when opposed, as it was, by other declarations of the same person made before the execution of the deed, and calculated, from their nature, to produce a very different effect. The case now before the court bears a much nearer resemblance, in many of its circumstances, to the case of Wilkinson v. Brayfield, and Woodhouse v. Brayfield. (b) There "the defendant Brayfield had, by means of an attorney, prevailed on Elizabeth Corie to levy a fine of some houses; and to execute a deed leading the uses thereof to Brayfield and his heirs; and it was proved that she, at the time of levying the fine, declared she must make use of some friend's name in trust; and afterwards, by will, declared she had levied such fine only in trust, and the better to enable her to dispose of the estate; and thereby devised it to Wilkinson and his heirs, subject to the payment of her debts; and, although Brayfield proved a great familiarity and friendship between them, and that she had declared he should have her estate; yet, it was decreed, not only that the estate should be liable to the creditors' debts, but that Brayfield should convey the estate to the devisee Wilkinson and his heirs."

On a full view of all the circumstances of the case now to be decided, I am compelled to believe that the deed sought to be set aside was executed through mistake on the part of the appellee, and obtained by fraud on the part of the appellant. I am therefore for affirming the decree of the chancellor.

JUDGE ROANE. The appellant 192 admits in his answer *that he was sent for by the appellee to do some writing for her, and that she told him when he went to her that she wished to give her estate to her children in a different manner from what she had before done by her will. This "different manner," standing singly, would be taken to relate, rather to a varying disposition of her property, than to a change of the nature of the instrument by which that alteration was to be effected; and the "writing," which the appellant says he was requested to do, does by no means necessarily import that it was to be by deed. Standing, therefore, solely on the admission of the appellant in his answer, it does not appear that the appellee contemplated a deed in the origin of this business; it is admitted, on the contrary, by the appellant, that the idea of a deed was first started by himself. This statement is fully corroborated by other testimony showing that the appellee only contemplated a will, and was much surprised to find that a deed, instead of a will, had been executed by her. The testimony as to the surprise is very strong; and, therefore, I infer that, both before and after the deed was executed, nothing but a will was contemplated by the appellee. If, at an intermediate time, viz. that of the execution of the deed, the appellee deliberately changed her mind in this particular, the

(a) 5 Ves. jun. 700.

(b) 2 Vern. 807.

appellant must regret his own indiscretion in sending out the witnesses who might have proved it. This case, therefore, seems analogous to the case cited from 2 Vern. 303, merely giving to the previous declarations in this case the effect of cotemporaneous ones, under a total absence of testimony as applying to the time of the contract. The declarations in the case before us are very strong to import a surprise on the part of the appellee, and it is proved (to make the case stronger) that Mrs. Comer had acknowledged that the appellee sent a request to Mr. Jones to come and make her will. On the ground of these declarations, therefore, under all the circumstances of the case, and

193 without giving any opinion upon "the competency of subsequent declarations, abstractedly taken, to fix a fraud on the appellant, I am of opinion that both decrees are correct, and ought to be affirmed.

JUDGE FLEMING concurred, and both decrees were affirmed by the unanimous opinion of the court.

Cave v. Shelor and Wife.

Thursday, April 4th, 1811.

Slander*—Declaration—Averments.—In an action of slander, an averment in the declaration that the slanderous words were spoken "of or concerning (1) the plaintiff," or "in some conversation or colloquium respecting him," is essentially necessary, unless the words, by fair construction, in themselves plainly and necessarily relate to the plaintiff. (2)

In an action for slander in the county court of Orange, "Ann Cave complains of John Shelor and Nancy his wife, in custody, &c. for this, to wit, that whereas the plaintiff is a virtuous woman, and of this the whole neighbourhood was well advised; the defendant Nancy, well knowing the premises, but, in the wickedness and abomination of her heart, maliciously intending to deprive the plaintiff of the only thing upon earth to her dear and interesting, a fair reputation, did, on the — day of —, in the year —, with an audible voice, in the hearing of very many respectable people, pronounce these false, slanderous and evil disposed words, to wit, that the negro man Humphrey was as great as her husband had been with her, or words to that amount, meaning they had such intercourse as man and wife have when they get children, whereby the plaintiff's reputation became blackened, and ruined by these aspersions, to her great and manifold

194 damage, to the amount of \$500 dollars." Plea, not guilty. Verdict and judgment for the plaintiff for 42l. damages and costs.

An appeal being taken to the district court of Fredericksburg, the judgment was reversed, upon the ground that the declara-

tion was not sufficient to maintain the action; whereupon the plaintiff appealed to this court.

Hay, for the appellant.

Botts, for the appellee.

Saturday, April 6th. The judges pronounced their opinions.

JUDGE ROANE. The just principle laid down by this court in the case of Hoyle v. Young, 1 Wash. 152, that words should be understood by the courts in the sense in which they would be understood by the bystanders, notwithstanding there may be a possible sense in which they may be esteemed innocent, is sufficient to overrule all the exceptions taken to the declaration in question in the appellee's statement. But there is a fatal defect in the declaration; that is, that it is not averred that the slanderous words were spoken of or concerning the plaintiff, or that they were spoken in any conversation or colloquium respecting her: nor do the words charged clearly import, in themselves, that they at all related to the plaintiff. (a)

The case deduced from the declaration is, therefore, no more than this, that the defendants, well knowing the plaintiff to be a virtuous woman, and intending to deprive her of her reputation, did, in the hearing of many persons, pronounce words which may as well relate to any other person as to the plaintiff; for any thing which is averred in the declaration, or any thing deducible from the words which are specified, in themselves. We cannot sustain this decla-

195 ration, therefore, unless we are *prepared to say that A. may maintain an action of slander for words spoken of, or applied to, B., and which do not, in themselves, plainly and necessarily relate to A.

On this ground I am for affirming the judgment.

JUDGE CABELL. The words laid in the declaration, not being charged to have been spoken of or concerning the plaintiff, and there being nothing which can by fair construction apply them to her, I think the declaration incurably defective, and not sufficient to support the action. I am therefore for affirming the judgment of the district court. In giving this opinion, however, I wish it to be distinctly understood, that I do not mean to impugn the principle established in the case of Hoyle v. Young, 1 Wash. 150.

JUDGE FLEMING was of opinion that the declaration was incurably defective.

The judgment of the district court was, therefore, unanimously affirmed.

Cornwell v. Truss.

March, 1811.

Detinue—Several Chattels—Joint Assessment.*—In detinue for several slaves, if their value be jointly assessed in the verdict, judgment ought not to be entered, but a writ of inquiry to ascertain their respective values should be awarded.

In an action of detinue in the district court of Suffolk, for several slaves, a verdict was found for the plaintiff, and a gross

(a) 6 Bac. Abr. Gwill. edit. 244.

*See monographic note on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578.

*The principal case is cited in Harman v. Cundiff, 82 Va. 249, a case of slander.

(1) Note. See Cro. Jac. 126; 2 Stra. 924; Lowfield v. Bancroft, 1 Saund. 243, a.

(2) Note. See 1 T. R. 145, Spliers v. Parker, in which BULLER, J. said, "After verdict nothing is to be presumed but what is expressly stated in the declaration, and is necessarily implied from those facts which are stated." See, also, 2 Doug. 683, Rushton v. Aspinall, 1 Call. 99, Chichester v. Vass, and 1 Call. 250-257, Fulgham v. Lightfoot.—Note in Original Edition.

sum assessed as their joint value. Judgment was entered accordingly, to which a writ of supersedeas was granted by a judge of this court, in conformity with the case of *Higgenbotham v. Rucker*, 2 Call, 313.

Wickham, for the plaintiff in error.

Call, for the defendant.

196 *The Court reversed the judgment, and remanded the cause to the superior court of Nansemond county, for a writ of inquiry to be awarded, to ascertain the separate prices of the slaves; and thereupon for judgment to be entered in favour of Truss, the original plaintiff, for the said slaves, or their respective prices, and the costs.

Lambert v. Nanny.

Tuesday, April 9th, 1811.

1. **Deed of Trust**—**Equitable Title to Land**.—A debtor, holding an equitable title to land, may convey it, by deed of trust, to secure a creditor; and a court of equity, on a bill exhibited by the cestui que trust, will compel another creditor who, with notice of such deed, (though not recorded,) has obtained a conveyance of the legal title, by means of an order from the debtor) to convey such legal title to the trustee, for the purpose of applying it to the object of the trust.

2. **Same—Same—Notice**.—In such case, the notice is binding, if received at any time before the conveyance.

See *Blair v. Owles*, 1 Munf. 38, and *Hoover v. Donally*, 3 H. & M. 316, to the same effect.

3. **Same—Same—Suit in Equity—Parties**.—A debtor, holding an equitable title to land, having conveyed it by deed of trust, to secure a creditor, and having afterwards caused a conveyance of the legal title to be made to another creditor, who had notice of the prior deed, need not be a party to a bill in equity exhibited by the cestui que trust to compel a conveyance of the legal title, and performance of the trust.

The appellee being a creditor of a certain John Quinn to the amount of 160l. 17s. 6 1-2d., and also bound as his security in two bonds, one to Andrew Kennedy for 391 dollars and 72 cents, and another to David M'Cormack for 333 1-3 dollars, the said John Quinn, for the purpose of securing the payment of the first-mentioned sum, and indemnifying the appellee as his security, on the 19th day of July, 1798, executed a trust deed to a certain William Graham, as trustee, conveying to him (besides many articles of personal property) a house and lot in the town of Liberty, which Quinn had purchased of a certain John Lynch and paid for, but without receiving a conveyance, or any note or memorandum in writing of the contract. (1) The trust deed from Quinn to Graham for Nanny's benefit, was proven, by two of the three subscribing witnesses thereto, in the

197 *county court of Bedford, on the 24th day of July, 1798, but was not recorded.

On the 6th day of May, 1799, the appel-

***Deeds of Trust**.—See monographic note on "Deeds of Trust" appended to Cadwallader v. Mason, Wythe 188.

1. **Suit in Equity—Parties**.—The principal case was cited in *Buck v. Pennybacker*, 4 Leigh 9.

(1) Note. The statute of fraud was not pleaded in this case, nor in any way relied upon. In the deed Lambert admitted the validity of the contract between Quinn and Lynch, because he claimed under it himself. That the statute does not apply in equity where the parties admit the contract, and do not insist upon the statute: see 1 Fonb. b. 1. c. 3. s. 8, and the notes thereto; and 3 H. & M. 162, part of JUDGE TUCKER'S opinion in *Argenbright v. Campbell and Wife*.—Note in Original Edition.

lant, George Lambert, who was also a creditor of Quinn, obtained a written order from him to Lynch, in whom the legal title was, directing him to convey the said house and lot to the appellant; which was accordingly done by deed, bearing date the 13th day of July 1799, and duly proved and admitted to record on the 22d of the same month. Whereupon Nanny the appellee filed his bill in chancery in the county court of Bedford against George Lambert and William Graham, (the trustee,) to compel a conveyance from the former, and a due execution of the trust by the latter. The bill stated that the plaintiff had been compelled to pay the debts for which he was bound as security for the said Quinn.

The answer of Lambert denied that he had any knowledge of the plaintiff's claim at the time he received the conveyance from Lynch; but the contrary was fully proved by depositions, showing that, although he might have known nothing of the trust deed when he made the arrangement with, and obtained the order from, Quinn, he was fully apprized of it before he received the conveyance from Lynch.

The county court was of opinion "that John Quinn had the power and did convey the lot, in the town of Liberty, in the proceedings mentioned, by the trust deed to Graham; and that the defendant George Lambert purchased the same, subject to the equity of the said conveyance." It was therefore adjudged, ordered, and decreed, that the said Lambert (having received the legal title from Lynch) do convey the same to the said William Graham, the trustee aforesaid; that he the said trustee proceed to sell the said lot, with its appurtenances, under the limitations in the said trust deed; and that the said Lambert pay to the complainant his costs.

198 *Upon an appeal, this decree was affirmed by the superior court of chancery for the Richmond district; whereupon the appellant again appealed.

Wickham, for the appellant, made three points.

1st. Proper parties to the suit were wanting. Quinn is materially interested. The debts for which the deed of trust was given may have been satisfied, and he may have the evidences of payment. He ought, therefore, to be a party, to afford him an opportunity of showing this, and of thereby protecting himself from Lambert's claim: for if Lambert loses the land, Quinn is responsible to him. Kennedy and M'Cormack, the creditors mentioned in the deed of trust, should have been parties also; because the money due to them may not have been paid.

In support of this point, Mr. Wickham cited *Harrison v. Harrison*, 1 Call, 428; *Hoover v. Donally*, 3 H. & M. 316; *Waggoner v. Gray*, 2 H. & M. 603; *Cooper's Eq. Pl.* 33-37; *Wyatt's Pr. Reg.* 299; *Call v. Scott*, MS.

2d. Admitting that Lambert had notice of the claim of Nanny before he obtained the legal title, he had no such notice before he made his arrangement with Quinn. His case, therefore, resembles that of a subsequent mortgagee, not having notice of a prior mortgage, and afterwards purchasing

a mortgage precedent to both; in which case the rule is established that the last mortgagee shall hold the land till he be satisfied what is due upon both securities; though he had notice of the intervening before his purchase of the prior mortgage. 5 Bac. 55, (Gwill. edit.) A subsequent purchaser (though without deed) stands on the same footing as a subsequent mortgagee. Ibid. 57.

3d. If Lambert cannot protect himself as a purchaser without notice, he is entitled as a creditor; the deed of trust having never been recorded. (a) The 199 clause in the "act of assembly makes a deed not recorded, void against "any creditor," whether with notice or without.

Samuel Taylor and Munford, contra, 1st. There was no necessity to make Quinn a party; because, with respect to the subject in controversy, he stands indifferent between the present parties; it being certain that the property in dispute is liable to one or the other; and the only question being which of them has the preference; a point in which he is not interested. Quinn is responsible, indeed, if Lambert loses the land; but he is equally so if Nanny should lose it. And should he prove that Nanny's deed of trust was satisfied, he would not be benefited; for the only effect would be to remove an obstacle to Lambert's title. If Lambert wished the assistance of Quinn to defeat the plaintiff, he might have taken his deposition, or filed a cross-bill, and made him a party; Nanny was not bound to do so, since he wanted no decree against Quinn, but against the property only.

Neither was there any necessity to make Kennedy and M'Cormack parties. If Nanny has not paid them the debts for which he was surety, they have still their remedy against him.

2d. Lambert was a purchaser with full notice of Nanny's equitable title; it being in proof that he had such notice before he obtained the conveyance. (b)

3d. The act of assembly relating to deeds not recorded does not apply; for Nanny and Lambert are both creditors of Quinn; and Nanny has the preference in equity, by virtue of his prior deed, (of which Lambert had notice,) though not recorded.

Saturday, April 20th. The president delivered the opinion of the court that the decree be affirmed.

200

*Hyer v. Shobe.

Tuesday, April 9th, 1811.

1. **Ejectment**—**Demurrer to Evidence**—**Case at Bar**.—It appearing from a demurrer to the evidence, in ejectment, that the right of the lessor of the plaintiff originated in a lease to I. S., his heirs and assigns, for the lives of his sons A. S. and M. S. and his grand-son A. S., jun. renewable to the said I. S., his heirs and assigns for ever; and that, I. S.

(a) Rev. Code, vol. 1, c. 90, s. 1, p. 155, 157.

(b) Hoover v. Donally, 8 H. & M. 816.

***Ejectment**.—See monographic note on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

†**Demurrer to Evidence**.—On this subject, see monographic note on "Demurrer to the Evidence" appended to Tutt v. Slaughter, 5 Gratt. 364. In Green v. Judith, 5 Rand. 1, the subject of demurrer to the evidence is discussed at some length, the principal case being cited at pages 15, 18, 23, 24. The principal case was also cited in Harman v. Cundiff, 82 Va. 249.

dying intestate, his heir at law devised the land to the lessor of the plaintiff; the defendant claiming under a conveyance from the said A. S., jun. and others, grandchildren of the said I. S., a judgment for the plaintiff was affirmed, tho' it did not certainly appear from the demurrer whether the said A. S., M. S., and A. S., jun. were yet living or not.

2. **Wills**—**Devise of Right of Entry**.—It seems that, under the act of 1785, c. 61, a right of entry, into land, by a person entitled as special occupant, is devisable by him, though he never was in actual possession, and another person held the land with an adverse claim, at the time of the devise.

On the trial of an action of ejectment, in the district court, holden at Hardy courthouse, in behalf of Jacob Shobe against Jacob Hyer, (on whom the declaration was served in February, 1803,) the defendant demurred to the evidence, which, thereupon, was stated on both sides. (c)

The testimony on the part of the plaintiff was, in the first place, an indenture of lease from Thomas Lord Fairfax, late proprietor of the Northern Neck, dated the 3d of August, 1773, conveying the land in controversy to Jacob Stookey the elder, "his heirs and assigns, for and during the natural lives of Abraham Stookey and Michael Stookey, his sons, and Abraham Stookey, son of the said Michael, and the longest liver of them; renewable unto the said Jacob Stookey, his heirs and assigns forever;" yielding and paying a certain annual rent; subject to a clause of re-entry, in case such rent should, at any time, be two whole years in arrear, and no distress could be found on the premises; with a covenant of renewal, on the part of Lord Fairfax, "upon the death of either the said Abraham Stookey, Michael Stookey and Abraham Stookey, jun. or upon the death of any future tenant; he the said Jacob Stookey, his heirs or assigns, yielding and paying one year's rent as a fine for such renewal;" and a covenant on the part of Jacob Stookey, for himself, his heirs and assigns, to give notice to Lord Fairfax, or his heirs, or his certain attorney or agent, within twelve months from the death either of the present or any future tenant, and to request such renewal; 201 *moreover, to pay the fine of one year's rent. This indenture was signed by both parties, and recorded May 10, 1774.

The plaintiff proved that Jacob Stookey the younger was the eldest son of the said Jacob Stookey the elder; that, in the year 1755 or 1756, he was taken prisoner by the Indians, being then sixteen years of age, and remained out of the commonwealth until January, 1802, when he was brought into the county of Hardy by one of his nephews; (his identity being established by several circumstances; especially a scar on his forehead occasioned by an accident when he was eight or nine years old;) that he lived, after his return, only nine or ten days, and, during that time, made a will, devising the land in controversy to the lessor of the plaintiff; which is duly recorded, and is set forth in hæc verba; that Jacob Stookey the elder departed this life intestate, in the January after Cornwallis was taken; that Michael Stookey lived on the land eight or ten years before the death

(c) See Hoyle v. Young, 1 Wash. 151.

of the said Jacob the elder, and died about ten or fifteen days before him.

The defendant proved that Jacob Stookey the elder was in possession of the land until his death, which took place in the year 1783; that (ever since) the defendant, and those under whom he claimed, had been in actual possession, under title derived from the grandchildren of the said Jacob Stookey the elder, to wit, David Stookey, Abraham Stookey and Eve Stookey; that "Jacob Stookey the younger, under whose will the lessor of the plaintiff claimed as devisee, was never in actual possession of the said land; neither was the lessor of the plaintiff ever in actual possession thereof."

Upon this demurrer, the district court gave judgment for the plaintiff; whereupon the defendant appealed.

Call, for the appellant. 1. The plaintiff did not make out such a right as entitled him to recover. The lease

202 *from Lord Fairfax conveyed no more than an estate for the lives of certain persons; and it does not appear from the demurrer, that any of those lives continued in being; (1) or that any renewal of the lease had taken place. And if the lives were in being, the grandchildren, under whom the defendant claims, were the first occupants, after the death of the tenant.

2. Jacob Stookey the younger, being out of possession, could not devise the land. (a)

Munford, for the appellee. The title of Jacob Stookey the elder, and his heirs, under the lease, ought to be considered as still in force; nothing to the contrary appearing; and both parties claiming ultimately under him. At his death, his title devolved on his eldest son and heir, who, alone, had the right of entry, as special occupant; (2 Tuck. Bl. 259,) which right was not taken away during the absence of such heir from the commonwealth. (b) But if the heir had not been absent, the length of time was not sufficient to bar his right: for, take out of the computation the period between the 5th of May, 1783, and the 20th of October, in the same year, (in conformity with the act of limitations,) (c) and twenty years had not elapsed between the death of Jacob Stookey the elder and the service of the declaration in ejectment.

The case of Hall v. Hall does not establish the doctrine contended for by Mr. Call. The marginal note, indeed, is, "if the title of the heir be abated by a stranger, he cannot devise it before entry:" but this is evidently a mistake; for the point decided in the case is not that a devise, but that a deed of bargain and sale, by one out of possession, is void. The rule, that a

203 person conveying *by bargain and sale must be in possession, to make the conveyance effectual, is founded on the doctrine of uses, in which that species of conveyance originated. In like manner as a feoffment, by a person out of possession, was void, because there could be no livery of seisin; the deed of bargain and sale, which, under the statute of uses, is a substitute for a feoffment, cannot take effect, unless the bargainor be in possession; without which the statute does not execute the use. (d) But the same reason does not apply to devises.

In England, the stat. 32 Hen. VIII. c. 1, uses the words "being seised," &c. (e) Yet, even there, it has been repeatedly decided that "contingencies and mere possibilities" may be devised. (f) But the language of our statute is much stronger; (g) being, that "all the estate, right, title and interest, in possession, reversion or remainder, which the testator hath, &c. of, in or to lands, &c. may be devised." If the legislature had intended only to declare that estates in possession, reversion or remainder, might be devised, they would not have added the words right, title and interest, which, unless they meant something else than estate, were merely superfluous. But they have used the strongest words they could to express their intention, to render any right or interest in land (whether coupled with possession, or not) devisable. That such is the true construction of the act is said, in the argument of Davies v. Miller, 1 Call, 130, to have been heretofore decided by this court, and seems admitted by president Pendleton, in delivering the opinion in that case. Ibid. 131.

Williams, in reply. 1. The plaintiff in ejectment must make out a complete title against all the world; which is not done here: for the court cannot draw conclusions from a demurrer to evidence, farther than the facts stated will warrant. (h)

2. I admit that Hall v. Hall was a 204 case where an heir "at law, out of possession, had conveyed by bargain and sale. But the reason of the rule applies equally to a devise. It is to prevent the increase of litigation arising from conveyances of defective or disputable titles.

The difference in phraseology between our statute and that of Henry VIII. is but small. The former says nothing of persons out of possession; except in case of remainder or reversion. A right of entry is not mentioned. In using the words "in possession, remainder or reversion," the legislature had in view the policy of the rule relating to bargains and sales, and intended to apply it to devises. The true line of distinction is, between a devise of a contingency, and of a bare right of entry. The former is devisable, the latter not. (i) No implication is to be drawn from the

(1) Note. Abraham Stookey, son of Michael, (one of those grandchildren,) was one of the persons mentioned in the indenture, during whose lives the estate of Jacob Stookey the elder, and his heirs, continued; and whether he was dead, or not, was not expressly stated in the demurrer. The implication was rather that he was living, it being mentioned that the defendant claimed under him and others; and nothing being said of his death.—Note in Original Edition.

(a) Hall v. Hall, 3 Call. 488.

(b) Co. Litt. 350. a; Litt. s. 486; Co. Litt. 280, 301; Litt. s. 430, 440; cited 3 Bac. (Gwilll. edit.) 311, 312.

(c) Rev. Code, vol. 1, p. 100.

(d) See 3 Tuck. Bl. 332, 333, 337, and Rev. Code, vol. 1, p. 150, s. 14.

(e) 2 Tuck. Bl. 375.

(f) 3 Tuck. Bl. 290; 3 Saund. 388, k., Selwyn v. Selwyn, 1 W. Bl. 223, 251, and 3 Burr. 1134; Roe, on demise of Perry, v. Jones, 1 H. Bl. 30—34, and Jones v. Roe, 3 T. R. 88, 98, 99.

(g) Rev. Code, vol. 1, p. 160.

(h) Hyers v. Green, 2 Call. 555.

(i) 8 East, 564—566, Goodright v. Forrester.

case of *Davies v. Miller*; for the point was not decided in that case.

Call. The case of *Hall v. Hall* settles the great principle that a person out of possession cannot convey a title to lands. The case from East (though a recent decision) is founded on Co. Litt., Shep. Touch. and other old authorities. The plain grammatical construction of our act of assembly is, that the words "in possession, remainder or reversion," are connected with the antecedent words "right, title or interest," as well as with "estate;" so that the "estate, right, title or interest," must be "in possession, remainder or reversion," to be devisable.

Monday, June 24th. The president pronounced the opinion of the court that the judgment be affirmed.

205

***Mangum v. Flowers.**

Tuesday, April 16th, 1811.

Trespass Quare Clausum Fregit—Pleading.—In trespass quare clausum fregit, the declaration charging the trespass, generally, in a parish and county: if the defendant plead not guilty, and a justification "that the land in question was his freehold," the plaintiff must reply to the justification, as well as join issue upon the plea of not guilty. (1)

This was an action of trespass quare clausum fregit, in the county court of Sussex, against Samuel Mangum and William Mangum. The declaration charged the trespass generally, "At the parish of —, in the county aforesaid." According to the transcript of the record, "The defendants appeared by their attorney, and pleaded not guilty, and filed their plea in the words following, Mangum, defendant, ads. Flowers, plaintiff. And the said defendant Samuel Mangum, by Archibald Thweatt, his attorney, comes and defends the force and injury, when, &c. and, as to the coming by force and arms, saith that he is in no manner or sort guilty thereof. And of this he putteth himself upon the country, and the plaintiff doth the like. And, as to the residue of the said trespass in the declaration charged, the said defendant saith, that the said close, and also the place in which the said trespass is supposed to have been committed, were the proper soil and freehold of him the said defendant, by reason whereof he the said defendant, at the time when the said trespass is charged to have been committed, broke the said close, as his own close, soil and freehold, &c. as it was lawful for him to do, and this he is ready to verify," &c. To this plea no replication appears to have been filed.

After a verdict for the plaintiff "upon the issue joined," a new trial was granted, and leave to amend the
206 declaration. An amended declaration was filed, not varying the assign-

ment of the trespass, but charging it with a continuando, and no change in the pleas took place. Another verdict was found for the plaintiff, after motions, on the part of the defendant, to the court to instruct the jury on several points arising upon the evidence; and a bill of exceptions was signed and sealed. Judgment was entered according to the verdict, and affirmed by the district court, from which the defendant appealed to this court.

The cause was argued, at considerable length, by George Keith Taylor, for the appellant, and Hay, for the appellee, upon several points; but the court's opinion was given as to one only, to wit, that issue ought to have been joined upon the second plea.

Hay was inclined to think there were not, in fact, two pleas, but one only. The defendants filed their plea jointly of not guilty as to part, and justification as to the residue. This is one plea only, according to all the precedents; (a) because every plea must go to the whole declaration. If so, it follows that this is a mere "misjoining" of issue, which is cured by the act of joifails. But, if there were two pleas, and an omission to take issue on the second, that omission was not fatal in this case, because, under the plea of not guilty, the defendant's title to the land might have been given in evidence. (b) Both pleas were, therefore, substantially the same; and the second plea was bad, amounting to no more than the general issue: (c) the court, on motion, would have set it aside, and ordered the general issue to be entered; (d) but for this there was no necessity; the general issue being already entered. The defendant erred in filing such a plea. Is our judgment, then, to be arrested on the ground that he committed an error, which

we failed to notice? In *Hammett v. Bullitt's executors*, 1 Call, 567, it was determined that a defendant shall not be received to object to such errors in pleadings as are for his benefit: a judgment, therefore, ought not to be reversed because the plaintiff failed to take issue upon an immaterial plea. (2)

Besides, the second plea may be considered as waived by the defendant. When the plaintiff had leave to amend his declaration, the defendant had a right to plead de novo; (e) but he did not. The trial, then, must be regarded as brought on by consent of parties; and since it was a trial "of the issue," it must have been of the issue joined upon the first plea; no other issue being in the cause. The second plea was waived, of course, by plain implication.

In *Brown v. Belsches*, 1 Wash. 9, after a reference to arbitrators, a trial was had in court, without discharging the order of reference; yet the verdict and judgment were not set aside; it being inferred that the trial was by consent. In *Barnett &*

(1) Note. On this subject see 2 Saunders, 209. b. c. 1 Chitty, 499, and 2 Chitty, 552, 553; from which authorities it appears that the general plea of liberum tenementum is good, wherever the trespass is assigned generally in the declaration; and this, for the purpose of compelling a new and more special assignment by the plaintiff of the trespass; though the plea might not be good where the declaration ascertains the place of the trespass; as to which, however, quære?

See also, in 2 Chitty, 648, the forms of some replications to this plea.—Note in Original Edition.

(a) 2 Chitty, 519; 6 Bac. (Gwill. edit.) 615.

(b) Dodd v. Kyffin, 7 T. R. 364; *Argent v. Durrant*, 8 T. R. 404; 12 Vin. 107, quoted and recognised by this court in the MS. case of *Ballard v. Leavell*.

(c) 6 Bac. 608.

(d) 1 Chitty, 498; Hobart, 127.

(e) Note. That the plea in this case was good, though amounting to the general issue, see ante, 206, note (1).—Note in Original Edition.

(f) *Cosby v. Hite*, 1 Wash. 365.

Woolfolk v. Watson & Urquhart, 1 Wash. 379, Barnett's appearance, and desiring to be made a defendant with Woolfolk, was considered as implying a consent to be united with him in his plea; especially, since he proceeded to the trial, and defended the suit. So, in Murdock and others v. Herndon's Executors, 4 H. & M. 200, where the suit would have abated by the deaths of the plaintiffs, and the defendants might have pleaded *de novo*, but omitted to do so, and went to trial, they were precluded from making the objection after verdict: in that case, it is true, there was an express admission that Murdock and others were the surviving partners; but this, together with the defendants' going to trial, was considered as implying a consent that the suit might be prosecuted in their names.

208 *George K. Taylor, contra. There certainly were two pleas in this case; 1st. The general issue as to both the defendants; and, 2d. A special plea on behalf of Samuel Mangum only. The clerk, indeed, has, inaccurately and inconsistently, after stating that "The defendants pleaded not guilty," proceeded to state that they filed their plea, which, upon inspection, appears to be a separate plea of one of them; and should be so considered, upon the authority of *Chinn v. Heale*, 1 Munf. 63, notwithstanding the mistake of the clerk.

This is not a misjoining of issue, but a total failure to join issue upon the second plea. If there be any issue as to that plea, it is upon the formal part only; while, as to the real gist of the defence, no issue is joined. Even if the similiter had been put at the end, instead of in the middle, it would not have been sufficient; for it is a rule that, when the defendant, in his own right, claims any interest in the land in dispute, a general replication is bad. (a)

No waiver of the second plea can be inferred in this case. The failure to plead *de novo* rather showed a willingness to abide by the pleadings already filed; and this, because, the amendment to the declaration not having varied the case in substance, a change of the pleas was in fact unnecessary. In the cases cited from 1 Wash. 379, and 2 H. & M. 200, there were express agreements, or admissions, from which assent was properly inferred; but there is no such agreement or admission here. To prevent surprise, it was the duty of the court to direct the cause to be sent to the rules. This, indeed, might have been dispensed with by express consent of parties, or by terms imposed upon the defendant in granting him the new trial; but nothing of this appears in the case.

Thursday, April 25th. The president delivered the opinion of the court that both judgments be reversed, *on the ground "That the county court judgment was erroneous; there being no issue joined upon the plea of justification in the proceedings mentioned." Cause remanded for proceedings to be had upon that plea.

Hughes v. Hughes's Executor.*

Thursday, April 18th, 1811.

1. *Will*—Implied Revocation.*—The doctrine of implied revocations of wills discussed.
2. *Same—Revocation—What Constitutes—Case at Bar.*—It seems that a deed of trust conveying all the property of the grantor to certain persons and their heirs "for ever," with warranty; "Nevertheless, upon special trust that they shall pay the profits to himself during his life;" concluding with declaring its "true intent and meaning to be, that, at his death, every thing therein contained between the parties should become null and void;" is a conveyance to the trustees and their heirs, of an estate for the life of the grantor only, and not a revocation of a previous will.
3. *Same—Same—Same—Commission of Lunacy.*—A commission of lunacy against a testator is not a revocation of a will which he made when of sound mind.
4. *Same—Same—Evidence—Declaration of Intention.*—Quære, whether parol testimony, of declarations by a testator of his intention in making a deed, ought to be regarded by a court of probate as evidence to rebut an implied revocation of a will by such deed?

At a court held for Amelia county, the 23d day of February, 1809, a paper, purporting to be the last will and testament of Anne Hughes, deceased, bearing date the 18th day of November, 1804, with a codicil thereto annexed, bearing date the 19th of December in the same year, was exhibited for probate, and contested by John Hughes. Sundry witnesses being examined, and arguments of counsel heard, the court admitted the paper to record as the will of the decedent; and Joshua Chaffin, one of the executors, qualified as such, (without giving bond or security, it being so directed by the testatrix,) Parham Booker and Waller Ford, two of the executors, having relinquished their right. Upon an appeal to the superior court of law, this judgment was affirmed; and John Hughes again appealed to this court.

On the part of the appellant, the following documents were offered in evidence, viz. 1st. A copy of a deed of trust from the testatrix to Joshua Chaffin and Waller Ford, dated the 20th of October, 1807; 2d. A record of certain proceedings in Amelia county court, for the purpose of trying whether the said Anne Hughes was a lunatic, or person insane; 3d. A report of certain commissioners, dated December 8th, 1807, declaring her, *at that time, a lunatic; and, 4th. An order of the said county court, confirming their report, and appointing a committee to take charge of her person and estate, dated December court, 1807.

The testatrix, by the paper purporting to be a will, emancipated all her slaves, (by name), and devised to Fanny, Henderson and Tinsley, (three of them,) twenty-eight acres of land; giving the residue of her land to Edward Hughes, son of Blackburn Hughes, together with a desk, and her interest and claim to a still in his father's possession. She farther gave to Anne Hughes, daughter of Blackburn Hughes, a feather bed and furniture, and a riding-saddle; to Polly and Henderson (two of the negroes) a bed and furniture; to the negroes, for their support, all the provisions on hand at the time of her death, and the growing crop. All the remainder of

(a) *Laws on Pleading*, 154.

*For monographic note on Wills, see end of case.

her estate she directed to be sold, and, after paying her debts, to be equally divided between George B. Hughes and John Hughes, sons of Blackburn Hughes. She desired no appraisal or inventory to be taken of her estate, and appointed Blackburn Hughes, Waller Ford and Parham Booker, executors.

By the codicil, she emancipated three negro children, whose names had been omitted in the will; bequeathed to Henry and Polly (two of the negroes) each a cow; and appointed Waller Ford, Joshua Chaffin, Blackburn Hughes and Parham Booker, executors; desiring that they should not be compelled to give security for their executorship.

By the deed of trust she "granted, bargained, sold and confirmed to Joshua Chaffin and Waller Ford, and to their heirs for ever, all her estate, both real and personal, to wit, a tract of land containing 186 acres, twenty-six slaves, (by name,) her stock of every kind, household and kitchen furniture and plantation utensils, and also all debts that were then due to her by bond or otherwise, or

211 *that might thereafter become due, and the reversion and reversions, remainder and remainders thereof, and all the estate, right, title, interest, property, claim and demand whatsoever, of her the said Nancy Hughes, of, in, and to the premises;" covenanting for herself and her heirs, to warrant and "for ever" defend the same to the said Chaffin and Ford, and their heirs; "Nevertheless upon this special trust, that they, or the survivor of them, shall take into their possession every part of the estate herein mentioned, and have the sole management thereof, and the profits arising therefrom to be paid unto the said Nancy Hughes, annually, for her benefit and support, during her natural life; and it is the true intent and meaning of these presents that, at the death of the said Nancy Hughes, every thing herein contained between the parties is to become null and void." This deed was duly recorded the 22d of October, 1807.

On the part of the appellee, Waller Ford, and Dudley Seay, the subscribing witnesses to the paper purporting to be a will, clearly proved the competency of the testatrix to make a will on the day of its date. It also appeared in evidence that, in the year before her death, but on what day was not stated, she made another will; but Waller Ford, one of the subscribing witnesses to that instrument, (by whom also it was written,) did not think her competent then. He said the slaves were emancipated in both. The second will was not produced; but Ford deposed that it differed from the first only in this, that, in the second, she left some provision to compensate Mr. Chaffin and himself for their trouble. "As a lawsuit concerning the will was expected, the estate was directed to be kept together until the decision of the lawsuit, and they were to have the profits until it should be decided. The land, also, (to the best of the recollection of the witness,) was directed, in the second will, to be sold, and he believed the negroes were to be hired out until the suit should be decided; that the hire of the

212 *negroes, and use of the money for which the land should be sold, was, in like manner, to go to compensate them for their trouble; and (a law having passed for removing out of the state negroes that should be emancipated) the second will directed the expense of removing them to be paid out of that money. But as to this, the witness was not very particular; neither was he so in writing the will. He stated that at that time, the testatrix could hardly speak at all, and appeared quite like a child; seeming, at some lucid intervals, to have some sense, but not enough to make a will; that Mr. Chaffin told him in what manner she wanted to have it written; and, when it was finished, he gave it to a negro, and told him to give it to Mr. Chaffin. He thought it of no account; otherwise would have been more particular."

Dudley Seay, the other subscribing witness to the second will, but who was not present when it was written, and knew nothing of its contents, deposed that he thought her competent, at that time, to make a will; having had many dealings with her about the time; and that Mr. Ford and she both declared in his presence that it had been read to her, and she was satisfied with it.

Mr. Ford moreover deposed that he was present when the testatrix signed the deed of trust; that she asked him whether her executing that deed would interfere with her will, and he told her that, in his opinion, it would not. She seemed very anxious lest her negroes might not be free, and said she would not execute any writing that would interfere with her will.

Dudley Seay was also a witness to the deed, and deposed that she assigned, as a reason for making it, that her brother and relations were going to have trustees appointed, and she thought, if there were to be any, she ought herself to have the choice of them. (1)

213 *Doctor Bathurst Randolph, one of the commissioners appointed by the county court of Amelia, was also examined, and stated his opinion that Mrs. Hughes was in a state of mental derangement, not only at the time of her being examined by the commissioners, but a long time before. His impression (though he could not be positive) was, that she must have been diseased both in mind and body six months or more. Dudley Seay also saw her then, and did not think her as sound as formerly, but supposed it proceeded from her being disturbed by the number of people about her: she had been bed-ridden, and was in that situation when the commissioners came to examine her.

Leigh, for the appellant, submitted, without comment, the evidence as to the sanity

(1) Note. The parol testimony, concerning the declarations by Mrs. Hughes, of her intention not to revoke the will by executing the deed, was objected to by the counsel for the appellant; but the court consented to hear it, reserving the question, whether it ought to be regarded, or not; upon which they afterwards pronounced no opinion; probably conceiving it unnecessary to consider the point in this case, because the deed, in itself, was not sufficient to operate a revocation of the will.—Note in Original Edition.

of the testatrix at the time the will was executed; and insisted,

That (allowing the will to have been good in its origin) it underwent, during the testatrix's life, a twofold revocation; 1. By her deed of trust subsequently executed, and comprising the whole subject of the will; 2. By the commission of lunacy afterwards issued, and never revoked, by the court of Amelia.

1. By the trust deed, Anne Hughes conveyed to the trustees the whole legal estate meant to be disposed of by the will, in respect both to subject matter and quantity of interest; subject to the trust expressly declared by the deed—which was a trust for her support during life; and (where such declaration of trust stooped short) to the use implied by law—a resulting use to her heirs at her death. (a) This would be, without doubt, the legal effect of the deed, but for the clause avoiding it 214 at the *death of Ann Hughes. Now, as every part of a deed should (if possible) be made to take effect, and every word to operate in some shape or other; (b) and as the words of inheritance, (they are peculiarly strong,) limiting the legal estate in this deed, cannot fully enure, if at all, on any other construction; it is, therefore, a just construction to refer this clause of avoidance, not to the legal estate vested in the trustees, but to the trust estate vested in the grantor, so as to determine the latter only, and not the former, with her death. The like words of inheritance, in a trust deed, have been adjudged to pass the whole legal estate to the trustees. (c) And it was formerly held that even in a will, where the construction is more liberal, if a particular estate be expressly devised, a contrary intent is not to be implied. (d) Still less should such looseness of construction be admitted of a deed. Therefore, though by this clause of avoidance, Anne Hughes's trust estate ceased with her life, yet the legal estate of the trustees continued, the use thereof (which the statute of uses executed into possession) resulting to her heirs. But if this view be erroneous, and the clause of avoidance be applicable to the legal estate vested in the trustees, then they took by the deed a base fee determinable by the grantor's death. But still they took a fee. And there is no difference, in point of ampleness and quantity of estate, between a base qualified fee-simple, and a fee-simple pure and absolute. (e)

Such, then, being the nature and effect of the deed, it is in law an absolute revocation of the previous will disposing of the same subject. For the property devised by a will must remain in the testator, in the same plight, and unaltered, to the time of his death; for any alteration, or new modelling, will work a revocation. (f) So inflexible is this rule, that, though the alteration in the legal estate, in effect, leave the testator as to beneficial interest in the

thing in the same plight as before, yet the will is thereby revoked. (g) Neither 215 is there any *mode of conveyance, or species of property, exempt from the rule. No matter whether the conveyance be by deed at common law, or deed operating under the statute of uses; (h) nor whether the subject be equitable or legal; (i) nor whether, if it be a trust, it be a limited or resulting one; (k) nor whether it lie in livery or grant; (l) nor whether it be realty or personalty: (m) in all cases, where the whole estate is conveyed away, though the ultimate reversion come back to the grantor by the same instrument, it operates as a revocation of a prior will. (n)

This principle goes the length of deciding the present case. Here, the same estate in omnibus, meant to be passed by the will, passed out of the testatrix by the deed. And that circumstance is conclusive: for that it is, which makes the basis of the rule, as is illustrated by the diverse effects of a mortgage in fee, or of a covenant to convey, according to the different views of courts of law and of equity. A mortgage in fee is a total revocation at law, and pro tanto only in equity: because, at law, such a mortgage is regarded as a conveyance, but in equity only as a pledge, a mere chattel interest: a covenant to convey is a revocation in equity, but not at law; because, as it may never be performed, it passes no estate at all at law, while equity considers it as tantamount to an actual conveyance. (o)

If objected, that here was no intent to revoke the will by the deed, the fact is agreed: but the same objection would equally apply to almost every case of revocation implied from alteration in the estate of the testator, and has been often overruled; such revocation being a consequence of law, and the intention immaterial. Not to mention weaker cases that abound and concur—revocations of prior wills have implied from alterations in the estate, necessarily and expressly done, to effectuate, and to confirm the will. (p) 216

*It may be objected, that on the testatrix's death, the use of the estate being no further limited, resulted to her heirs, and so they were in of the old use again, and that precisely at the moment when the trust estate under the deed ceased, and the interests derived from the will commenced; therefore, the deed did not interfere with the will. But the estate came back by a new limitation, and (whether so

(g) *Fraunces's Case*, 8 Rep. 89, b. 98, a.

(h) *Burgoline v. Fox*, 1 Atk. 576.

(i) *Lord Lincoln's Case*, 1 Eq. Cas. Abr. 411, pl. 11, and 2 Ves. jun. 426, et seq.; *Ibid.* 608, in notis.

(k) *Pollen v. Hubbard*, 1 Eq. Cas. Abr. 412, pl. 12.

(l) *Sparrow v. Hardcastle*, 3 Atk. 798, 803.

(m) *Abnes v. Miller*, 2 Atk. 598, and *Hone v. Medcraft*, 1 Bro. C. R. 264.

(n) *Brydges v. Duchess of Chandos*, 2 Ves. jun. 417; *Goodtitle v. Otway*, 7 T. R. 369, 419; S. C. 2 Ves. jun. 804, in notis, 5 Ves. jun. 651, and 1 B. & P. 576, where the authorities on this subject (which abound in the books) are all reviewed by the courts of Chanc., C. P., and K. B. See too a complete and lucid statement of them, 1 Wms. edit. of Saund. Rep. 277, n. 4.

(o) 3 Atk. 804, et seq.; 3 P. Wms. 332, 334; *Ibid.* 624, S. F.

(p) *Marwood v. Turner*, 3 P. Wms. 163, case stated by Lord Hardwicke, 3 Atk. 803, *Arnold v. Arnold*, 1 Bro. C. R. 401, and n. 4; 1 Wms. edit. of Saund. 277, cited supra.

(a) *Hill Shep. Touch.* 507, in note, and 531.

(b) 3 Bl. Com. 280.

(c) *Bagshaw v. Spencer*, 2 Atk. 570, 577.

(d) *Popham v. Bamfield*, Salk. 286.

(e) *Co. Litt.* 18, a. 10 Rep. 97, b.

(f) *Sparrow v. Hardcastle*, 3 Atk. 798, 803; S. C. *Amb.* 224, and 7 T. R. 416, in notis.

intended or not) the deed was incompatible with, and so revoked, the will.(a) And in *Parsons v. Freeman*, Lord Hardwicke said, "If one seised in fee devise, and then levy a fine to his own use in fee, this has always been held a revocation, though the testator was in of his old use," which he thought "a prodigious strong case:" and truly so it was; for so completely was it the old use, that if the estate be derived ex parte materna, the descent is not diverted from the maternal blood by such new limitation.(b) Now, if such a conveyance as that, which passes the estate out of the testator, instantaneously to return, be a revocation of a prior will; much more shall the deed, in the principal case, work such revocation.

As to the reason of the rule—favour to the heir; the reason of favouring our system of decedents is as strong in regard to our policy, as is the reason of favouring the British system, in regard to theirs.

It may be said, the rule contended for is but the general rule, subject, like all others, to exceptions. Agreed. But this case resembles none of those exceptions, in fact or in principle. It is not like a testator changing by deed the trustees of a trust estate devised by prior will; which is no revocation;(c) nor like partition between tenants in common;(d) nor like a subsequent surrender of a copyhold before devised;(e) nor like the case where several deeds make one conveyance, and a devise, in the interval between the first and last, is held not revoked by the last, because all parts of the conveyance

217 *make one whole, and relate to the beginning;(f) nor like the case put by Lord Hardwicke, in *Parsons v. Freeman*, of a testator subsequently converting an equitable estate disposed of by will into a legal one; which he thought would not revoke the will;(g) though he afterwards mentioned this opinion doubtfully;(h) and the converse thereof is certainly not true.(i) *Williams v. Owens*(k) was decided on similar ground, it being held, that the will there operated on an equitable estate, and that the subsequent deed had no other effect than to give the deviser a legal, in place of the equitable estate, of which he was seised at the time of making the will. The decision, however, was afterwards questioned,(l) explained,(m) and finally exploded.(n) The case of *Loyd v. Spillet*(o) is a distinct one,

decided on the ground, that there nothing more was done by the deed than to affirm the will, in order to secure the object of both in all events, and, therefore, the trustees in the deed were held trustees for the benefit of the will. That case does not touch our question. But it may be objected, lastly, that the deed in this case was only for a particular purpose, and so a revocation of the will only pro tanto. But the excepted cases out of the general rule of revocation, grounded on the deed being for a particular purpose, and so a revocation pro tanto only, "have been confined to mortgages and securities for money, and to other conveyances for raising money to pay debts."(p) The opinion of Lord Chief Justice Eyre, indeed, in *Goodtitle v. Otway*,(q) would extend the bounds of such exceptions: but the rest of the court differed from him, and their judgment was affirmed in *K. B.*(r) And in that case, the will was revoked by the passing of a base fee out of the devisor. In Lord Lincoln's Case,(s) "nothing could be more decidedly particular than the purpose for which he made the deed"—to provide for a marriage that never took place, and never was likely, nay,

218 never intended *to take place. Yet was the deed held to revoke the will in toto; and the decree has been repeatedly, by the highest authorities, and sometimes against the strongest inclination to renounce it, recognised for law.(t) Nay, where the particular purpose of the subsequent conveyance has been to confirm the will, the conveyance, passing the estate devised out of the testator, has been held (as we have before seen) to revoke the will.(u) The truth, is although the conveyance, whereby an estate before devised is altered, be evidently for a particular purpose, yet if the whole estate be affected thereby, the conveyance will work a revocation of the will;(v) and to make such conveyance a revocation pro tanto only, not only its purpose must be particular, but its effect partial.(w)

2. But admit this reasoning to be fallacious or inapplicable, if the deed was not, the commission of lunacy was, a revocation of the will.

According to both civil and common law, a subsequent lunacy is no revocation of a prior will:(x) but our law, in effect, compels lunatics to die intestate.(y) The clause referred to expressly intends, not hospital lunatics, but those in custody of committees. It has been thought that this clause was designed, not to compel, but to provide for, the intestacy of lunatics;

(a) *Brudenell v. Boughton*, 2 Atk. 273; *Darley v. Darley*, 3 Wils. 13; *Hick v. Mors*, Amb. 216; *Parsons v. Freeman*, best reported 1 Wils. 310.

(b) *Abbot v. Burton*, 1 Salk. 590, and *Martin v. Strachan*, best reported 5 T. R. 107, in notes.

(c) *Doe v. Pott*, Doug. 722.

(d) *Luther v. Kidby*, 3 Cox's edit. of P. Wms. 170, n. B. *Tickner v. Tickner*, cited 3 Atk. 742, 745, 750.

(e) *Thrustout v. Cunningham*, Wm. Bl. Rep. 1046.

(f) *Selwyn v. Selwyn*, 3 Burr. 1131, and *Roe v. Griffith*, 4 Burr. 1052.

(g) 1 Wils. 311.

(h) 3 Atk. 804.

(i) 1 Wils. 311.

(k) 2 Ves. jun. 505.

(l) 3 Ves. jun. 684.

(m) By LORD ALVANLEY, (then master of the rolls), who gave the opinion in *Harwood v. Oglander*, 6 Ves. jun. 218, et seq.

(n) S. C. on appeal, 8 Ves. jun. 137.

(o) 3 P. Wms. 344.

(p) By LORD HARDWICKE, 3 Atk. 805; LORD LOUGHBOROUGH, 2 Ves. jun. 430, et seq.; Master of the rolls, 6 Ves. jun. 219, et seq., and again by LORD CHANCELLOR, 8 Ves. jun. 126.

(q) 1 B. & P. 508.

(r) 7 T. R. 399.

(s) 1 Eq. Cas. Abr. 411, cited supra.

(t) See 3 Atk. 803; 7 T. R. 419, 420; 2 Ves. jun. 430; 1 B. & P. 509, 614, 615, 619; Doug. 722.

(u) See the cases cited on the point of intention, supra.

(v) 3 Atk. 749, case mentioned by LORD HARDWICKE. See, too, Pow. on Dev. 579.

(w) 2 Ves. jun. 431, 432.

(x) Just. Inst. 1, 2, tit. 12, s. 1; *Forse & Hembling's Case*, 4 Co. 61.

(y) Rev. Code, vol. 1, c. 120, s. 17, p. 235.

but on that construction it is unnecessary and idle. To all objections to the effect of this commission, on the score of irregularity in the proceeding whence it resulted, I answer, that this court is not now reviewing, in an appellate character, that proceeding; and that, though it be not conformable to the course of the English chancery in like cases, (a) the paramount authority of our own law has been substantially pursued; for the clause before quoted ordains the appointment of a committee for "all idiots and lunatics in like manner as before directed" for hospital idiots, &c. and for these latter the courts are expressly authorized to appoint committees. (b)

219 Regular inquests "on such occasions, are unnecessary and unwonted in Virginia. Nor was the commission of lunacy in this case ever revoked: there are but two ways it could be done—by scire facias, (c) which is obsolete; or by petition in chancery: (d) and here no such proceeding was ever had.

In one way or the other, or both, therefore, the will of Ann Hughes has been in law revoked; and it has been settled in this court, (e) that such implied revocations are cognisable before courts of probate.

David Robertson, for the appellee. 1st. As to the alleged revocation by the deed of trust. If any of the authorities quoted have any application, I am much mistaken. If they did apply, this court should not be bound by adjudications, the absurdity of which some of the British judges admit to be "shocking." (f) But in fact, the cases cited have no bearing on the subject; for no case has been produced in which an express intention not to revoke the will appeared in evidence.

The object of the deed was to convey an estate, for the life only of Mrs. Hughes, to the same gentlemen who were to be her executors. The whole instrument must be taken together; the restrictive or explanatory clause in connection with the donative. There was no such clause in any of the cases relied upon by Mr. Leigh. There is not the smallest incompatibility between the deed and will in this case. The will took effect at the death of the testatrix, and she was very anxious to prevent it from being set aside.

All the cases cited are reducible to two classes; 1st. Where there was a conveyance of the whole property immediately; (that of a common recovery is a striking example;) 2d. Where a party, having a temporary interest, surrenders it, and takes a different interest in exchange.

The revocation must always arise 220 from a change of "the intention of the testator, or, necessarily, from the change of his estate; neither of which is the case here.

2d. As to the revocation by the commission of lunacy. A greater absurdity would result from this proposition than from the other. Our act of 1792, concerning wills,

(passed December 14th, 1792,) says that a will shall not be revoked, but by cancelling, or by a subsequent will, codicil, or declaration in writing. (g) Yet it is contended that by an act of the same session of assembly, (passed December 24th,) a will is declared to be, ipso facto, revoked by a subsequent privation of understanding! But these two acts may stand very consistently together.

The clause in question in the act concerning lunatics has not introduced, a new rule. Its intention was only to prevent the property of the lunatic from going to the commonwealth; as, at common law, it went to the king. It is, indeed, literally copied from the statute of 17 Edw. II. c. 10; (h) except as to the last clause, which gave the estate pro salute animæ, whereas in this country it goes to the relations. But here, as well as in England, a previous will is not to be set aside.

A different construction would establish the strange position that all persons who may lose their senses by disease are compelled to die intestate, however judicious wills they may have previously made! A man's being overtaken by madness ought no more to operate a revocation, (on the ground that he might have intended to revoke,) than sudden death has such effect. In that case an intention to revoke may be defeated; but inconveniences of this nature cannot be guarded against. All that can be done is to lay down general regulations.

George K. Taylor, on the same side, contended that, this being an appeal from a court of probate, if the will be made out according to the act of assembly, the 221 court "must admit it to record; the court of probate having nothing to do with implied revocations: but he observed that future litigation might be prevented if the court's opinion could be obtained upon all the points in dispute.

The will is good as to whatever property may not be conveyed by the deed: for the general residuary clause might operate upon property, afterwards acquired, and therefore not conveyed. The court, then, should say, "Let it be recorded; let the executor qualify: if any part has been revoked, the person entitled will not be injured; and others will get that to which they are entitled."

The rule is the same in relation to revocations of wills of personal estate as of real. (i) Let us see, then, whether the deed in this case was a revocation as to either.

There must be a concurrence of the intention and act, in a subsequent instrument, to operate a revocation of a former: in the same manner as tearing a will is prima facie evidence of revocation, but accidental or unintentional tearing is not a revocation. Therefore, in *Onions v. Tyrer*, 1 P. Wms. 343, a new will repeating the old totidem verbis was decided not to have the effect of a revocation; and in *Harwood v. Goodright*, Cowp. 87, (k) a subsequent

(a) 1 Harr. Ch. Prac. 492, et seq.

(b) Rev. Code, vol. 1, c. 120, s. 6, 7, p. 284.

(c) 1 Sid. 124.

(d) 1 Fonb. Eq. 60.

(e) *Wilcox v. Rootes*, 1 Wash. 141; *Yerby v. Yerby*, 3 Call. 330.

(f) Per LORD MANSFIELD, in *Doe v. Pott*, Doug. 722.

(g) Rev. Code, vol. 1, c. 92, s. 2.

(h) 3 Bac. (Gwill. edit.) 539, 580.

(i) *Roberts on Wills*, 416.

(k) S. C. 3 Wils. 497, under the style of *Goodright v. Harwood*.

will, though found by the jury to contain a different disposition from a former, was considered no revocation; the particulars of the difference between the two instruments being unknown.

Such is the doctrine as to express revocations; and it equally applies to such as are implied.

Mr. Leigh and myself agree in the law, that a conveyance of the whole estate is an implied revocation; but we differ as to the question of fact, whether the deed in this case conveyed all the estate. It clearly was but a conveyance for the life of the grantor. Suppose, in the body of the deed, it had been, "To them and their

222 heirs *for ever, during my life, and no longer," would not the estate conveyed have been for life merely? And is not the effect the same where there is a condition or defeasance limiting the duration of the deeds to the party's life? For the court must construe it all together; and, if this be done, what is it but a lease of her lands, and hire of her slaves, for her life? If it ever was a grant of the whole interest in either, at what time was it so? Before the concluding clause was added? Surely not; because then the deed was not signed; and when sealed and acknowledged, was it not together with the limitation?

It may be said that a deed is to be taken most strongly against the grantor. Agreed; when the court is reduced to that melancholy alternative. But there is no intricacy or ambiguity in the language of this deed. The trustees could not claim the estate to them and their heirs, in opposition to the defeasance.

There never was, for a single moment, a divestment of all her estate, right and interest; in which respect this case differs from that of *Goodtitle v. Otway*, 7 T. R. 399, and *Lord Lincoln's Case*, 1 Eq. Cas. Abr. 411. There was no defeasance on the face of the deed in either of those cases; the first of which comes nearest to the present, of any cited by Mr. Leigh. As the court, I trust, will not be disposed to extend the doctrine of revocations farther than it has gone, they will decide that there was no revocation here.

2d. As to the operation of the act of assembly concerning lunatics, all the English authorities are, that subsequent lunacy shall not revoke a will. (a) And those authorities apply here, because our act is copied from the English statute, except the last clause. But the act itself removes every difficulty; for it does not say that the lands and chattels shall be distributed as if the lunatic had died intestate, (so 223 as to abrogate any will *which he may have made,) but it merely refers to the act of descents. Now the act of descents, in its terms, provides for the distribution in the manner therein directed, in case of intestacy; but not where there is a will.

Wickham, on the same side. It appears strange to me that in this, as a court of probate, the point about implied revocation should have been made, in this case. An implied revocation of the whole will may

be considered by the court of probate. (b) But the case is otherwise with respect to implied revocations of particular bequests. According to the case of *Beard v. Beard*, 3 Atk. 73, even "though all the legacies be revoked, yet, the executor continuing, the will must be proved, and he becomes a trustee for the next of kin." All Mr. Leigh's cases are of wills which had been admitted to probate.

On the merits, whether the will was revoked, or not, the English authorities, I admit, are not to be departed from. But they are founded on the technical construction of the statute of wills; and, if not, do not apply to this case. Mr. Leigh's premises, that all the interest was parted with by the deed, are clearly not founded in law. Two erroneous positions are the substratum of his whole argument; first, that an estate to A. and his heirs for the life of B. is a fee-simple; and, secondly, that a like estate for 500 years, though carved out of the fee-simple, is the whole estate. An estate *pur autre vie*, or for any number of years, is not even a base fee; though conveyed for the limited time to the donees and their heirs. (c)

This fallacy, therefore, being removed, the superstructure falls to the ground; for there is not a dictum to show that, where a part only of the estate is conveyed by a subsequent deed, the will is not good for the balance; and the doctrine laid 224 down in *Brydges v. The Duchess of Chandos*, 2 Ves. jun. 428, is express that, in such case, the will is good *pro tanto*.

But, even if the question as to a devise of land were against us, the rule would be otherwise in relation to ademption of legacies, which depends altogether upon the intention of the testator, according to the circumstances of each case. (d) And it should be remembered that the parties contending in this cause are interested only in the slaves. Ned Hughes, the devisee of the land, is not a party.

Another point, also, is in itself conclusive in our favour, viz. that parol evidence is admissible to rebut an implied revocation. (e)

As to the question upon the commission of lunacy, the act of assembly concerning lunatics (f) ought not to be construed as repealing the 3d section of the act concerning wills. (g) Both laws took effect on the same day, (the 1st of October, 1793,) by virtue of the suspending act, passed December 28, 1792; (h) and both, being in *pari materia*, should be considered together. No more violence would be done by interpolating the words "in case of intestacy," after the word "distributed" in the 17th section of the act concerning lunatics, (for the purpose of effectuating the obvious intention of the legislature,) than was done in

(b) *Wilcox v. Rootes*, 1 Wash. 141, and *Yerby v. Yerby*, 3 Call. 330.

(c) 2 Bl. Com. 130. *Ibid.* 358, as to estates *pur autre vie*, and *Stirling v. Lidyard*, 3 Atk. 199, as to leases for years.

(d) 1 *Roper on Legacies*, 29; *Hambling v. Lister*, Amb. 401; *Coleman v. Coleman*, 2 Ves. jun. 630.

(e) *Brady v. Cubitt*, Doug. 81.

(f) *Rev. Code*, vol. 1, c. 150, s. 17.

(g) *Ibid.* c. 92.

(h) *Ibid.* c. 150.

(a) *Roberts*, 81, et seq.

the case of *Browne v. Turberville*, 2 Call, 398, by interpolating the words "in case of an infant," in the 7th section of the act of descents.

Botta, in reply. As to the parol proof of Ann Hughes's declarations, that she did not intend to revoke her will; such proof is admissible to repel, or fortify, presumptions arising, 1. From marriage and birth of a child; (a) 2. From cancelling, defacing, tearing, obliterating or burning the will; (b) 3. From imperfect memoranda which may have been made with, or without, the testator's intent; (c) 4. Or, from any other presumptive facts. But the import and effect of words in a deed cannot be contradicted, explained or controlled by such proof. There is no case or dictum for it; and the general rule is expressly against it. Mr. Taylor knew this, and therefore did not contend for the doctrine.

225 But the revocation depends not on intent, but a rule of law; (d), and the rule itself is based on twenty-four concurring cases without one contradicting. (e)

The rule is admitted to be binding and conclusive where the deed conveys the whole estate. But it is objected that, in this case, the deed is only for a life estate. According to the rules of construction of deeds, (f) the court is to reconcile the different parts, if possible, but, if there be two clauses totally repugnant, the first shall be received, and the latter rejected; keeping also in view the maxim that the deed is to be taken most strongly against the grantor.

Applying these rules to the present case, it is to be observed that the conveyance is of all the estate to the trustees, their heirs and assigns (not during the life of Ann Hughes, but) "forever;" to be held by them "forever;" and she warrants to them "forever." This important word "forever" has not been noticed by the counsel for the appellee. It is three times repeated, is stubborn and inflexible, and its empire over the deed cannot be destroyed but by a violence reaching to the heart of that instrument.

The latter clause is, therefore, irreconcilable with the former, and must be rejected; especially since this construction is most strongly against the grantor. In case of a mortgage, the proviso is that, on payment of the money, every thing is to be void; yet, at law, the fee is in the mortgagee from the moment of execution, even before payment; and a release is necessary to reconvey it; (g) though in the different parts of a mortgage there is no repugnancy. "I give to A. a tract of land forever, in case I do not pay him a sum

226 of money by a certain *day; and if I do pay it, then I do not give

him the land," is sense, and common to mortgages: but "I give to A. forever, to have for life," is a contradiction in terms. The argument is stronger, then, for vesting the fee-simple in the trustees, under this deed, than in the case of a mortgage.

It is said that the court of probate is to consider express revocations only. But according to the authorities, its powers are certainly more extensive. (h) It is also said that some pittance, not comprehended in the deed, might have passed by the will: but she conveyed all by the deed; was bedridden until her death; and it is not probable that, after executing the deed, she acquired any property.

But "the will should be recorded to give validity to the appointment of the executor!" The gentlemen are welcome to this fish out of the water, this general without an army, this executor of a will without any will to execute! But in *Wilcox v. Rootes*, 1 Wash. 141, the court rejected the office, with the will, though the point was made; and, in that case, the marriage and birth of a child furnished no presumption of revocation of the executor's office.

If the will be not revoked as to one thing, while it is as to another, it ought to be recorded only for the purpose for which it is good; for, if admitted generally, it is conclusive as to every part, unless set aside by bill in equity; and those who contested the probate cannot be received, afterwards, to file a bill.

Mr. Wickham was the only counsel who said there was a distinction, between the two species of property, with respect to the effect of a revocation. The cases referred to by Mr. Leigh related not to land only, but personal property; for example, *Rudstone v. Anderson*, 2 Vez. sen. 418, and *Hone v. Medcraft*, 1 Bro. Ch. Rep. 264. The court, in both those cases, considered personal estate as governed, in this respect, by the same rules as real.

227 *But in this case, if the deed revoked the first will, as to land only, the revocation was extended to personals by the second will. The act of assembly (i) only requires a subsequent will to be "in writing," to make it effectual to revoke a former; not that it shall be proved by two witnesses. The testimony is, indeed, contradictory as to the sanity of the testatrix at the time of making the second will. Seay and Ford, the two subscribing witnesses, differ on this point; but Seay is most to be relied upon, since he declares himself to have been more intimately acquainted with Mrs. Hughes, and therefore better qualified to form a judgment on the subject.

Wickham. Ford proves that she had lucid intervals: he was called in to write the will, and had the best opportunity of knowing the state of her mind at the time. He says, too, it was not her intention to revoke the former will. The case of *Cogbill v. Cogbill*, 2 H. & M. 467, proves that a subsequent will may be made without revoking a former.

(h) *Bates v. Holman*, 3 H. & M. 527; *Wilcox v. Rootes*, 1 Wash. 141; *Yerby v. Yerby*, 3 Call. 339.

(i) Rev. Code, vol. 1. c. 92, s. 7, p. 161.

(a) *Wilcox v. Rootes*, 1 Wash. 141, and *Yerby v. Yerby*, 3 Call. 334.

(b) *Brady v. Cubitt*, Doug. 81; *Burtenshaw v. Gilbert*, Cowp. 53.

(c) *Cogbill v. Cogbill*, 2 H. & M. 467.

(d) 1 Saunc. 277, note 4. Pow. on Dev. 555, 580-583, 593, 606; 7 T. R. 415, 430; 2 Vez. sen. 419.

(e) See Rob. on Wills. 294.

(f) 3 Tuck. Bl. 380; Co. Litt. 146, a; *Ibid*. 112, Har. dres. 94.

(g) Pow. on Mortg. 66.

Botta. The second will ought certainly to be produced to clear up this point.

Cur. adv. vult.

Tuesday, June 25th. The president pronounced the opinion of the court, that the judgment, admitting the will to record, was correct, and should be affirmed.

WILLS.

I. Definitions.

II. By What Law Governed.

III. Classes of Wills and Incidents Thereof.

A. Written Testaments or Ordinary Wills.

B. Nuncupative Wills.

1. Definition.

2. Under Early Statutes.

3. Abolished by Present Statute Except in Certain Cases.

C. Holographic or Olographic Wills.

D. Contingent Wills.

IV. What Writings Are Testamentary.

A. No Particular Form Required for a Will.

B. The Paper Must Have Been Written with Testamentary Intent.

C. Wills Distinguished from Gifts Causa Mortis.

D. Wills Distinguished from Deeds and Contracts.

E. Will May Consist of Several Testamentary Papers.

F. Wills in Form of Letters.

G. Indorsement on Insurance Policy.

H. Assignment to Operate at Death of Assignor.

I. Memorandum of Instructions.

J. Writing to Prevent Heirs from Having Any Part of Testator's Estate.

K. Parol Evidence to Show Character of Instrument.

V. Formal Requisites.

A. The Will Must Be in Writing.

B. Must Be Signed So That Name Is Manifestly Intended as Signature.

1. In General—Statutory Provisions.

2. Signature by Mark.

3. Signature by Initial.

4. Signature by Some Other Person by Direction of Testator.

5. Instances of Wills Not Properly Signed.

C. Must Be Signed or Acknowledged in Presence of at Least Two Competent Witnesses.

1. Statutory Provision.

2. Acknowledgment of Signature by Testator.

3. Number of Witnesses.

4. Competency of Witnesses.

D. Witnesses Must Be Present at Same Time.

E. Witnesses Must Subscribe Will in Presence of Testator.

1. Statutory Provision.

2. Object of Requirement.

3. What Amounts to Signature as Subscribing Witness.

4. The Request That Witness Shall Subscribe.

5. Order of Signing.

6. What Constitutes "in the Presence of the Testator."

F. Form of Attestation.

G. Sealing.

H. Publication.

I. Evidence of Execution.

1. Value of Attestation Clause as Evidence.

2. Value of Testimony of Subscribing Witnesses.

a. In Support of Will.

b. Against Validity of Will.

c. Presumption Where Subscribing Witness Forgets Facts of Execution.

3. Number of Witnesses Required to Prove Due Execution.

4. How Due Execution Proved Where Witnesses Are Dead or Out of Jurisdiction.

5. Evidence of Execution in Cases of Holographic Wills.

VI. Testamentary Capacity.

A. Of Infants.

B. Of Married Women.

C. Of Blind Persons.

D. Of Persons Addicted to Use of Opium and Ardent Spirits.

E. Of Aged Persons—Failure of Memory.

F. Of Persons under Insane Delusion—Mistake of Fact.

G. Of Eccentric Persons.

H. Of Persons in Extremis.

I. Degree of Mental Capacity Required.

1. General Rule.

2. Degree of Memory Requisite.

3. Capacity to Make Contracts and Wills Compared.

J. Time When Capacity Must Exist.

K. Evidence of Testamentary Capacity.

1. Burden of Proof.

2. Presumption from Fact That Will Was Wholly Written by Testator.

3. Nature of Will as Evidence of Capacity.

4. Former Will as Evidence of Capacity.

5. Evidence of Business Transactions.

6. Declarations of Testator.

7. Acts and Conduct of Testator.

8. Failure of Memory as Evidence of Incapacity.

9. Admissibility of Record of Inquisition of Lunacy.

10. Opinion Testimony.

a. Opinions of Subscribing Witnesses.

b. Opinions of Physicians.

c. Opinions of Other Persons.

VII. Who May Be devisees or Legatees.

VIII. What May Be devised or bequeathed.

IX. Undue Influence and Mistake.

A. What Constitutes Undue Influence.

B. Circumstances Tending to Show Undue Influence.

1. Physical Condition of Testator.

2. Fact That Will Was Written by Beneficiary.

3. Fact That Will Is in Favor of Those Having Controlling Influence over Testator.

4. Unnatural Provisions of Will.

C. Declarations of Testator as Evidence of Undue Influence.

D. Burden of Proving Undue Influence.

E. Time to Which Question Relates.

F. Mistake.

X. Revocation of Wills.

A. Definition of Revocation.

- B. Revocation by Cutting, Tearing, Burning, etc.
- C. Revocation by Subsequent Will or Codicil or Writing Declaring Intention to Revoke.
- D. Revocation by Subsequent Conveyance.
- E. Revocation by Marriage.
- F. Revocation by Birth of Issue Where There Are No Children at Date of Will.
- G. Revocation by Birth of Issue Where There Are Children Living at Date of Will.
- H. Revocation Based on Erroneous Advice.
- I. Revocation Not Implied from Subsequent Insanity of Testator.
- J. Revocatory Effect of Lost Wills.
- K. Evidence of Revocation.

XI. Revival and Republication.

XII. Probate and Contest.

- A. Of Domestic Wills Generally.
 - 1. Various Forms of Probate.
 - 2. Who May Offer Will for Probate.
 - 3. Reprobanding Will Once Probated or Rejected.
 - 4. Hearing on Application Not Formally Contested.
 - 5. Time for Contesting Probated Wills.
 - 6. Parties to Formal Contests.
 - 7. The Contestant's Pleading.
 - 8. The Defendant's Pleading.
 - 9. Withdrawal or Voluntary Nonsuit.
 - 10. Right to Jury Trial of Will Contests.
 - 11. The Issue in Will Contests.
 - 12. Plaintiffs and Defendants in Issue.
 - 13. Trial of Issue by Jury.
 - 14. Verdict.
 - 15. Judgment or Decree—Judgment Confined to Issue.
- 16. Conclusiveness of Probate Proceedings.
- 17. Costs.
- 18. New Trials.
- 19. Bill of Review.
- 20. Appeal and Error.
- B. Of Nuncupative Wills.
- C. Of Lost or Destroyed Wills.
- D. Of Foreign Wills.

XIII. General Principles of Interpretation.

- A. General Rule of Intention.
- B. Legal Presumptions and Rules of Construction Yield to an Intention Satisfactorily Expressed.
- C. Intention Must Be Gathered from the Words as Used by the Testator.
- D. Sense in Which Words Are Presumed to Be Used.
 - 1. Ordinary Words Presumed to Be Used in Their Ordinary Sense.
 - 2. Technical Words Presumed to Be Used in Their Technical Sense.
 - 3. Words Presumed to Be Used with Intent Consistent with Other Provisions of Will.
 - 4. Value of Adjudged Cases in Construing Words.
- E. Words May Be Supplied, Transposed or Rejected to Effectuate Intention of Testator.
- F. Punctuation.
- G. All Parts of Will to Be Construed Together.
- H. Some Effect to Be Given to Every Part.
 - 1. A Clear Gift Not to Be Diminished or Enlarged by Doubtful Expressions.
- J. If Two Clauses Are Irreconcilably Repugnant, the Last Will Prevail.

- K. If General and Particular Intent Conflict, the General Will Control the Particular.
- L. Presumption against Partial Intestacy.
- M. The Law Favors the Vesting of Estates.
- N. The Heir Not to Be Disinherited Except by Necessary Implication.

XIV. Rules of Construction Where Testamentary Donors Are Designated as Classes.

- A. Gifts to "Children."
 - 1. Meaning of the Term as Used in Wills.
 - 2. May Include Grandchildren.
 - 3. May Mean "Issue."
 - 4. Gifts to Children as Purchasers—After-Born Children.
 - 5. Rule in Wild's Case.
- B. Gifts to "Sons."
- C. Gifts to "Descendants."
- D. Gifts to "Heirs."
 - 1. In General.
 - 2. Time of Ascertainment.
 - 3. Devise to Heirs of Living Person.
 - 4. Remainders Limited to Heirs of Taker of an Estate of Freehold—Rule in Shelley's Case.
 - 5. Devise to Heir to Take as He Would Take as Heir.
- E. Gifts to "Family."
- F. Gifts to "Next of Kin."
- G. Gifts to Survivors.
- H. Gifts to Representatives.

XV. In What Proportion Beneficiaries Take.

- A. When Beneficiaries Take Per Capita.
- B. When Beneficiaries Take Per Stirpes.
- C. Presumption in Doubtful Cases.

XVI. Gifts to Wife and Children.

XVII. The Vesting of Legacies and Devises.

- A. The Law Favors an Early Vesting.
- B. General Rule as to Time of Vesting.
- C. To What Period Words of Survivorship Refer.
- D. The Vesting of Legacies in General.
- E. The Vesting of Devises in General.
- F. Gifts of Mixed Funds.
- G. The Vesting of Remainders.
- H. Executory Devises.

XVIII. Perpetuities.

XIX. Limitations Over upon a Failure of Heirs, or Heirs of the Body, or Issue, etc.

XX. Limitations Over after Devise or Bequest for Life with Power of Control or Disposition.

XXI. Suits to Construe Wills.

- A. Jurisdiction.
- B. Parties.
- C. Decree.
- D. Rehearing.
- E. Costs.

XXII. Extrinsic Evidence to Aid in Interpretation of Wills.

- A. Divisible into Two Classes.
- B. Evidence as to Facts and Circumstances.
 - 1. In General.
 - 2. To Identify Persons and Things Described—Misdescription.
 - 3. To Rebut an Equity.
- C. Declarations of Intention—Equivocation.

Cross References to Monographic Notes.

Advancements, appended to *Watkins v. Young*, 81 Gratt. 84.

Charities, appended to *Kelly v. Love*, 20 Gratt. 124.

Church Property, appended to Brooke v. Shacklett, 18 Gratt. 301.

Conversion and Reconversion, appended to Vaughan v. Jones, 23 Gratt. 444.

Debts of Decedents, appended to Shores v. Wares, 1 Rob. 1.

Executors and Administrators, appended to Rosser v. Depriest, 5 Gratt. 6.

Joint Tenants and Tenants in Common, appended to Ambler v. Wyld, Wythe 235.

Legacies and Devises, appended to Early v. Early, Gilm. 124.

Trusts and Trustees, appended to Lee v. Randolph, 3 Hen. & M. 12.

I. DEFINITIONS.

A will is defined to be the disposition of one's property to take effect after death. Coffman v. Coffman, 85 Va. 450, 8 S. E. Rep. 673; Jones v. Irvin (Corp. Ct. of Danville, Va.), 4 Va. Law Reg. 535.

"A will," says Mr. Jarman (Jarman on Wills, p. 16), "is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life." The definition is concise, and, in the great majority of instances, is correct. But it is now well settled that an instrument may be a valid will without disposing of any property. A person may be willing to permit his property, whether real or personal, to be distributed as though he died intestate; but he may have a suspicion of the integrity of the person whom the law would make administrator, and may wish to have the distribution attended by someone in whom he has confidence. He may therefore appoint such a person his executor by an instrument, which, if properly executed, will be a valid will, and should be probated as such though disposing of no property. When the will operates upon personal property it is sometimes called a testament, and when upon real estate, a devise (see Page on Wills, sec. 2); but the general and more popular denomination of the instrument, embracing equally real and personal estate, is that of last will and testament. The words 'last will' are now regarded as precisely synonymous with the word 'testament.' The latter word had its origin in the Roman law, and was distinguished in the early ecclesiastical courts from the last will, being applied exclusively to those wills in which an executor was appointed." Underhill on Wills, sec. 4. See also, 29 Am. & Eng. Enc. Law (1st Ed.) 125.

"A will is a declaration, made in due form of law, of a man's mind or last will of what he would have to be done with his estate, whether real or personal, after his death. The word testament is synonymous with it, the two words being indiscriminately used in our law. A will is always in its nature ambulatory, that is, revocable during the lifetime of the maker; and if truly a will, and not partaking of the nature of a contract, it cannot be made irrevocable by the most express declaration." 3 Min. Inst. (4th Ed.) 997.

A will is the testator's "last solemn act touching his worldly goods. It is his testamentary disposition of his property—the last and highest exercise of the right of absolute dominion over his property. A will is an instrument employed for the sole purpose of disposing of one's property. As it can take effect only at the death of the person making it, when he can no longer give directions and exercise dominion and control, the will is required to be in writing as the best evidence of the intention of the testator respecting his property after his death." Carr v. Effinger, 78 Va. 197. See Selden v. Coalter, 2 Va. Cas. 558.

An instrument, though in form a will, and which the writer states in the preamble in his last will, which disposes of no property and appoints no executor, but merely directs that one of the testator's children shall be excluded from all share in his estate, is not a will and does not give devises by implication to the other children. The child mentioned is not disinherited, for the right to disinherit an heir exists only as the result of the testamentary power; and, when the will is invalid, the writer of it is intestate. Coffman v. Coffman, 85 Va. 450, 8 S. E. Rep. 673. See Boisseau v. Aldridges, 5 Leigh 240, and foot-note.

Definition of Codicil.—"A codicil, from *codicillus*, a small *codex*, a little book or writing, may be defined as a writing by the testator intended as a supplement or addition to his will, the effect of which may be either to enlarge or restrict it, or to annul or revoke it altogether. It may add to or subtract from provisions of the will, may explain or alter, confirm or revoke them wholly or in part; or, when the will itself is invalid, may by a valid re-execution and republication revive and renew the will. The execution of a valid codicil is a republication of the will in the condition that it then is, so as to include matter which was attached to the will since its execution. The will and all intermediate writings and codicils subsequently written are regarded as one instrument, whether attached to one another by some material substance or not, all the papers, including all codicils, are to be construed together unless it shall appear that the testator, in using the word 'will' did not intend to refer to the codicil; and all are to be admitted to probate together." Underhill on Wills, sec. 7.

II. BY WHAT LAW GOVERNED.

The laws of the state in which the domicile of the decedent is at the time of his death control and govern the distribution of his personal estate, although he may die in another state. White v. Tennant, 31 W. Va. 790, 8 S. E. Rep. 596.

It is a rule of the common law that bequests of personal property are to be construed according to the law of the testator's domicile, wheresoever the judicial inquiry may be made as to its meaning, and there is nothing in the Virginia statute, Va. Code 1887, § 2270, indicating an intention to abrogate or change this rule. Bolling v. Bolling, 88 Va. 524, 14 S. E. Rep. 67.

A bequest of personal property to a widow who is entitled to dower in real property located in another state is regulated by the law of the domicile in determining whether it is in lieu of dower. Thus, where a testator domiciled in New York bequeathes personal property to his wife, but makes no disposition of his realty, and there is no incompatibility between her claim for dower and her claim to the provision, the testator's intention must be construed according to the law of New York. Bolling v. Bolling, 88 Va. 524, 14 S. E. Rep. 67.

The validity of a devise of real property, both as regards the power and testamentary capacity of the testator, and the form and mode in which the will is executed, is to be determined solely and exclusively according to the law of the place where the land devised is situated. Underhill on Wills, 20; Morrison v. Campbell, 2 Rand. 200; Thrasher v. Ballard, 33 W. Va. 235, 10 S. E. Rep. 411.

The law of the domicile controls as to questions of election. Bolling v. Bolling, 88 Va. 524, 14 S. E. Rep. 67.

III. CLASSES OF WILLS AND INCIDENTS THEREOF.

A. WRITTEN TESTAMENTS OR ORDINARY WILLS.—These are instruments in writing which

fulfil the above definition and present no other characteristics.

B. NUNCUPATIVE WILLS.

1. **DEFINITION.**—A nuncupative will is an oral will, declared by the testator *in extremis*, or under circumstances considered equivalent thereto, before witnesses, and afterwards reduced to writing. Bouv. L. Dict. (Rawle's Revision) 528.

2. **UNDER EARLY STATUTES.**—The early Virginia statute on wills provides that no nuncupative will shall be established unless it be made at the time of the last sickness of the deceased, at his or her habitation, or where he or she hath resided for ten days next preceding; except where the deceased is taken sick from home, and dies before he or she returns to such habitation; nor when the value exceeds \$30, unless it be proved by two witnesses that the testator or testatrix called on some person present to take notice or bear testimony that such is his or her will, or words of the like import. The testimony or the substance thereof shall be committed to writing within six days after the making of the will. 1 Rev. Code 1819, ch. 104, §§ 7, 8. See Reese v. Hawthorn, 10 Gratt. 548; Page v. Page, 2 Rob. 424.

Must Be Made "At the Time of Last Sickness of the Deceased."—A nuncupative will to be valid must be made in the last sickness of the testator, when he is in such extremity that he has not the ability and opportunity to make a written will. Reese v. Hawthorn, 10 Gratt. 548. As to what sickness will be considered the last sickness of the deceased, see Page v. Page, 2 Rob. 424.

Meaning of "Habitation."—The word "habitation" in the statute, 1 Rev. Code, ch. 104, sec. 7, in relation to nuncupative wills, means "dwelling house." Nowlin v. Scott, 10 Gratt. 64.

What Amounts to "Taken Sick from Home."—A nuncupative will not made at the habitation of the deceased, nor where he had resided for ten days next preceding, the making of the will, but authenticated as the law requires, ought to be established, notwithstanding his being very unwell when he left home; if, afterwards, he was taken more dangerously ill, and died at the place where such will was made. Marks v. Bryant, 4 Hen. & M. 91.

Testator Must Indicate Testamentary Design by Calling on Persons Present to "Bear Testimony."—It is essential to the validity of a nuncupative will that it should appear that the deceased, at the time he spoke the alleged testamentary words, had a present intention to make his will, and spoke the words with such intention, and should distinctly indicate that intention, by calling upon persons present to take notice or bear testimony that such is his will, or by saying or doing something tantamount in substance, indicating plainly that the words spoken were designed to be testamentary. Winn v. Bob, 3 Leigh 140, 23 Am. Dec. 258.

Must Be Proved by Two Witnesses.—Proof by one witness, that, on a certain day, in the time of the last sickness of the deceased, and at his habitation, he said it was his wish that a certain person should have all his property; and, by a second witness, that on another day, during the same sickness and at the same place, he heard the deceased speak the same words, and was told by him to take notice of what he said, is not sufficient to establish a nuncupative will, if the value of the personal property of the deceased exceeds \$30. Weeden v. Bartlett, 6 Munf. 123.

Effect of Failure to Reduce Part of Will to Writing.—Although in committing a nuncupative will to writing, within six days from the speaking of the testamentary words, a distinct and independent part thereof be omitted, the residue of the will is not

thereby vitiated. Marks v. Bryant, 4 Hen. & M. 91. As to what will be considered a commitment to writing of the testimony or the substance thereof within the meaning of the statute, see also, Page v. Page, 2 Rob. 424.

A Paper Not Good as a Written Will May Be Valid as a Nuncupative Will.—A man on his death bed, at his own house, and in his proper senses, sent for a neighbor to make his will, who took notes thereof in his presence, and in that of another witness who was present all the time, and heard the sick man request the first witness to make his will, and direct each note to be taken. A third witness was not present when the first began to take notes, but was present afterwards, and heard some of the notes dictated. Two of the witnesses swore that the notes, or most of them, were read to the decedent, but were not positive that all of them were. Nor did the sick man read them himself, but he was then in his proper senses. After the first witness had made a draft of a will from the notes, the decedent was incapable of reading or hearing it read, being at the time delirious. Held, that the notes thus taken established a good nuncupative will. Mason v. Dunman, 1 Munf. 456.

A testator, being at his own house and *in extremis* but of sound and disposing mind and memory, requested a scrivener to write his will. The scrivener seated at a table by the bed of the testator wrote the will from his dictation; and after it was finished, it was read to the testator and approved by him. By this will he emancipated his slaves and disposed of his entire estate, real and personal. After the paper was read, the testator attempted to sign it, but desisted, saying he could not see; and then requested the scrivener to sign it for him. While the scrivener was in the act of signing the paper, the testator swooned, and, about two hours afterwards, died. There were three witnesses to these facts, all of whom heard the bequests as they were dictated by the testator to the scrivener. Held, that this was a good nuncupative will. Phoebe v. Boggess, 1 Gratt. 129.

"The principle to be deduced from these cases is, that testamentary declarations made in the extremities of a last illness, may be established as a nuncupative will, if proved by the requisite number of witnesses who were present when they were made, even though there was a design by the testator to give to those declarations the form of a written will; the completion of such design being frustrated by the act of God depriving the testator of the capacity to perfect the instrument." Reese v. Hawthorn, 10 Gratt. 548.

But a written will which is incomplete or improperly executed or attested cannot be established as a nuncupative will where the defect in the instrument designed to be executed has grown out of no emergency, and where everything has been done by the testator and by the witnesses which they supposed necessary in order for the testator legally to declare and certify his testamentary purposes in the form of a written will. Reese v. Hawthorn, 10 Gratt. 548.

Thus it was held that an instrument, executed by a testatrix in her last sickness as a written will, with all the ceremonies requisite to the validity of a written will, except the attestation of the witnesses was not made in the presence of the testatrix, could not be set up as a nuncupative will. Reese v. Hawthorn, 10 Gratt. 548.

Emancipation of Slaves by Nuncupative Will.—Under the statute, 1 Rev. Code, p. 433, § 58, providing for the emancipation of slaves by any person "by his or her last will and testament, or by any other in-

strument in writing," it was held that slaves could be emancipated by a nuncupative will. *Phoebe v. Boggess*, 1 Gratt. 129, 42 Am. Dec. 543. The question whether slaves could be emancipated by a nuncupative will was raised but not decided in *Winn v. Bob*, 3 Leigh 140, 23 Am. Dec. 258.

Invalidity of Nuncupative Will as to Realty.—A nuncupative will is of no effect in law in relation to the testator's real estate, or the profits to accrue therefrom. But where, in the lifetime of the testator, a division was made between him and his two brothers of their father's real estate, which was acted upon by him in his lifetime by taking possession of the part allotted to him, and was also confirmed and ratified by him at the time of making his nuncupative will, the validity of such division was recognized in a court of equity. *Page v. Page*, 2 Rob. 424.

Impeachment after Probate.—The statute, 1 Rev. Code, 1819, p. 378, sec. 13, which allows a person interested to appear within seven years after the probate of a will, and by bill in chancery to contest the validity of the will, applies only to written and not to nuncupative wills. *Page v. Page*, 2 Rob. 424.

When a nuncupative will has been proved before a court of competent jurisdiction, after fourteen days from the death of the testator, and after the widow has been summoned to contest the same, as directed by the statute, 1 Rev. Code 1819, p. 379, § 18, the sentence of the court admitting the same to probate is binding upon her, and cannot be impeached except by appeal therefrom, or by a bill in equity founded upon her having been prevented by fraud or accident from making her defence in the court of probate. *Page v. Page*, 2 Rob. 424.

3. ABOLISHED BY PRESENT STATUTE EXCEPT IN CERTAIN CASES.—Under the present law all wills are required to be in writing, with the exception that a soldier, being in actual military service, or a mariner or seaman being at sea, may dispose of his personal estate as he might heretofore have done; and the will of a person domiciled out of the state at the time of his death shall be valid as to personal property in the state, if it be executed according to the law of the state or country in which he was so domiciled. Va. Code 1887, §§ 2514, 2516; W. Va. Code 1899, ch. 77, §§ 3, 5; 2 Min. Inst. (4th Ed.) 1020.

C. HOLOGRAPHIC OR OLOGRAPHIC WILLS.

Holographic Wills Defined.—A holographic or olographic will is one which is written wholly by the testator himself. In order to be valid, it must be entirely written, dated and signed by the hand of the testator. *Bouv. L. Dict. "Testament"* (Rawle's Rev.) 1113; *Underhill on Wills*, § 9.

Holographic Wills Need Not Be Attested by Witnesses.—In Virginia and West Virginia a holographic will is by statute valid without attestation and subscription by witnesses. Va. Code 1887, § 2514; W. Va. Code 1899, ch. 77, § 3, p. 705; *Perkins v. Jones*, 84 Va. 358, 4 S. E. Rep. 893.

The fact that the testator in writing a holographic will has attached an attestation clause which is not signed by the testator, does not render the instrument void as a holograph, where it is wholly in the handwriting of the testator and subscribed by him. *Perkins v. Jones*, 84 Va. 358, 4 S. E. Rep. 893.

Must Be Wholly Written by Testator.—The two following papers were offered together for probate: Paper No. 1: "I, Elizabeth Holmes, do make the following as my last will and testament. I give all my estate, both real and personal, to my two sisters, Margaret and Sally." This was neither in the handwriting of the testatrix, nor was it signed. Paper No. 2—written on the same sheet as the

foregoing and about an inch below: "As Margaret is dead, I give her share to my niece Lizzie Leigh Gibson." This was in the handwriting of the testatrix and signed by her. *Held*, that the two papers together do not constitute a good holographic will, since they are not wholly in the handwriting of the testatrix. It was also held that they do not constitute a good ordinary will, for lack of attestation. *Gibson v. Gibson*, 28 Gratt. 44. See 1 Va. Law Reg. 551.

Must Be Signed by Testator.—In order for a holographic will to be valid, it must, like ordinary written wills, be signed by the testator or by some other person in his presence, by his direction, in such manner as to make it manifest that the name is intended to be his signature. Va. Code 1887, § 2514; W. Va. Code 1899, ch. 77, § 3, p. 705. For a discussion of what amounts to such signing, see *infra*, "Formal Requisites."

Costs Where Will Defective for Want of Proper Signature.—Where the holographic will proposed for probate by the person named as executor therein is adjudged defective for want of proper signature, the costs thereby incurred must be paid out of the funds of the estate. *Roy v. Roy*, 16 Gratt. 418, 84 Am. Dec. 606. As to costs, see generally, *infra*, "Probate and Contest."

D. CONTINGENT WILLS.—"A will which is to be effective and valid as the last will of the testator only upon the happening of a contingent event is a contingent will; and, if the event does not happen, the will is *ipso facto* annulled and revoked." *Underhill on Wills*, 12. See also, *Page on Wills*, 64; 3 Min. Inst. (3d Ed.) 504.

For a full discussion of the subject of legacies and devises upon condition, see monographic *note* on "Legacies and Devises" appended to *Early v. Early*, Gilm. 124.

Where ambiguous words are used expressive of contingency, it may be a question whether the contingency is referred to as the reason or occasion for making the disposition, or as the condition upon which the disposition is to become operative. In order to make the bequest conditional, it must be clear that the testator intended that it should operate only in a certain event. Hence, where a testatrix says: "In case of a sudden and unexpected death, I give the remainder of my property to be equally divided between my cousin Dr. C., of Philadelphia, and my cousin, P. S., of New Orleans," no condition that the testatrix shall die suddenly and unexpectedly is contemplated, and the words express only that the possibility of such event was the reason or occasion for making the bequest. 3 Min. Inst. (3d Ed.) 506; *Skipwith v. Cabell*, 19 Gratt. 783.

In discussing the subject of what wills are contingent, Mr. Woerner says: "The case of *French v. French*, 14 W. Va. 458, presents some instructive features on this question, and may with profit be noticed *in extenso*. The will was a holograph, in the following form: 'Let all men know hereby, if I get drowned this morning, March 7, 1872, that I bequeath all my property, personal and real, to my beloved wife, Florence. Witness my hand and seal, 7th of March, 1872. Wm. T. French.' It was proved, on the propounding of the will, that French was about to cross a deep river, that his wife being afraid that some accident would happen was anxious that he should not go; that decedent started out of the room, and then came back and wrote the will. It also appeared in the cause that French had no children; that he was not drowned on the day of writing the will, but died on the 29th of December 1874; that if he had died on the day of the date

of said will, his wife would have been the sole legal heir of her husband, but that after that day and before the day of his death, the law of descent was so amended that the father of the deceased was his sole legal heir. It was also proved in the proceeding to set aside the probate of said will that the testator subsequently recognized the writing as a valid will; but the court held such testimony inadmissible. Upon these facts the majority of the court, after an extensive review of English and American authorities bearing upon the question of contingent wills, reached the conclusion that 'it was the intention and purpose of the decedent that said paper writing should be his unconditional will and testament, giving to his wife Florence all of his real and personal estate at his death, whether natural or otherwise; and the court, in order to give effect to the intention of the decedent, will presume that said paper writing was executed in contemplation of any change of the law of descents as to legal heirship which might be and was made between the date of the said will and the death of the decedent.' The president of the court dissented, holding it to be self-evident that the words of the will, 'if I get drowned,' etc., could not possibly mean, 'as I may get drowned,' etc. Four of the five judges concurred in the majority opinion, rendered by HAYMON, J." Woerner on the American Law of Administration (2d Ed.) § 36.

A paper writing was in these words:—"Lewinsville, August 19, 1862. Dear Wife: I am going away; I may never return. I leave my property to Gaines and Dan; dispose of it as you see fit; don't forget sister Mary and Bridget. Pay William McCauley twenty dollars; Patrick Sullivan, twenty-five dollars. Edmund C. Conly." Held, in view of the circumstances surrounding the writer at the time that this will was not conditional on his going away and not returning. *Cody v. Conly*, 27 Gratt. 218.

If a will is clearly provisional and contingent, and the contingency contemplated by the will did not happen within the time specified, the recognition of the will by the testator after the failure of the contingency by mere verbal declaration does not revive or continue the will as an absolute, valid will. *French v. French*, 14 W. Va. 458.

IV. WHAT WRITINGS ARE TESTAMENTARY.

A. NO PARTICULAR FORM REQUIRED FOR A WILL.—It is not necessary to the validity of a will that it should have a testamentary form, or that the decedent himself should know that he had performed a testamentary act, or that he should intend to perform such act. An instrument in any form to go into effect after death is testamentary in character. If it is the intent that it shall not operate until death, that impresses the act as a testamentary one. It is sufficient that the instrument, however irregular in form or unofficial in expression, discloses the intention respecting the posthumous destination of the maker's property; and, if this appear to be the nature of its contents, any contrary title or name he may give the paper will be disregarded; and, therefore, deeds poll, deeds of gift, bonds, letters, and other instruments, even agreements between parties, have been often held testamentary. 2 Min. Inst. (4th Ed.) 1087; *Jones v. Irvin* (Va.), 4 Va. Law Reg. 536; *McBride v. McBride*, 26 Gratt. 476; *Roberts v. Coleman*, 27 W. Va. 143, 16 S. E. Rep. 423.

"There is nothing that requires less formality than the body of a will or testament. If it be duly signed, attested and published, it may assume almost any form, provided it be intended by the party to take effect after his death. Thus deeds, bonds, agreements, assignments, etc., have been estab-

lished as testamentary. Nor is it necessary that the testator should intend to perform, or be aware that he has performed, a testamentary act. Though it be meant to operate as a settlement, or deed of gift, or a bond, and not intended to be a will or other testamentary paper, but an instrument of a different shape, yet, if it cannot operate in the latter, it may nevertheless in the former character * * * It is therefore well settled that the form of a paper does not affect its title to probate, provided it be the intention of the deceased that it should operate after his death." *Baldwin, J.*, in *Pollock v. Glasell*, 2 Gratt. 439.

B. THE PAPER MUST HAVE BEEN WRITTEN WITH TESTAMENTARY INTENT.—In order for an instrument to operate as a will, the writing, whatever it may be, whether note, deed, letter, or settlement, must have been designed by the maker as an actual disposition of property, to take effect after his death, and not merely as an expression of what he intended or expected to do. It must satisfactorily appear from the whole evidence that he intended the very paper propounded to contain the contemplated posthumous disposition, or else it must be rejected. The identical paper must have been intended to take effect in some form. It must have been written *animo testandi*. *McBride v. McBride*, 26 Gratt. 476; 2 Min. Inst. (4th Ed.) 1087.

"A paper is not to be established as a man's will, merely by proving that he intended to make a disposition of his property similar to, or even identically the same with, that contained in the paper. It must satisfactorily appear that he intended the very paper to be his will. Unless it appear, that the very paper was intended to be his will, it must be rejected; however correct it may be in its form, however comprehensive in its details, however conformable to the otherwise declared intentions of the party, and although it may have been signed by him with all due solemnity." Dissenting opinion of *CABELL, J.*, in *Sharp v. Sharp*, 3 Leigh 249, approved in *McBride v. McBride*, 26 Gratt. 476.

"The will, whether of realty or personalty, is a statutory disposition of the property. The very paper must have been intended as and for the last will." *ALLEN, J.*, in *Waller v. Waller*, 1 Gratt. 454. **Circumstances Showing Want of Testamentary Intent.**—See *infra*, "Memorandum of Instructions." See also, "Formal Requisites."

Such circumstances as the following, viz: A statement that a list of debts shall accompany the paper, no such list being found; a statement that the testator's debts are to be paid out of funds hereafter appropriated, and there is no such appropriation; an intention expressed to appoint an executor, which is not done; the interlineation of certain bequests, and the underscoring of others, without erasing them, thereby showing a suspended intention as to such bequests, either of striking them out or not, as circumstances hereafter may require; the omission of the date; the want of a usual conclusion, and breaking off abruptly, etc., are such as tend to show that it is not completed, or that the testator (having had full time to conclude it, not having been arrested by sickness or death), has abandoned his original intention; and that it is therefore no will. *Selden v. Coalter*, 2 Va. Cas. 553. If the testamentary paper is not subscribed by the testator, and on the face of it there appears an intention on the part of the testator to make some other devise or to do some other act which is not done, it will be considered as wanting that character of finality, and that conclusiveness of intention, which is requisite to make it a will; and it ought not to be admitted to probate. *Selden v. Coalter*, 2 Va. Cas. 553.

A testator had a will prepared by his counsel, which he examined and approved. He did not, however, sign the will, but told his counsel he would meet him in a neighboring village and execute it. A few days afterwards he wrote his brother that he had made a will, naming the bequests in it, and stating that he had appointed him and the counsel his executors. He also stated that it was not such a will as he had expected to make. The letter was signed merely with the initial of his christian name. Two months after seeing the will prepared for him, he was accidentally killed, not having executed the paper. *Held*, that the letter was not a testamentary paper, either alone or in connection with the unexecuted will. *McBride v. McBride*, 26 Gratt. 476.

Parol Evidence Not Admissible to Show Finality of Testamentary Intent.—The finality of the testamentary intent must be ascertained from the face of the paper, and extrinsic evidence is not admissible, either to prove or disprove it. *Waller v. Waller*, 1 Gratt. 454, 43 Am. Dec. 464. See *Perkins v. Jones*, 84 Va. 388, 1 S. E. Rep. 833.

Effect of Intention to Make a Different Will.—It is not necessary that the paper should be the identical one intended by the testator for his last will. If the instrument has once received the sanction of the testator as the final disposition of his property, it will so remain until revoked or cancelled in a way prescribed by the statute, though he may have always intended to make another will. *McBride v. McBride*, 26 Gratt. 476.

C. WILLS DISTINGUISHED FROM GIFTS CAUSA MORTIS.—A will resembles a gift *causa mortis* in that it is made in contemplation of death, is revocable during the lifetime of the donor, and is subject to his debts in the event of an insufficiency of assets. It differs from a gift *causa mortis* in that the property remains in the possession of the testator until his death, while actual delivery of the property by the donor in his lifetime is essential to the validity of a gift *causa mortis*. A will, moreover, has to be proved in a court of probate, while in the case of a gift *causa mortis* the title to the property passes to the donee by the delivery, defeasible only during the lifetime of the donor, and becomes absolute immediately upon the donor's death, without the intervention of his personal representatives. "The donee takes the gift not from the personal representative, but against him, and no act or assent on the part of the latter is necessary to perfect the donee's title. A gift *causa mortis* is a claim against the personal representative; a legacy is a claim from him." 14 Am. & Eng. Enc. Law (2d Ed.) 1058. See *Jones v. Irvin* (Corp. Ct. of Danville, Va.), 4 Va. Law Reg. 525; *Thomas v. Lewis*, 39 Va. 1, 15 S. E. Rep. 389; also, monographic note on "Gifts" appended to *Barker v. Barker*, 2 Gratt. 344.

In *Jones v. Irvin* (Corp. Ct. of Danville, Va.), 4 Va. Law Reg. 525, it was held that a letter addressed to A. and B. directing them to send C. certain specified articles, although written in contemplation of death, which immediately followed, could not be sustained as a valid gift *causa mortis*, there being no delivery either actual or constructive of the articles themselves. The letter, however, was held to be testamentary in character and effective as a will.

In *Ruth v. Owens*, 2 Rand. 507, a gift *causa mortis* which would otherwise have operated to reduce the share of the estate to which the testator's widow was entitled, was construed to be in effect a legacy.

The expressions of a donor, "If I die," or "if anything happen to me," are but the expressions of the

condition attached by implication of law to every gift *causa mortis*. *Johnson v. Colley*, 101 Va. —, 44 S. E. Rep. 721.

D. WILLS DISTINGUISHED FROM DEEDS AND CONTRACTS.—A paper writing in the form of a deed is testamentary in character if it confers no interest *in present*, is revocable at pleasure, and is not to take effect until the death of the maker. But if the instrument confers a benefit without reference to the death of its maker, it operates, if at all, *inter vivos*, not as a testamentary act. 29 Am. & Eng. Enc. Law (1st Ed.) 146; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. Rep. 432; *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. Rep. 986. See *McBride v. McBride*, 26 Gratt. 476; *Pollock v. Glassell*, 2 Gratt. 449. See also, articles in 4 Va. Law Reg. 474, 710, 778.

"If a writing passes a present interest, though the right to its possession and enjoyment may not accrue till grantor's death, it is a good deed or contract; but, if it does not pass an interest or right till the death of the maker, it is a will or testamentary paper, and not good as a deed or contract. No matter that the paper is in name or form a deed, a bond, a note, or an agreement, if it is to pass title only at death, and vest no manner of estate till then, it is not a deed, bond, note, or agreement, but a will or testamentary paper; no matter what its maker called the paper, or believed it to be. * * * The intention of the maker as to the character of the estate conveyed is the criterion by which the court determines whether it is a deed or will, and, if the intention gathered from the whole paper is that no estate is to pass until his death; it is a will, not a deed. It may confer a present vested estate, though the right of possession and enjoyment under it may be in the future, and it is a good deed; but if it vests no estate whatever till death it is a will." *BRANNON, J.*, in *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. Rep. 986, citing 29 Am. & Eng. Enc. Law (1st Ed.) 145; *McBride v. McBride*, 26 Gratt. 476; *Pollock v. Glassell*, 2 Gratt. 457.

In order for an instrument to operate as a will, the maker must have designed thereby to dispose of his property after his death. He must have looked to that paper as the means by which an object was to be accomplished, and that object the disposition of his estate after his death. Unless he intended this, the paper is not his will, whatever he may have called it. If he did so intend, it is his will, whatever he may have called it. The intention is the controlling principle in such cases. *McBride v. McBride*, 26 Gratt. 476.

In determining whether an instrument is testamentary or a deed or contract, the court does not allow language peculiar to either class of instruments, or even the belief of the maker as to the character of the instrument, or the name he gives it, to control inflexibly its construction; but, giving due weight to these circumstances, the court looks further, and, weighing all the circumstances surrounding the parties and attending the execution of the instrument, gives to it such construction as will effectuate the manifest intention of the maker. *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. Rep. 986.

Importance of Distinction.—The importance of determining whether an instrument is a will or a deed arises from the fact that a will is revocable at any time after execution. A deed, however, cannot be revoked after it has been delivered to the grantee. Hence, if the instrument in question is a deed designed to convey a present vested interest, though possession may have been postponed, it cannot be defeated by a deed or will

subsequently made which disposes of the property in another and inconsistent manner. But if the writing is a will, it may be revoked by the testator at any time, either by a conveyance *inter vivos* or by an inconsistent testamentary disposition of the same property. Underhill on Wills, § 40; Swann v. Housman, 90 Va. 816, 20 S. E. Rep. 880.

Illustrations of Conveyances Held Not Testamentary.—A deed of trust, if not revocable by the grantor, is not to be considered a will in disguise, on the ground that nearly all of the grantor's personal estate is thereby conveyed, and that he reserves to himself the possession and control of the property during his life. *Lightfoot v. Colgin*, 5 Munf. 42. See *Cocke v. Phillips*, 13 Leigh 248.

A conveyance by a husband, by which he parts absolutely with an interest in personal property, though it is not to take effect until his death, and though he retains the power to sell and reinvest, and also the power to reappoint among specified objects, is a valid deed and will bar the wife of her distributable share in the property thereby conveyed. *Gentry v. Bailey*, 6 Gratt. 594.

An instrument which purports on its face to be a deed, is signed, sealed, acknowledged before a notary public, and admitted to record, and which grants, bargains, sells, and conveys absolutely, and without reservation or condition, all of the stocks, bonds, and other evidences of debt of the grantor to a trustee to be held for the benefit of the grantor (who is an unmarried woman, but who is shortly thereafter married), for the term of her natural life, without the further provision that, at the death of the grantor, the property conveyed shall pass to her children, if any, and if none, to her heirs at law, as though the same were real estate, is a deed, and is not a power of attorney, nor a will, nor a writing partaking of the double nature of power of attorney and will, and therefore is not revocable. *Claiborne v. Radford*, 91 Va. 527, 22 S. E. Rep. 848.

An instrument in form and name a deed of conveyance, acknowledged as such, and delivered to the grantee, whereby, in consideration of five dollars and love and affection, the grantors "do grant with general warranty" a tract of land, closing with the clause, "But it is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the said William Logan shall depart this life, and not sooner," is a valid deed, not a testamentary paper, and confers a vested remainder on the grantee, to come into enjoyment on William Logan's death. *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. Rep. 986.

Illustrations of Writings Held Testamentary.—A grantor executed an assignment of certain bonds to his daughter. On the back of the assignment was the following signed endorsement: "For E. Pollock [the daughter] to be delivered at my death." This instrument the grantor retained until her death. The court held the paper to be testamentary. "The very reason," said the court, "which prevents this assignment from taking effect as a deed requires that it should be treated as a will. A deed is an instrument which must operate *inter vivos*; and here the instrument cannot operate in that way, it having no legal effect till the death of the party by whom it was executed." *Pollock v. Glassell*, 2 Gratt. 449. The language above is quoted with approval in *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. Rep. 986.

A testator executed the following paper: "\$1,000. This article is to certify that, if E. survive me, I bequeath him \$1,000 of my property, free from any lien or encumbrance,"—and sealed and signed it. E. was an orphan living with the testator when the above was written, but subsequently left him.

Afterwards the testator executed a will disposing of all his property, but made no mention of the above or of E. Held, that the first writing was not a contract but a will, and was revoked by the subsequent will. *Swann v. Housman*, 90 Va. 816, 20 S. E. Rep. 880.

An endorsement by the holder of a certificate of membership in a beneficial order to the effect that all the indorser's claim thereto shall at her death go to two specified children, or to a specified person called "executrix" for such children, is testamentary in its character, and inoperative when it is not executed in the manner required for the execution of wills. *Grand Fountain U. O. of T. R. v. Wilson*, 96 Va. 596, 22 S. E. Rep. 48.

An instrument which purported to transfer property from a father to his son, and which was denominated a bond, recited that the subscriber (the father) retained full possession and right to convey certain land during his lifetime, but that if he died without conveying it, then the instrument should be construed as a conveyance of land to the son for life with remainder to the son's boy; "and if I should not convey the land during my lifetime, I hereby direct by this instrument that my administrators or executors convey to the said son and his boys." Held, that the instrument was testamentary in character, and not being attested and proved as required by law, was inoperative. *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. Rep. 482.

E. WILL MAY CONSIST OF SEVERAL TESTAMENTARY PAPERS.—A will need not be confined to one paper but may consist of several testamentary papers of different dates, and executed and attested in different ways, and at different times. The expression in the subsequent will, "This is my last will," is not entitled to any weight. If the subsequent paper is merely supplemental, it will be treated as a codicil; if partially conflicting, that of later date will operate to revoke the former so far as the provisions of the two are conflicting or incompatible. But in the absence of a clause of revocation, the court will adopt that construction which will give effect to all the testamentary papers, if possible, sacrificing the earlier papers only so far as clearly irreconcilable with the later. *Schultz v. Schultz*, 10 Gratt. 358; *Gordon v. Whitlock*, 92 Va. 723, 24 S. E. Rep. 342.

The jurisdiction of a court of probate is not exhausted by the admission to probate of the testamentary papers passed upon at one time. If a codicil to a will admitted to probate be afterwards found, or a will supplemental to the first, or one which may consist with the first and has no clause of revocation, or the will without a clause of revocation, which, though it conflicts in part, may consist in part, in all these cases the two papers constitute the testator's will, and the second may be admitted to probate upon a second motion after the first has been admitted. And if the second paper has a clause of revocation, or conflicts wholly with the first, or from the scheme of the second will it is apparent that it is intended as a complete disposition of the testator's property, the court of probate has jurisdiction to admit such second paper to probate, though the probate of the first paper is not annulled, but remains in full force. *Schultz v. Schultz*, 10 Gratt. 358.

A testator in 1888 executed a will disposing of all his property. In 1894 he made a holographic will, having reference to a small part of his estate, and containing no revocatory provision. He afterwards made three codicils, relating to a single matter each. The last was made when suffering from some mental delusions regarding his property. Held, that all the papers except the third codicil

should be taken together as the will of the deceased. *Gordon v. Whitlock*, 92 Va. 723, 24 S. E. Rep. 342.

F. WILLS IN FORM OF LETTERS.—A letter found folded and addressed in the room in which the writer died and which contained all his property, directing the person to whom it was addressed to provide for his burial, pay his debts and to send certain of his property to specified persons, was held to be a valid will, although the testator added at the end the words, "Let no one see this." *Jones v. Irvin* (Corp. Ct. of Danville, Va.), 4 Va. Law Reg. 525.

A man had a will prepared by his attorney, which he examined and approved but did not execute, stating to his attorney that he would execute it in a short time. He then wrote his brother that he had made the will, naming the bequests in it and stating that he had appointed him and the attorney his executors. He also stated that it was not such a will as he had expected to make. The letter was signed merely with the initial of his christian name. Two months afterwards he was accidentally killed, not having executed the paper. *Held*, that the letter was not a testamentary paper, either alone or in connection with the unexecuted will. *McBride v. McBride*, 26 Gratt. 476.

The following letter was held to be a valid will: "Lewinsville, August 19, 1862. Dear Wife: I am going away: I may never return. I leave my property to Gaines and Dan; dispose of it as you see fit; don't forget sister Mary and Bridget. Pay William McCauley twenty dollars, Patrick Sullivan, twenty-five dollars, Edmund C. Conly." In this case it was held that in view of the circumstances surrounding the writer at the time, that this will was not conditional on his going away and not returning. *Cody v. Conly*, 27 Gratt. 313. See *French v. French* 14 W. Va. 481. See also, *supra*, "Contingent Wills."

G. INDORSEMENT ON INSURANCE POLICY.—An indorsement by the holder of a certificate of membership in a beneficial order, giving to her two children all her interest in such certificate at her death, and naming an executrix to receive payment thereof, is testamentary and must be executed as a will. *Grand Fountain U. O. T. R. v. Wilson*, 96 Va. 594, 32 S. E. Rep. 48.

H. ASSIGNMENT TO OPERATE AT DEATH OF ASSIGNOR.—A marriage settlement gave a power to the wife to dispose of the settled estate by gift, or devise, under her hand and seal, attested by two or more witnesses. The wife, upon the marriage of her daughter to A. D. Pollock, executed the following instrument: "Whereas I have promised Elizabeth Pollock, the wife of A. D. Pollock, to pay her the sum of \$1,000, and whereas by my marriage contract, power was reserved to me to dispose of my property by deed or will: Now, therefore, in pursuance of said power, and in consideration of said promise, I do hereby give, grant and assign to said Elizabeth Pollock two bonds, executed by John Glassell on the 8th of Oct., 1822, to William Bell for my use, one for \$1,000, and the other for \$350, together with all equitable rights and interests I may have in and to the said bonds. Witness my hand and seal this 10th day of December, 1841. Signed, Margaret C. Glassell. (Seal). Teste, Henry Shackelford, E. A. Shackelford." On the back of this paper was endorsed, "For E. Pollock, to be delivered at my death." On each bond was endorsed, "This bond I have assigned to E. Pollock by deed of this date, 10 Dec., 1841. Margaret C. Glassell." *Held*, that this writing was testamentary. *Pollock v. Glassell*, 2 Gratt. 439.

I. MEMORANDUM OF INSTRUCTIONS.—"A last will is defined to be the lawful disposing of that

which any one would have done after death. This word disposing or disposition, signifies an act proceeding from a firm purpose or resolution, and therefore, any thing spoken or written unadvisedly is no will. Swinburne, p. 1, § 4. There must be '*animus disponendi*,' as applied to wills, or '*animus testandi*,' as applied to testaments. If, therefore, a paper be found written by the testator in manner of a will, and disposing of his property; but which is neither subscribed with his hand, nor sealed with his seal, nor attested by witnesses under the statute, a doubt may arise whether this is to be accounted a mere project, sketch or draught, or the will of the testator itself. The solution of this question, says Swinburne, p. 971, part 7, § 13, resteth in variety of circumstances. 'If the writing be imperfect' (I quote his words), 'for that perhaps the testator doth leave off in the midst of a sentence, and without any date, or if the same be written in strange characters, or on paper (instead of parchment), and at great distance between the lines, with divers amendations and corrections, or be found among papers of small value and account: by these circumstances it seemeth rather a draught or preparation of a testament, than a testament itself. But, on the contrary, if the writing be perfect or fully finished, having a certain date of the day, month, and year, and be written with usual and accustomed letters in parchment, without corrections and with small distance between the lines; and also found in some chest of the testator, among other writings of great value and moment: By these circumstances, it rather seemeth to be the very testament itself, than a draught only.' It appears, therefore, that the '*animus testandi*,' without which there can be no will, is a fact to be collected from a variety of circumstances; and that the imperfect or unfinished state of an instrument, is one of them, entitled to no slight consideration; and which with others, may be conclusive." PARKER, J., in *Selden v. Coalter*, 2 Va. Cas. 538.

Where the notes or drafts of a will embody the provisions actually designed by the testator with reference to his property, and declare the settled purposes of the testator, they may be established as his will, although his purpose may have been to extend the notes or drafts into a more regular form. This, however, is only permitted where the testator is prevented by the act of God from completing the instrument in the form in which he designed it. And even in such a case it is essential that the paper shall contain the final determination of the testator with regard to the disposition of his property. *McBride v. McBride*, 26 Gratt. 476.

A man had a will prepared by his counsel, which he examined and approved, but did not execute, stating to his counsel that he would execute it in a short time. He then wrote his brother that he had made the will, setting out its contents, but stating that it was not such a will as he had expected to make. Several months afterwards he was accidentally killed. *Held*, that the paper was not a will, even though taken in connection with the letter. *McBride v. McBride*, 26 Gratt. 476.

A paper writing commenced, "Directions how I want my will wrote," and set forth the disposition the decedent wished to be made of his property. It was wholly in the handwriting of the testator, and was dated and signed by him. *Held*, that the paper writing was not testamentary, as it appeared from its face that it was not a final act, but contemplated something yet to be done, namely, the writing of the will. *Hocker v. Hocker*, 4 Gratt. 277.

An instrument, dated April 13, 1870, which speaks of "the testatrix" in the third person, and merely recites that she had spoken to an amanuensis "of

her wish to make a will to secure to her son J. \$900 a year for every year he had been staying at home with her since his father's death," and that on the 3rd of January, 1870, she had asked the amanuensis "to write her will for her to copy," etc., is not testamentary in its character. *Peake v. Jenkins*, 80 Va. 398.

In *Sharp v. Sharp*, 3 Leigh 240, the principal question was, whether the paper writing in question was a mere memorandum of the manner in which the decedent intended to give his property by a will thereafter to be made, or a completed will; and the court, upon proof that such paper writing was altogether in the handwriting of the deceased, and that his name subscribed thereto was in his proper handwriting, and that it was found in an old pocket book in the desk of deceased with some other papers, namely checks, tickets and sheriffs' receipts, established the will.

J. WRITING TO PREVENT HEIRS FROM HAVING ANY PART OF TESTATOR'S ESTATE.—It is a maxim that a testator can disinherit his heirs and next of kin only by leaving his property to others. Mere words or exclusion will not suffice; the estate must be actually given to somebody else. It is true that the devise or bequest need not be in express terms, and that it may be by necessary implication; but to justify such an implication, the intention of the testator must be so apparent that an intention to the contrary cannot be supposed, for otherwise the implication is not a necessary one. The rule that a testator can disinherit his heirs only by giving his property to others results from the nature of the property; for property is the creature of law, and the law will dispose of it, unless the owner, under the permission which the court gives him to make a will, disposes of it himself. *Boisseau v. Aldridges*, 5 Leigh 240, 27 Am. Dec. 590; *Southerland v. Sydnor*, 84 Va. 880, 6 S. E. Rep. 480; *Coffman v. Coffman*, 85 Va. 459, 8 S. E. Rep. 672; *Beard v. Beard*, 22 W. Va. 136; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. Rep. 650.

Hence, an instrument, in form a will and purporting to be a will, revoking all former wills, and providing that one of the testator's sons shall have no part of his estate at his death, reciting as a reason that said son has inherited from his mother a sum equal to that which the testator's estate will probably pay to his other legal heirs, naming no executor and making no other provisions whatever, is not a will, as it does not necessarily imply a disposition of the testator's estate to his other heirs; and his property goes to those entitled thereto under the law of descents and distributions, including the son mentioned. *Coffman v. Coffman*, 85 Va. 459, 8 S. E. Rep. 672.

And, in accordance with these principles, it was held that a writing to prevent two heirs named therein from having any part of the writer's estate, but not making any disposition of his property, could not operate to disinherit the two heirs named, and to give the estate to the other heirs, although, from bequeathing a contingent legacy, the writing was testamentary in character and entitled to admission to probate. *Boisseau v. Aldridges*, 5 Leigh 240, 27 Am. Dec. 590.

K. PAROL EVIDENCE TO SHOW CHARACTER OF INSTRUMENT.—"In seeking the intention of the maker of an instrument, the court must, in the first instance, consult the language of the writing itself. The fact that the writing which is presented for probate is testamentary in form is some evidence that it is a will. The form of the instrument is not controlling. The court of probate may go outside of the writing to ascertain its character; *not to supply an intention which cannot be found in it*, but to ascertain with what intention the execution

of the instrument was accompanied. The declarations of the testator, whether made before, at, or subsequent to execution, may be received to show whether he did or did not regard it as a will." *Underhill on Wills*, § 40, citing *Waller v. Waller*, 1 Gratt. 454. See also, 29 Am. & Eng. Enc. Law (1st Ed.) 158.

"But, when certain formal tests are provided by statute in the presence of these, what inference can arise as to finality of intention? As was said by this court in *Waller v. Waller* [1 Gratt. 454, 42 Am. Dec. 594], 'When the formalities are present, parol testimony cannot be heard against the will for that would be to hear parol testimony against the statute.' 'And, on the other hand, would any degree of proof short of any formalities prescribed,' etc., 'suffice, though aided by the strongest proof of testamentary intent?' 'When the formalities are absent, parol testimony cannot avail to supply their place.' Our statute having prescribed the formalities required, where these exist no further proof can be required; and when a testator has complied with all the law's prescription, and preserved his will in that guise, no indorsements thereon short of the requisites provided for revocation can affect the testamentary character of the paper. If any essential thing remains to be done to complete the entire will, if a signature is necessary, and one is wanting, or if witnesses are necessary to subscribe the attestation clause, and they are wanting, then the failure to complete the will is not explained by the instrument; but where everything has been done which the law requires, everything is complete upon the face of the will, and no presumptions arise from the failure to do a wholly vain and unnecessary thing." *Lacy, J.*, in *Perkins v. Jones*, 84 Va. 358, 4 S. E. Rep. 838.

V. FORMAL REQUISITES.

A. THE WILL MUST BE IN WRITING.—The statute of wills, except in the case of a soldier in actual military service, or a mariner or seaman at sea, declares that "no will shall be valid unless it be in writing." Each and every part of the last will and testament of a decedent must be in writing, and if any part is in parol, such part is void and inoperative. *Sims v. Sims*, 94 Va. 580, 27 S. E. Rep. 436.

In *Sprinkle v. Hayworth*, 26 Gratt. 384, it was said by JUDGE MONCURE, in delivering the opinion of the court, that the statute of wills "plainly forbids that a parol will, whether in the form of a trust or otherwise, shall be set up and established." This language is quoted with approval in *Sims v. Sims*, 94 Va. 580, 27 S. E. Rep. 436.

Verbal instructions cannot be incorporated into a written will by any words of reference, however clear, since the statute requires the will to be in writing. *Underhill on Wills*, § 168; *Sims v. Sims*, 94 Va. 580, 27 S. E. Rep. 436.

Hence where a trust is created by will, if the beneficiary is not disclosed and cannot be discovered from the will itself, the trustee holds the property for the benefit of the heirs or distributees of the testator; and third persons cannot come in and establish by parol that a trust was intended for their benefit. *Sims v. Sims*, 94 Va. 580, 27 S. E. Rep. 436.

Although the will must be in writing, it is not material upon what matter or stuff it be written, whether paper or parchment, linen, leather, stone, or metal, or in what tongue, or whether in printing or manuscript, with ink or in pencil, or in what kind of handwriting, or character, provided it is legible, and the meaning capable of being deciphered. Nor is it material whether it be expressed at large, or

by mere notes; or whether sums of money, etc., be written in words or in figures; provided the meaning be free from ambiguity and doubt. 2 Min. Inst. (4th Ed.) 1011.

B. MUST BE SIGNED SO THAT NAME IS MANIFESTLY INTENDED AS SIGNATURE.

1. IN GENERAL—STATUTORY PROVISIONS.—The present statute requires that the will shall be signed by the testator or by some other person in his presence, and by his direction in such a manner as to make it manifest that the name is intended to be his signature. Va. Code 1887, § 2514; W. Va. Code 1899, ch. 77, § 3, p. 705. This statute (taken from 7 Wm. IV. and 1 Vict. c. 26; see also, 15 and 16 Vict. c. 24) was first enacted in 1850. Va. Code 1849, ch. 123, § 4. See 2 Min. Inst. (4th Ed.) 1012; *Perkins v. Jones*, 84 Va. 358, 4 S. E. Rep. 833; *Warwick v. Warwick*, 86 Va. 596, 10 S. E. Rep. 843, 6 L. R. A. 775.

The statute in force prior to 1850, when the present statute went into effect, was a transcript of the statute of 29 Charles II., with the exception that it dispensed with subscribing witnesses in cases of wills wholly in the handwriting of the testator. The statute of 29 Charles II. required that the will should be in writing; signed by the deviser, or some other person, in his presence, and by his direction; and that it should be attested and subscribed by three or more credible witnesses in his presence. About four years after the statute was passed, it was determined in the case of *Lemayne v. Stanley*, 3 Levintz 1, that the statute did not appoint where the will should be signed, and that a signing in any part, whether in the top, or bottom, or margin, was sufficient. In this case, the testator wrote his will with his own hand, but did not subscribe his name thereto, but only affixed his seal; the instrument was subscribed by four witnesses in his presence. *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564. See *Selden v. Coalter*, 2 Va. Cas. 553.

Since the statute in force prior to 1850 was borrowed from the statute of 29 Charles II. (with one exception, which dispenses with the attestation of witnesses where the will is altogether written by the testator), it was held that it should be construed in accordance with the decision in *Lemayne v. Stanley*, 3 Lev. 1, and that therefore, the name of the testator appearing either at the commencement, or in the margin, or at the foot, was a sufficient signing of the will. *Selden v. Coalter*, 2 Va. Cas. 553; *Bailey v. Teackle*, Wythe 173.

In *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564, the decision in *Lemayne v. Stanley*, 3 Lev. 1, was criticised and held not to apply to holographic wills. In this case ALLEN, J., said: "By *Lemayne v. Stanley*, I concede I am bound, when such a case, relating to attested wills, may arise. And I admit the force of the argument that when the legislature used the word 'signed' in the same connection as it respects both classes of wills, it ought to receive the same construction. Were it an original question, I would give the word the same construction, as it regards both classes of instruments; and hold no signing to be sufficient, except where it appeared affirmatively upon the face, or from the frame of the instrument, the signing was intended to be a signing to give authenticity to the document. But the statute, before its adoption here, received a construction with reference to the meaning of the word as relates to attested wills, condemned by all the English jurists, and at length changed by statutes in England and New York. I do not conceive we are bound to extend an admitted erroneous construction to another class of wills, when by doing so we defeat the leading intent of the legislature in regard to this whole class of wills; the letting in, indeed the making necessary, the introduction of

parol testimony to establish the finality and completeness of the act. These consequences do not follow the construction given in *Lemayne v. Stanley*, when confined to attested wills, and, therefore, the construction does not conflict with the policy of the act to avoid frauds and perjuries, by excluding parol testimony as to the intentions of the deceased. In view of these results, I think, we are fully justified in giving the word 'signing' its natural and appropriate meaning, as applied to unattested wills, and that we may do so, though yielding to the authority of *Lemayne v. Stanley*, when a similar case occurs. I do not wish, however, to be understood as holding a literal signing at the foot or end of the instrument as absolutely necessary in all cases. The signing must be such as, upon the face, and from the frame of the instrument, appears to have been intended to give it authenticity. It must appear that the name, so written, was regarded as a signature; that the instrument was regarded as complete without further signature. And the paper itself must show this."

The decision in *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564, was followed, at the Revision of 1849, by the adoption in Virginia of the present statute in reference to wills, and the revisors in a note say: "This conforms to the decision in *Waller v. Waller*, 1 Gratt. 454, and is thought to be better than an arbitrary rule requiring the signature at the foot or end of the paper." Report of Rev. p. 516, c. 122, § 4. See *Ramsey v. Ramsey*, 13 Gratt. 664, 70 Am. Dec. 438; *Perkins v. Jones*, 84 Va. 358, 4 S. E. Rep. 833.

"The provision in the new law that the will should be signed in such manner as to make it manifest that the name is intended for a signature, was no change of the old law; but merely an express adoption of the judicial construction it had received in *Waller v. Waller*, 1 Gratt. 454." MONCURE, J., in *Paramore v. Taylor*, 11 Gratt. 244.

LACY, J., in delivering the opinion of the court in *Warwick v. Warwick*, 86 Va. 596, 10 S. E. Rep. 843, 6 L. R. A. 775, reviews the statutes and early decisions upon the question of what constitutes a sufficient signing by the testator as follows: "We have set forth above, the statute of this state upon this subject; our several statutes upon this subject have been derived from the English statutes of 29 Car. II., ch. 3, § 5; 7 Wm. IV., 1 Vict., ch. 26; and 15 and 16 Vict., ch. 24. The statute of 29 Car. II., ch. 3, § 5, did not prescribe where the signature should be placed, and soon after the enactment of the statute it was determined in the case of *Lemayne v. Stanley*, decided in the court of common pleas at Easter term, in the 33d year of Charles II., 1682, that 'a will written wholly by the testator himself, but not signed by him, was good; * * * for, being written by himself, and his name in the will, it is a sufficient signing, within the statute, which does not appoint where the will shall be signed—in the top, bottom, or margin—and therefore a signing in any part is sufficient.' 3 Lev. 1. 'This decision,' says Mr. Minor (2 Min. Inst. [4th Ed.] 1012), 'was often regretted, but never directly overruled, until it was done by statute, both in England and in Virginia. It was agreed that the object in requiring the testator's signature, was two-fold, namely: (1) To connect him with the paper and (2) to afford proof of the finality or completion of the testamentary intent. It was admitted, also, that the first object was satisfactorily attained by the testator's signature occurring anywhere in the paper. But it was insisted that the second object was wholly frustrated by allowing the signature to be anywhere else but at the end, and, in response to the suggestion that the finality of testamentary intent was proved by the

attestation of the subscribing witnesses, it was said that the statute designed two safe-guards—the attestation of the witnesses and the signature also, and that the courts thwarted the design of the legislature when they dispensed with either. 2 Bl. Comm. 376, 377, and note, 9. The Virginia courts, like those of England, acquiesced reluctantly in *Lemayne v. Stanley* until November, 1818, when, in the case of *Selden v. Coalter*, 3 Va. Cas. 553, it was very gravely doubted whether the doctrine of that case was applicable to a will wholly written by the testator's own hand, which, by our statute, does not need to be attested by subscribing witnesses at all, for that there would then be no proof whatever, on the face of the will, of the finality of the testamentary intent. And afterwards, in 1845, in *Waller v. Waller*, 1 Gratt. 454, that doubt as to holograph wills, was not a little strengthened, although the court still admitted that in an attested will it must follow *Lemayne v. Stanley*. Then, in 1850, came the statute (taken from 7 Wm. IV. and 1 Vict., ch. 26. See, also, 15 and 16 Vict., ch. 24), requiring, in the terms above stated, that the signature should be affixed in such a manner as to make it manifest that the name was intended as a signature. Speaking of this statute of July 1, 1850, JUDGE LOMAX says: It now requires, in addition to what was expressed under the former law, that it shall be signed in such manner as to make it manifest that the name is intended as a signature. This expression was probably inserted in approbation of the principle that was decided (but in which decision, it may seem, there was not an unanimity of the judges) in the case of *Waller v. Waller*, and to settle, as far as general expression in a statute can settle, the law of particular cases, the doubts and difficulties which are presented in *Selden v. Coalter*, and which may often occur in cases of holograph wills. The design is probably the same, in effect, as that which the English statute (1 Vict., ch. 26, § 9) requires when it says that it shall be signed at the foot or end thereof by the testator, the manifest intention of the signature, wherever placed, being the rule of the Virginia statute; the signing at the foot or end being alone the index of the intention as the rule of the English statute. Lomax Dig., §. 70." *Warwick v. Warwick*, 86 Va. 596, 10 S. E. Rep. 843, 6 L. R. A. 775. See also, *Perkins v. Jones*, 84 Va. 358, 4 S. E. Rep. 333.

It is well settled that it is an equivocal act to insert the name at the commencement of a will, and unless it appears affirmatively from something on the face of the paper that it was intended as a signature, it is not a sufficient signing under the statute. Parol evidence is not admissible upon the question of finality of intention, when this internal evidence, to be afforded by the face of the paper, is wanting. *Ramsey v. Ramsey*, 13 Gratt. 664, 70 Am. Dec. 438; *Roy v. Roy*, 16 Gratt. 418, 84 Am. Dec. 696; *Warwick v. Warwick*, 86 Va. 608, 10 S. E. Rep. 843, 6 L. R. A. 775. See also, *Waller v. Waller*, 1 Gratt. 454, 43 Am. Dec. 564.

2. SIGNATURE BY MARK.—Where a testator puts his mark to the subscription of his name to his will in the presence of two or more subscribing witnesses, this is a sufficient signing thereof, within the meaning of the Code. *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97; *Clarke v. Dunnivant*, 10 Leigh 18.

3. SIGNATURE BY INITIAL.—*Quere*: If the signing of the paper with the initial of his name is a sufficient signing by the testator. *McBride v. McBride*, 36 Gratt. 476.

4. SIGNATURE BY SOME OTHER PERSON BY DIRECTION OF TESTATOR.—Our statute does not require that the will be signed by the testator himself.

It may be signed "by some other person in his presence and by his direction." See *Peake v. Jenkins*, 80 Va. 298; *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314.

An instruction that a will is invalid unless in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature, and unless it be wholly written by the testator, the signature must be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time, and such witnesses must subscribe the will in testator's presence, is in accord with the statute and covers the whole ground, and any addition to the effect that such direction need not be in any particular form, but may be given by the testator spontaneously or at the suggestion of another, should not be given. *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314.

Where Will Is Signed by Other Person Testator Need Not Add His Mark.—Where the will is signed at the request of the testator, and in his presence, the subsequent addition by him of his mark to the signature so made is superfluous. And, whether such mark is added before or after the witnesses subscribe to the will is not material, where the whole transaction is one continuous uninterrupted act, conducted and completed within a few minutes, while all concerned in it continued present, and during the unbroken, supervising, attesting attention of the subscribing witnesses. *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97.

5. INSTANCES OF WILLS NOT PROPERLY SIGNED.—A will wholly in the handwriting of the testator commenced: "I, J. W. of the county of H., calling to mind the uncertainty of human life, and being desirous to dispose of all such estate as it hath pleased God to bless me with, I give and bequeath the same in manner following." The testator then proceeded to dispose of the whole of his estate, real and personal, and concluded thus: "In witness whereof, I have hereunto set my hand this day of 1841. Signed and acknowledged in the presence of . . ." The blank for the date was not filled, and the testator's name was not subscribed to the paper, nor were there any attesting witnesses. Held, that the will was not properly executed. *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564.

An instrument commencing, "I, Thomas Ramsey, of Charlotte, do hereby make my last will and testament in manner and form following," but in which the testator's name does not elsewhere appear, cannot be admitted to probate as a holographic will. *Ramsey v. Ramsey*, 13 Gratt. 664, 70 Am. Dec. 438.

A paper-writing in the handwriting of a decedent, written on a sheet of letter paper, the body of the writing commencing with the decedent's name on the first page and ending about the middle of the next, the paper being folded so that the third page was outside, with the words "David M. Roy's Will" endorsed on the back, at about the middle of the third page when the page was folded, in the handwriting of the deceased, with the name of the deceased not signed at the end of the writing, but with the date attached, and after the date a clause appointing an executor, the instrument not professing to dispose of the entire estate of the decedent, is not a good holographic will, and cannot be admitted to probate. *Roy v. Roy*, 16 Gratt. 418, 84 Am. Dec. 696.

A letter signed only with an initial of the writer's christian name was sought to be established as a will. In the concluding part of the letter the

writer said: "I don't know where to direct this letter, and don't much like to sign it on uncertainties, and will not sign it; you know who it is from if you get it;" and then followed the letter J. The paper did not show where it was written or mailed. The state, county and post-office were not given. In delivering its opinion, the court said: "So far from the signature being intended to give it authenticity, it is apparent that this form of signing was adopted to conceal the name of the writer. His purpose was not to identify himself with the paper, but to prevent even a suspicion of his connection with it in any form. * * * The conclusion is irresistible, that he did not intend this initial letter as a signing within the true intent and meaning of the statute." *McBride v. McBride*, 26 Gratt. 476.

A holographic will began thus: "I, Abraham Warwick, Jr., of the county of H., declare this to be my last will and testament." Then followed the provisions of the will, without a signature at the end. The testator placed the paper in an envelope and sealed it, and wrote on the envelope "My Will, Abraham Warwick, Jr." *Held*, that the will was not so signed as to satisfy the Virginia statute. For the signature at the top of the will was an equivocal act *per se*, and there was nothing on the face of the will to remove the equivocation; and as to the name on the envelope, it was not a signature at all to the will, but a mere label or indorsement of the envelope, which contained what the testator supposed was already a validly executed will. *Warwick v. Warwick*, 86 Va. 596, 10 S. E. Rep. 843, 6 L. R. A. 775.

C. MUST BE SIGNED OR ACKNOWLEDGED IN PRESENCE OF AT LEAST TWO COMPETENT WITNESSES.

1. **STATUTORY PROVISION.**—The present statute provides that, unless the will be wholly written by the testator, "the signature shall be made or the will acknowledged in the presence of at least two competent witnesses." Va. Code 1849, ch. 122, § 4; Va. Code 1887, § 2514; W. Va. Code 1899, ch. 77, § 3, p. 706.

2. **ACKNOWLEDGMENT OF SIGNATURE BY TESTATOR.**—Where a testator acknowledges his signature to a will in the presence of the witnesses, it is equivalent to signing in their presence. *Burwell v. Corbin*, 1 Rand. 131, 10 Am. Dec. 494.

The rule making the acknowledgment of his signature by the testator equivalent to signing in their presence was adopted as a part of our statute of wills at the Revision of 1849. (Va. Code 1849, ch. 122, § 4; Va. Code 1887, § 2514; W. Va. Code 1899, ch. 77, § 3, p. 706.) Speaking of this statute, *MONCURE, J.*, in delivering the opinion of the court in *Parramore v. Taylor*, 11 Gratt. 220, says: "The words in the new law authorizing the will to be acknowledged by the testator in the presence of the witnesses, were not in the old law, but they were embodied in the long-settled construction of that law."

It is not necessary for the subscribing witnesses to see the testator sign his will, nor that he should acknowledge to them his signature thereto, or even that the instrument is his will. It is sufficient if he acknowledges, in their presence, that the act is his, with a knowledge of the contents of the instrument, and with the intention that it shall be the testamentary disposition of his property. Such acknowledgment is a ratification of the signature, whether made by himself, or by another. *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97.

A testator's will was written for him by R. P., who testified that he also signed the testator's name thereto, in the presence of, and at the request of the testator, and then subscribed his own name as

a witness in the testator's presence; and another witness, B. H., testified that some years afterwards, the witness being at the testator's house, it was suggested to the testator that that was a favorable time to have that will witnessed; the testator assented; the paper in question was produced; the witness took it near the testator, and inquired whether he acknowledged it; the testator said he did, upon which, this witness subscribed as a witness in the testator's presence. It was held that the acknowledgment of the paper by the testator to the second witness was a recognition of the signature thereto as his own, and evidence from which a court of probate might well infer that the testator's signature to the will was written by his authority; and so there were two witnesses to the execution of the will, as required by the statute. *Dudleys v. Dudleys*, 3 Leigh 486. See also, *Parramore v. Taylor*, 11 Gratt. 220; *Beane v. Yerby*, 12 Gratt. 220; *Green v. Crain*, 13 Gratt. 353.

3. **NUMBER OF WITNESSES.**—Prior to 1748, a will of land or of personally might be established by one witness. *Worsham v. Worsham*, 5 Leigh 589.

In 1748 a statute was enacted (5 Hen. Stat. at Large 454), declaring wills of land void unless attested and subscribed by two or more witnesses in the presence of the deviser, or wholly written by the deviser's own hand. This statute made no change in the mode of execution or probate of wills of chattels. *Worsham v. Worsham*, 5 Leigh 589. Until the Statutes of 1834-5, ch. 60, Sess. Acts, p. 43, a testament of personal property might be well proved by a single witness. *Worsham v. Worsham*, 5 Leigh 589, *overruling a dictum* to the contrary in *Redford v. Peggy*, 6 Rand. 316. See *Parker v. Brown*, 6 Gratt. 554.

In delivering the opinion of the court in *Worsham v. Worsham*, 5 Leigh 589, *CARR, J.*, says: "The act of 1748 effectually separated them (wills of land and personally), requiring that a will of land should be attested and subscribed by two witnesses, but leaving a will of personals precisely where it stood from that period down, the uniform practice has been, so far as we can get evidence from the general court and elsewhere, to admit wills of personally to probate, on the evidence of one witness; and it has been the universal opinion of the country, that this was the law. And it must be owing to the universality of this opinion, I suppose, that our books from Washington down, present but one case in which this point was decided: *Glasscock v. Smither*, 1 Call 479, decided by this court in October, 1798. There, the testator having made a will, in all respects properly executed, a paper of subsequent date was offered for probate, as his last will: it contained several pecuniary legacies, with a devise of all the residue of the estate to a son, and concluded thus—'This is my last will and testament, being made this 19th October, 1793; I subscribe and hereby acknowledge—but the testator did not sign or subscribe the same. One witness proved that he drew it at the request of the testator; that the decedent had it altered in several particulars; that he had it read over a second time with the alterations, and said he was satisfied, it was his will, etc. The district court declared this not to be the last will of Glasscock. This court reversed the sentence. The judgment was as follows: 'The court is of opinion, that the writing aforesaid ought to be established as the last will of the said George Glasscock, deceased, notwithstanding the existence of a will legally executed of a prior date, so far as it may concern the devise of chattels, etc.' * * * Now, I cannot understand this (as my late Brother GREEN did in *Redford v. Peggy*, 6 Rand. 316, 337), as a mere decision, that the latter paper was a revocation of

the former will which it might be, without being a will itself. I consider it a declaration of this court, that so far as the proof by one witness was concerned, it was a good will of chattels."

In 1835 the legislature, in consequence of the decision in *Worsham v. Worsham*, 5 Leigh 589, and at the suggestion of the court which pronounced that decision, enacted a statute, Acts of 1834-5, ch. 60, Sess. Acts, p. 43, requiring the same proof in cases of wills of personalty as of realty. See note of reporter appended to *Worsham v. Worsham*, 5 Leigh 589. See also, *Gibson v. Beckham*, 16 Gratt. 321.

From 1835 to the present time, our statutes have required the same proof in cases of wills of personalty as of realty, and have required that the will be attested by two witnesses. The present statute provides that unless the will "be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses." See Va. Code 1887, § 2514; W. Va. Code 1899, ch. 77, § 2, p. 705.

While the statutes in Virginia and West Virginia require that there shall be at least two witnesses, in some of the states three or more are required; hence, if the will is designed to pass real property not in the state, since it must be executed according to the *lex loci rei sitæ*, it is prudent to have three or more witnesses, unless it is known with certainty that the law is satisfied with a less number. 2 Min. Inst. (4th Ed.) 1016.

It should also be noted that while the statute requires that at least two witnesses shall subscribe the will, it may be proved by one of them, he proving the attestation of the other. *Lamberts v. Cooper*, 29 Gratt. 61; *Jesse v. Parker*, 6 Gratt. 57, 52 Am. Dec. 102; *Cheatham v. Hatcher*, 30 Gratt. 61, 33 Am. Rep. 650; *Webb v. Dye*, 18 W. Va. 386; *Coffman v. Hedrick*, 32 W. Va. 128, 9 S. E. Rep. 66; *Davis v. Davis*, 43 W. Va. 303, 27 S. E. Rep. 321.

"Although there must be satisfactory proof that every statutory provision has been complied with, in order to establish a will, the law does not prescribe the mode of proof, not that the will shall be proved, as well as attested, by a specified number of witnesses. If such proof were to be required from each subscribing witness, the validity of wills would be made to depend upon the memory and good faith of a witness, and not upon reasonable proof that all the requirements of the statute had, in fact, been complied with." ALLEN, J., delivering the opinion of the court in *Jesse v. Parker*, 6 Gratt. 57, 52 Am. Dec. 102. Quoted with approval in *Cheatham v. Hatcher*, 30 Gratt. 55, 33 Am. Rep. 650.

4. COMPETENCY OF WITNESSES.—The witnesses must be competent. The word employed in the statute, 29 Car. II., ch. 3, § 5, and in our statute down to 1850, was "credible." However, it was universally agreed that credible meant no more and no less than competent, so that no progress was made in substituting in our late statutes the one word for the other. 2 Min. Inst. (4th Ed.) 1013. See also, 29 Am. & Eng. Enc. Law (1st Ed.) 231.

"In respect to the competency of witnesses to wills, it may be observed that, at common law, persons incompetent to be witnesses are—(1) Parties to the Record in the Cause; Husbands and Wives of Parties; (2) Persons Deficient in Understanding; (3) Persons Insensible to the Obligation of an Oath, from Defect of Religious Belief; (4) Persons Infamous, by Reason of Conviction of Crime; (5) Persons Interested in the Result. (1 Greenl. Ev. §§ 327 to 480.) In Virginia, important changes have been wrought in respect to these disabilities in ordinary cases in the courts; that is, in respect to the first, the third, and the fifth. Thus:

Parties are for the most part competent, and compellable to testify in ordinary cases; but not husband and wife for or against each other (Va. Code 1887, §§ 2345, 2346). Our state constitution also provides that the opinions of men in matters of religion shall in no wise affect, diminish, or enlarge their civil capacities (Va. Const. 1869, art. V., § 14), which is understood to do away with the disqualification arising from defect of religious belief (*Perry's Case*, 3 Gratt. 632). And, lastly, it is enacted by statute that 'no witness shall be incompetent to testify because of interest' (Va. Code 1887, § 2345). But, in respect of wills, it is provided that nothing in these statutory enactments (Va. Code 1887, § 2345) shall be construed to alter the rules of law then in force in respect to attesting witnesses to wills, deeds, or other instruments (Va. Code 1887, § 2346). It follows, therefore, that all the above described common-law instances of incompetency (with a few special exceptions presently to be mentioned), prevail with us, in respect to attesting witnesses to wills, except only the third. The cases excepted are all cases of interest in the witness, and one of them, also, the case of a party; namely (1) the case of a legatee or devisee, who, or whose husband or wife, is an attesting witness (Va. Code 1887, § 2539); (2) the case of a creditor whose debt is by the will charged on the decedent's estate (i. e. on his lands), and who, or whose husband or wife, is an attesting witness (Va. Code 1887, § 2539); and (3) the case of an executor of a will, called as a witness for or against it. (Va. Code 1887, § 2531; 2 Min. Inst. [4th Ed.] 1014 *et seq.*") 4 Min. Inst. (3d Ed.) pp. 108-109.

Legatee or Devisee as Attesting Witness.—If a will be attested by a person to whom, or to whose wife or husband, any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise proved, such person shall be deemed a competent witness, but such devise or bequest shall be void, except that if such witness would be entitled to any share of the estate of the testator, in case the will were not established, so much of his share shall be saved to him as shall not exceed the value of what is so devised or bequeathed. Va. Code 1887, § 2539; W. Va. Code 1899, ch. 77, § 18, p. 707; *Croft v. Croft*, 4 Gratt. 105.

In West Virginia it has been held that where a will can be proved independently of the testimony of an attesting witness beneficially interested therein, a devise or bequest to such witness, or the wife or husband of such witness, is not void. In this case there were two subscribing witnesses to the will, to one of whom, Mrs. Davis, and to whose husband bequests and devises were made. The will was probated upon the testimony of the witness who took nothing under the will; and a bill to declare void the legacies and devises to Mrs. Davis and her husband was dismissed. The decision was placed on two grounds: (1) That there were two competent witnesses at the time of the attestation of the will; (2) That a will must be subscribed but need not be proved, by two attesting witnesses, even though the other attesting witness be alive and within the jurisdiction of the court. The court said: "The only reasonable way to construe §§ 3, 18, c. 77, Code (Va. Code 1887, §§ 2514, 2529), is that the word 'competent' as used in each one of them, refers to the separate time to which they relate,—the first, to the attestation; the second, to the proof of the will. Mrs. Davis was competent as an attesting witness. While she was interested in the will the testator was alive, and, if the question of the attestation had arisen during his life, they were both competent to testify in relation thereto. Hence the word 'competency,' in so far as it relates to an attesting wit-

ness, excludes the question of interest, and has reference to age, sanity, and moral integrity. As used in the eighteenth section in relation to the proof of the will, it has reference merely to the question of beneficial interest; its object being to remove all motive for false swearing or forgery and also the incompetency of the witnesses, occasioned by the death of the testator, thus throwing on the beneficiaries thereunder the burden of sustaining the will independently of their own testimony. If the will can be thus sustained, it is sustained as a whole, and not in parts, and none of its provisions are void, but all the beneficiaries take under it, even though the attesting witnesses were incompetent (*i. e.* to testify at the probate) on account of interest. * * * The will is fully established by the other attesting witness. It might have occurred that the will could not have been established without the evidence of Mrs. Davis, and in such case, to make her competent as against the heirs of the testator, her beneficial interest would have to be avoided." *Davis v. Davis*, 48 W. Va. 300, 27 S. E. Rep. 323.

"Whether the decision in *Davis v. Davis* (48 W. Va. 300, 27 S. E. Rep. 323), will be followed in Virginia, remains to be seen. It is possible that it might be held that the subscribing witness who takes a benefit under a will is incompetent at the time of the attestation, and that both of the subscribing witnesses should be examined at the probate. If both are alive and within the jurisdiction of the court. The true view of the statute would then be that the words 'if the will may not be otherwise proved' have reference to the case where the devisee or legatee is needed as an attesting witness, to make up the number required by law, in which case he is made a competent attesting witness by the avoidance of his interest, and he may also be called to testify at the probate of the will. And, conversely, a will may be otherwise proved when there is an extra or superfluous attesting witness, beyond the number required by the statute. This view would assimilate the law of Virginia to that of many of the other states. See Tiedeman, 1 Real Prop., § 878, where it is said: 'The common-law rule is, that if a witness to a will is interested in it as a legatee or devisee, the will is void. But now, in most of the states, it is provided by statute that in such a case the will (shall) be good, but the devise or legacy to the witness shall be void. In some of the states, the devise is declared absolutely void, but generally the devise is void only when there is not a sufficient number of witnesses without the disqualified witness. And in Redfield, Wills, vol. 1, p. 258, note: 'But in many of the American states the statute only renders the estate of witnesses to a will, who take a beneficial interest under it, void to the extent of the number required to give validity to the instrument. And where supernumerary names appear upon the paper as witnesses, those will first be taken to complete the required number who take no benefit under the will.'" Editorial by Prof. Graves, in 4 Va. Law Reg. 320.

A devisee or legatee, however, who is not an attesting witness is not subjected to the terms of the statute, but may be examined in support of the will, like any indifferent person, interest being now no disqualification, except in the case of attesting witnesses. 2 Min. Inst. (4th Ed.) 1015; *Martz v. Martz*, 25 Gratt. 361.

Creditor as Attesting Witness.—If a will charging an estate with debts be attested by a creditor, or the wife or husband of a creditor whose debt is so charged, such creditors shall, notwithstanding, be admitted as a witness for or against the will. Va.

Code 1887, § 2580; W. Va. Code 1899, ch. 77, § 19, p. 708; 2 Min. Inst. (4th Ed.) 1015.

Executor as Attesting Witness.—No person shall, on account of his being an executor of a will, be incompetent as a witness for or against the will. Va. Code 1887, § 2531; W. Va. Code 1899, ch. 77, § 20, p. 708; 2 Min. Inst. (4th Ed.) 1015; *Coalter v. Bryan*, 1 Gratt. 18; *Martz v. Martz*, 25 Gratt. 361.

Time When Competency Must Exist.—It seems that an attesting witness must be competent at the time when he attests and subscribes his name. If he is competent then and afterwards becomes incompetent the will is not thereby invalidated. Page on Wills, § 192; Underhill on the Law of Wills, § 92; Woerner on the American Law of Administration (2d Ed.) § 41; 39 Am. & Eng. Enc. Law (1st Ed.) 238; 2 Min. Inst. (4th Ed.) 1018. See also, *Davis v. Davis*, 48 W. Va. 300, 27 S. E. Rep. 323.

D. WITNESSES MUST BE PRESENT AT SAME TIME.—The provision of the present statute, Va. Code, 1887, § 2514; W. Va. Code 1899, ch. 77, § 3, p. 705, requiring the witnesses to be "present at the same time when the testator subscribes or acknowledges the will," was first adopted, as a part of the statute of wills at the Revision of 1849. See Va. Code 1849, ch. 122, § 4. Speaking of the adoption of this provision, MONCURE, J., in delivering the opinion of the court in *Paramore v. Taylor*, 11 Gratt. 220, says: "The next, and perhaps only other, difference arises from the introduction of the words 'present at the same time' after the word 'witnesses' in the new law. It had been well settled under the old law, that a will might be acknowledged before the witnesses at different times. In *Dudleys v. Dudleys*, 3 Leigh 436, the will was attested by one witness in 1818, and by the other in 1825. The evil arising from this construction was, that the testator might be capable of making a will at the time of one of the attestations, and incapable at the time of the other, and only one attesting witness could prove the important fact of mental capacity at either time. Wills are frequently, if not generally, executed by persons in *extremis*, whose powers of mind as well as of body are gradually sinking. They are often capable one day, and incapable the next, of making a will. The words in question were introduced to remedy this obvious evil. There seems to have been considerable opposition in the legislature even to this change. The words 'present at the same time,' in the report of the revisors were stricken out by a committee of the whole house of delegates; but were restored by the house itself."

Prior to the introduction of the provision requiring the witnesses to be present at the same time when the testator subscribes or acknowledges the will, a testator's name was written for him by R. P., who testified that he also signed the testator's name thereto, in the presence of, and at the request of the testator, and then subscribed his own name as a witness in the testator's presence; and another witness, B. H., testified that some years afterwards, being at the testator's house, it was suggested to the testator that it was a favorable time to have the will witnessed. The testator assented. The paper in question was produced, and the witness took it near the testator and inquired whether he acknowledged it. The testator said he did, and the witness subscribed as a witness in the testator's presence. It was held that the acknowledgment of the paper by the testator to the second witness was a recognition of the signature thereto as his own, and evidence from which a court of probate might well infer that the testator's signature to the will was written by his authority; and so there were two witnesses to the will, as required by the statute. *Dudleys v. Dudleys*, 3 Leigh 436.

Under the Virginia statute, the witnesses must be present together at some time, when the testator acknowledges the signature, or the instrument to be his act, but not necessarily when they subscribe their names. 2 Min. Inst. (4th Ed.) 1016; *Parramore v. Taylor*, 11 Gratt. 220; *Beane v. Yerby*, 12 Gratt. 230; *Green v. Crain*, 12 Gratt. 252. But the West Virginia statute requires that the witnesses "shall subscribe the will in the presence of the testator, and of each other." W. Va. Code, 1890, ch. 77, § 2, p. 705.

A testator subscribed his name to his will in the presence of a witness who attested it at his request. Another witness was called into the room and the testator again acknowledged the paper as his will and requested the second witness to attest it, who did so, the first witness being present when the testator acknowledged the paper to the second witness, but not subscribing or recognizing his subscription at that time. The whole transaction, however, was finished within a few minutes. *Held*, that the will was properly attested. *Parramore v. Taylor*, 11 Gratt. 220.

A testator subscribed his name to his will in the presence of R., who wrote it, and requested R. to witness it, who did so. H. was then called into the room and requested by the testator to witness the instrument, and the testator acknowledged his signature to him, in the presence and hearing of R., and H. subscribed his name as a witness in the presence of the testator and of R. *Held*, that the acknowledgment of the signature by the testator was a sufficient acknowledgment of the will. *Beane v. Yerby*, 12 Gratt. 230.

A paper prepared as a will was read to the testator by the scrivener and approved; and then the scrivener, at the request of the testator, subscribed the testator's name to the paper and at his request, attested it. No other witness attested the will in the presence of this witness. About three days afterwards, the testator acknowledged the paper as his will in the presence of H., who, at his request, attested it in his presence. No other witness attested the paper on that day; but about four days afterwards, H. was again at the house of the testator with W., when the testator requested W. to attest the paper, which W. did in the presence of H. and the testator. The testator then acknowledged the paper as his will in the presence of H. and W. *Held*, that the will was duly attested. *Green v. Crain*, 12 Gratt. 252.

E. WITNESSES MUST SUBSCRIBE WILL IN PRESENCE OF TESTATOR.

1. **STATUTORY PROVISION.**—The Virginia statute requires that the attesting witnesses "shall subscribe the will in the presence of the testator." Va. Code 1849, ch. 122, § 4; Va. Code 1887, § 2514. The West Virginia statute requires the witnesses to "subscribe the will in the presence of the testator and of each other." W. Va. Code 1890, ch. 77, § 2, p. 705.

2. **OBJECT OF REQUIREMENT.**—The object of the statute, in requiring a will to be attested in the presence of the testator, is to enable the testator to see that the very persons whom he has requested to attest his will do in fact attest it, and also to prevent interested parties from surreptitiously substituting some other paper in the place of the will which he intends to publish. *Neil v. Neil*, 1 Leigh 6; *Moore v. Moore*, 8 Gratt. 307; *Nock v. Nock*, 10 Gratt. 117; 2 Min. Inst. (4th Ed.) 1017. See also, *Boyd v. Cook*, 8 Leigh 32; *Baldwin v. Baldwin*, 81 Va. 405.

3. **WHAT AMOUNTS TO SIGNATURE AS SUBSCRIBING WITNESS.**—The signature must be by way of attestation, not as an agent merely. In *Peake v. Jen-*

kins, 80 Va. 225, the execution of the will was as follows:

"April 13, 1870.

Witness:

Lucy P. B. Lipscomb."

Held, that Mary F. Holladay, who had written the will for Anna L. Jenkins, and had signed Anna L. Jenkins' name, had written her own name not as a witness, but to indicate agency, and so the will failed for lack of two witnesses. See 2 Va. Law Reg. 471.

Attestation May Be by Mark.—A subscribing witness may attest the will by making his mark, his name being written by another in his presence and at his request. The validity of such attestation depends upon the signing of the name of the witness by his authority, and in his presence, and not upon the fact of his making a mark or doing some manual act in connection with the signature. *Jesse v. Parker*, 6 Gratt. 57, 52 Am. Dec. 102. See *Sturdivant v. Birchett*, 10 Gratt. 67.

Adoption of Signature Previously Made.—Though the name of the witness was put to the paper, not as a witness, but for some other reason, yet if the testator afterwards requests the witness to attest the paper, and he adopts the signature already there, it is a valid attestation. *Pollock v. Glassell*, 3 Gratt. 439; *Sturdivant v. Birchett*, 10 Gratt. 67.

4. **THE REQUEST THAT WITNESS SHALL SUBSCRIBE.**—The request that a witness shall subscribe a will may be made by a third person, provided the testator hears and understands it, and does not dissent. *Cheatham v. Hatcher*, 30 Gratt. 54, 32 Am. Rep. 650.

5. **ORDER OF SIGNING.**—The witnesses should subscribe their names after the testator has subscribed his; for, if the purpose of the attestation is to identify the signature of the testator, this purpose cannot properly be carried out if they shall precede him in signing. There can be no attestation until there is something to attest. Underhill on the Law of Wills, § 195; Page on Wills, § 223; *Dudleys v. Dudleys*, 3 Leigh 436.

"It must be admitted, that a paper attested before it is signed, is not a will under the statute; that the statute requires the attestation of two witnesses, after it is a perfect will. If all the witnesses die, or are out of the jurisdiction of the court, then, of necessity, proof is admitted of their handwriting, and is all that can be required to identify the paper attested by them. But if they are present, all must identify the paper attested by them. In such case, the statute requires that two witnesses shall prove the factum of signing by the testator. Suppose he acknowledge the will only, before both of them, and before it is signed, as was the case in *Burwell v. Corbin*, 1 Rand. 131, as to one of the witnesses would such an acknowledgment be a compliance with the statute? The witnesses, in such case, by looking at their signatures, might identify the paper they attested; but they could not say, that it was a will executed by the testator by signing his name to it. This would open the door to fraud; a paper not signed by the testator, but afterwards by another, might be palmed upon a court for a will. I have seen no case, in which the acknowledgment of the testator, that the paper was his will, in the absence of all proof that it was signed by him at the time the acknowledgment was made, has been held a recognition by the testator of his signature." *BROOKS, J.*, in *Dudleys v. Dudleys*, 3 Leigh 436.

But it is immaterial whether the testator makes his signature before or after the witnesses sign the will, where the whole transaction is one continuous act, completed within a few minutes.

Rosser v. Franklin, 6 Gratt. 1, 52 Am. Dec. 97. See *Parramore v. Taylor*, 11 Gratt. 246; *Pollock v. Glassell*, 2 Gratt. 489.

6. WHAT CONSTITUTES "IN THE PRESENCE OF THE TESTATOR."—"The statute uses the word *presence*, but has not attempted to define it. Its meaning depends upon the circumstances of each particular case; and the duty of ascertaining it devolves on the court or jury which has to decide the case; their guides being reason and common sense, controlled only by authoritative adjudications. It is a word of which every man has something like a just idea but which no man can accurately define. In fact, it implies an area which has no metes and bounds; but is contracted or enlarged according as the attestation occurs, as it certainly may. 'In a small chamber, or a spacious hall, or a public street or an open field.'" *MONCURE, J.*, in *Nock v. Nock*, 10 Gratt. 106.

"Presence," in the sense in which the word is used in the statute of wills, does not mean simply being together at the same time and place, and especially it does not mean the being together of animate or inanimate things or persons, or of living, competent witnesses with a supposed testator who is asleep or unconscious. It means conscious presence. *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. Rep. 650; *Baldwin v. Baldwin*, 81 Va. 405; 2 Min. Inst. (4th Ed.) 1017. See also, *Cheatham v. Hatcher*, 30 Gratt. 56; *Nock v. Nock*, 10 Gratt. 119; *Neill v. Neill*, 1 Leigh 11.

"Proximity and consciousness may create presence. A room *ex vi termini* denotes such proximity as is required to constitute presence; but there may be such proximity, as well without as within a room. And wherever that proximity exists and presence is created, it has the same effect as if the transaction occurred in the same room and sight becomes unnecessary. When a testator is in one of two adjoining rooms, of which the door of communication is closed, what is done in the room is done in his presence and what is done in the adjoining room is done out of his presence. But throw open the door, and place the witnesses and the table on which they are attesting the will in the adjoining room, directly before the testator, and they are in his presence. The moment the range of vision becomes unobstructed, the distinction between the same room and different room ceases; the partition wall is broken down and the two rooms are turned into one." *MONCURE, J.*, in *Nock v. Nock*, 10 Gratt. 106.

Mr. Minor, in discussing what presence is required, says: "The idea of presence requires the attestation to occur within the range of the testator's vision, and within a reasonable degree of proximity, in case of one who has the faculty of sight, and with consciousness on the part of the testator, of the presence of the witnesses, presence meaning conscious presence. (*Baldwin v. Baldwin*, 81 Va. 410, 418; *Tucker v. Sandidge*, 85 Va. 570.) In case of a blind man, proximity no doubt is one criterion of presence, but what other circumstance must concur therewith (supposing the attestation to take place in the same room) is not settled by authority, and must be decided when the case occurs. (3 Lom. Dig. 54-5; *Neill v. Neill*, 1 Leigh 22; *Boyd v. Cook*, 3 Leigh 82; *Nock v. Nock*, 10 Gratt. 119; 1 Redf. Wills, 54, 57-8; 1 Jarm. Wills [5th Ed.] 87, n. 2.) To be in the same room with the testator, when witness subscribes the will, is *prima facie* to be in his presence; which, however, may be repelled by proof that the testator was so situated relatively to the witness that he could not see the act of attestation, and could not, without help, place himself in a position to see. If he could see, or could, with-

out help, place himself in a position to see, it is immaterial whether he really did see or not. (3 Lom. Dig. 52-3; *Neill v. Neill*, 1 Leigh 6; *Sturdivant v. Birchett*, 10 Gratt. 67, 86; *Pollock v. Glassell*, 2 Gratt. 489; 1 Redf. Wills, 245 et seq.; *Cheatham v. Hatcher*, 30 Gratt. 56; *Baldwin v. Baldwin*, 81 Va. 405.) An attestation not made in the same room is *prima facie* not an attestation in his presence. But this also may be repelled by showing that from the position actually occupied by the testator, he could plainly see the act of attestation." 2 Min. Inst. (4th Ed.) 1017.

LACY, J., in delivering the opinion of the court in *Baldwin v. Baldwin*, 81 Va. 405, says: "What is 'in presence of the testator' has been often the subject of judicial investigation and construction. Actual presence is being bodily in the precise spot indicated. Constructive presence is being so near to, or in such relation with the parties actually in a designated place as to be considered in law as being in the place. He who is incapable of giving his consent to an act is not to be considered present, although he be actually in the place. It would seem that a lunatic, or a person sleeping when the act was done, could not be considered present. Under the English statute of frauds, it has been said that an actual presence is not indispensable, but that when there was a constructive presence it was sufficient; as when the testatrix executed the will in her carriage standing before the office of her solicitor—the witness retired into the office to attest it—and it being proved that the carriage was accidentally put back, so that she was in a position to see the witness sign the will through the window of the office. *Casson v. Dade*, 1 Brown C. C., p. 98. *JUDGE CARR* said, in *Neill v. Neill*, 1 Leigh 11: 'Signing in the presence of the testator was to enable him to see that the persons he confided in were those who attested, and to prevent a false paper being imposed upon them. The phrase employed is one in common use—in presence of the testator. What is presence? The opposite of absence. It may be said of every attestation that it was either in the presence, or in the absence, of the testator. Presence seems to mean, in company with—within the view of—in the same room with. Thus, if you ask a man, were you present when such a thing happened? He will answer, 'Yes, I was in the same room.' If a man be in one room, and the transaction take place in another room of the house, it would certainly, *prima facie*, be considered out of his presence. In all the cases, therefore, when an attestation out of the room of the testator has been supported, the court has extended the construction to take in the cases within the meaning, though not the strict words of the statute. This the courts are always inclined to do; and on no subject have they gone farther than in support of the last wills of the dead when the objection is technical, and the meaning of the statute has been substantially complied with. Thus, in *Right v. Price*, 1 Doug. 248, *LORD MANSFIELD* says: 'The court would lean in support of a fair will, and not defeat it for a slip in form when the meaning had been complied with.'" *JUDGE GREEN*, in the same case (*Neill v. Neill*) said: 'Courts of justice have always, and very properly, leaned strongly in favor of the validity of wills fairly made, and when there is no imputation of fraud. * * * Where the testator and the witnesses are together for the purpose of attesting a will, and so their attention specially called to that object; if they be in such a situation that the testator may, if he pleases, by the exertion of his own volition and physical powers, without materially changing his position with reference to place, and without the assistance of others, see the witnesses subscribe, that is a sub-

scribing in his presence. And perhaps the cases justify us in saying that this is, under such circumstances, a presumption or conclusion of law against which no evidence will be received.' JUDGE COALTER said, in that case, speaking of the witnesses: 'And, therefore, the most that they can be required to prove is that he (the testator) was so present to them, and they to him, as that he might, and therefore, probably did, see the attestation.' JUDGE CABELL said on this subject: 'An attestation, therefore, out of the room of the testator, but proved to be within the scope of his vision, becomes good as being in his presence; and an attestation in the same room, but proved to be out of the scope of his vision, becomes bad as not being in his presence. And this is, as I take it, the substance of all the authorities.' JUDGE BROOKS said: 'It is admitted, that it need not be proved that the testator *actually saw* the attestation of the will, if he had the power to see it; and that he may dispense with this portion of his controlling influence, and turn his back upon the witnesses when they attest the will. * * * The statute might have required that the testator should actually, see the witnesses subscribe the will, but this would have rendered it impossible for a blind man to make a will.' This case was considered and decided by a full bench, and all the judges wrote opinions; and while they differed in the result of the case—a majority being of opinion to reverse the case, and reject the will—they all concurred in the foregoing views, as we have seen. In that case the testator, being incapable of moving himself, was placed, after he had signed the will, with his face to the wall and his back to the witnesses when they subscribed the will, so that, although in the same room with the witnesses, he did not, and could not by the exercise of any power which he possessed, have seen the witnesses subscribe the will; although in the same room with him, they were not within the scope of his vision, and he had no power to bring them within it. In that case a majority of the judges held that they were not in his presence. This case has met with some disapproval from some of the judges of this court in subsequent decisions, but has been followed and is relied on by the counsel for the appellant here as conclusive of this case. But each case is, as to this question, dependent upon its own circumstances. In this case the witnesses were not only in the same room, but within the line of vision of a conscious, and capable, and consenting testatrix, who could, and who, as far as this evidence goes, did see the attesting witnesses subscribing the will which she had herself just heard read in a clear and distinct voice, and had then signed legibly with her own hand. JUDGE MONCURE, speaking for this court in the case of *Nock v. Nock*, 10 Gratt. 119, says of the case of *Nell v. Nell*, *supra*: 'Its effect has been to modify in this state the general rule, and add thereto this proviso: that if the testator be physically unable to change his position, the witnesses must make their subscriptions within the range of his vision.' And then remarks: 'The word room does not occur in the statute; nor does the word sight. Presence is the only word there used, and when it exists, sight is unnecessary, and the statute is satisfied. A blind man can make a will, which, of course, he could not do if sight were necessary. * * * Proximity and consciousness may create presence. Will they (the witnesses) be considered as not in his (the testator's) presence merely because in the actual position which he happens to be, he cannot see their forearms and writing hands, and the paper itself? The statute says nothing about forearms,

or writing hands, or seeing the will itself. It requires the witnesses to subscribe their names in the testator's presence. He cannot, in the nature of things, see their whole persons at the same time. They are in his presence, whether their faces or their backs are towards him. And if, being in his presence, they subscribe their names, the statute is literally complied with. There is not even a slip of form, and the attestation is good. If he does not choose to see when he can so easily see, the forearms and writing hands, and paper itself, and when he sees and hears that the attestation is going on, it is the same thing as if he had actually seen them.' Citing the case of *Shires v. Glasscock*, 2 Salk. R. 688, *Davy v. Smith*, 3 Salk. R. 395, and also, *Casson v. Davy*, 1 Bro. C. C. *supra*."

For a further discussion of the meaning of the words "in the presence of," as used in the statute of wills, see opinions of CARR, GREEN, COALTER, CABELL and BROOKS, JJ., in *Nell v. Nell*, 1 Leigh 6; opinions of DANIEL, BALDWIN and ALLEN, JJ., in *Moore v. Moore*, 8 Gratt. 307; opinions of LEE and DANIEL, JJ., in *Sturdivant v. Birchett*, 10 Gratt. 67; opinions of MONCURE and DANIEL, JJ., in *Nock v. Nock*, 10 Gratt. 106. See also, *foot-note* to *Sturdivant v. Birchett*, 10 Gratt. 67.

What is in the Presence of One Who is Blind.—The will of a blind man will be admitted to probate, if attested at his request in the same room with him, though it be not proved that the will was read to him in the presence of the attesting witnesses, or that it was ever read to him, provided it appears satisfactorily to the court, that he was acquainted with its contents, and intended to make the testamentary dispositions therein contained. *Boyd v. Cook*, 3 Leigh 33.

Whether Acknowledgment of Signature Previously Made Equivalent to Subscribing in the Presence of the Testator.—A testatrix verbally stated to a lady friend, Miss S. S. Ashton, her wishes as to the disposition of her property after her death; and the lady, lest she should forget them, of her own accord, wrote a memorandum of the wishes of the testatrix. At the foot of the paper she wrote the words "Written by S. S. Ashton for," intending to add the name of the testatrix if the latter should be unable to sign her own name. When she mentioned the matter to the testatrix, the latter wrote her name to the paper herself, and when she was about to do so Miss Ashton struck out with a pen the word "for," which followed her own name and was intended to precede that of the testatrix, if it had been written by Miss Ashton. The testatrix requested another lady to witness the paper which she did; and she then requested Miss Ashton to witness it; but she thought and so told the testatrix, that it was not necessary for her to sign the paper again, as her name was already to it, in the matter before stated; and she did not again subscribe it. *Held*, that although the name of the witness Miss Ashton, was subscribed before the testatrix signed the paper herself, yet by reason of her recognition of her signature as that of a witness after the paper had been signed by the testatrix, the attestation was good. *Pollock v. Glassell*, 2 Gratt. 439. In this case it does not appear whether Miss Ashton wrote the paper and the words "Written by S. S. Ashton for" in the presence of the testatrix or not. Nor does it appear whether any question was raised by the counsel or the court as to whether she subscribed the will in the presence of the testatrix. See *Sturdivant v. Birchett*, 10 Gratt. 67.

A will was signed by the testator in the presence of three attesting witnesses, who were by him requested to sign it as witnesses. The will was then

taken by the witnesses into the passage, and there signed by them in the presence of each other; after which they carried it back and handed it open, with their names subscribed to it, to the testator, who held it a moment or more and looked at it, and then gave it to one of them to be folded up for preservation. The testator, from the place where he actually was, could not have seen the attesting witnesses subscribe their names, but he might have changed his position in bed so as to have seen them, if he had so desired. *Held*, that the will was duly attested. *Moore v. Moore*, 8 Gratt. 307. But this case cannot be considered as an authority either way upon the question whether a subsequent recognition of their signatures by the witnesses would be equivalent to signing in the presence of the testator, as the four judges who sat in it were equally divided in opinion, though the will was sustained, such having been the decree of the court below. See *Sturdivant v. Birchett*, 10 Gratt. 67.

A will was executed by the testator, and certain persons were requested by him to attest it. For convenience they took it into another room, out of the vision of the testator, and there subscribed their names to the paper as witnesses; and they immediately, within one or two minutes, returned to the testator with the paper; and one of them, in the presence of the other, with the paper open in his hand, said to the testator: "Here is your will witnessed;" at the same time pointing to the names of the witnesses, which were on the same page and close to the name of the testator. The testator took the paper and looked at it as if examining it, and then folded it up, and spoke of it as his will. *Held*, that under these circumstances, the recognition of their attestation by the witnesses to the testator, was a substantial subscribing of their names as witnesses in his presence. *Sturdivant v. Birchett*, 10 Gratt. 67, two judges dissenting.

The decision in *Sturdivant v. Birchett*, 10 Gratt. 67, has been regretted, and is criticised as out of line with the weight of authority in other states. See 2 Min. Inst. (4th Ed.) 1018; note by Prof. Graves in 3 Va. Law Reg. 471; Underhill on the Law of Wills, § 196. See also, *foot-note* to *Sturdivant v. Birchett*, 10 Gratt. 67.

Mr. Underhill, in his work on the Law of Wills, § 196, p. 267, says: "Presence in its widest meaning is the antonym of absence. Hence where the statute requires a signing by witnesses in the presence of the testator, a subscription to a will by the witnesses in the absence of the testator is absolutely void. Nor can such a fatal defect be remedied by a subsequent acknowledgment by the witnesses of their signatures, uttered in the presence of the testator." Citing among many authorities from other states, *Moore v. Moore*, 8 Gratt. 307. See also, 29 Am. & Eng. Enc. Law (1st Ed.) pp. 210-215.

Instances of Attestation Held to Be in the Presence of the Testator.—As the witnesses were entering the room of the testatrix a friend said to her: "These gentlemen, F. and R., have come to witness the will." She bowed her head in assent. The will was read to her by F. in an audible voice, and on being asked if she understood it she signified her assent as before. She then signed the will in a legible manner, her arm being held to steady it but the pen not being touched. She was then laid back in a recumbent posture as before, and the witnesses subscribed the will at a table in the little room near the foot of the bed in her presence, both being present together. She was so lying that she was obliged to see them unless she shut her eyes or turned her head away. *Held*, that the will was duly executed

as required by statute. *Baldwin v. Baldwin*, 81 Va. 405.

The witnesses to a will subscribed their names in another room from the testator, who, though lying on a bed, was able to walk about; but the witnesses were directly within the range of his vision, so that he could see all their persons except the forearm and writing hand, these being hid by the body of the witness while he was subscribing his name. It might be inferred also that the testator could see the paper as it lay on the bureau or desk where the witnesses subscribed their names. *Held*, that the witnesses subscribed their names in the presence of the testator, within the meaning of the statute. *Nock v. Nock*, 10 Gratt. 106.

A will was signed by the testator in the presence of three attesting witnesses, who were by him requested to sign it as witnesses. The will was then taken by the witnesses into the passage, and there signed by them in the presence of each other; after which they carried it back and handed it open, with their names subscribed to it, to the testator, who held it a minute or more and looked at it, and then gave it to one of them to be folded up for preservation. The testator, from the place where he actually was, could not have seen the attesting witnesses subscribe their names, but he might have changed his position in bed so as to have seen them, if he had so desired. *Held*, though by a divided court, that the will was attested in the presence of the testator. *Moore v. Moore*, 8 Gratt. 307. See *Sturdivant v. Birchett*, 10 Gratt. 67. See also, *supra*, "What Constitutes 'In the Presence of the Testator.'"

Instance of Attestation Held Not to Be in the Presence of the Testator.—A testator, being incapable of moving himself, was placed after he had signed the will, with his face to the wall and his back to the witnesses when they subscribed the will, so that, although in the same room with the witnesses, he did not and could not by the exercise of any power which he possessed have seen the witnesses subscribe the will; although in the same room with him, they were not within the scope of his vision, and he had no power to bring them within it. *Held*, that the attestation was not within the presence of the testator. *Neil v. Neil*, 1 Leigh 6.

F. FORM OF ATTESTATION.—The statute declares that "no form of attestation shall be necessary." Va. Code 1887, § 2614; W. Va. Code 1899, ch. 77, § 3, p. 705.

"The statute requires the will to be attested by witnesses, but does not prescribe what, nor that any facts shall be stated in their attestation. I think it plain that the legislature meant nothing more than that the instrument itself should be attested, in order to identify the witnesses, and designate who are to prove its due execution. The object was not to obtain from the witnesses a certificate of the essential facts of the transaction, but to provide the means of proving them by persons entitled to confidence, and selected for the purpose. The subscription of their names by the witnesses denotes that they were present at, and prepared to prove, the due execution of the instrument so attested, and nothing more. The attestation is the act of the witnesses, and it was not intended to confide to them the duty of stamping their testimony upon the paper, which could avail nothing as evidence, however perfect, and which ought to occasion no estoppel, however imperfect." *BALDWIN, J.*, in *Pollock v. Glassell*, 3 Gratt. 439.

No form is required, but it is better to have the subscribing witnesses sign a form of attestation, reciting compliance with all the formalities. The

following form is believed to be sufficient everywhere:

"Signed, sealed, published, and declared by William Brown (the testator), as and for his last will and testament, in the presence of us, all three present together, who, at his request, in his presence, and in the presence of one another, have herenunto subscribed our names as attesting witnesses." Then follow the signature of the three attesting witnesses.

The above contains more than is necessary in Virginia. We require *two* witnesses only, and the witnesses need not subscribe in the presence of *each other*, but only in the presence of the testator. And a will, unlike a deed, does not require to be sealed. It is safer, however, to have three witnesses and to have them sign in the presence of one another; for a will of land is governed by the law of the *situs* (*lex loci rei sitae*), and the testator might own land in another state where these formalities are required. Note by Prof. Graves in 3 Va. Law Reg. 472.

G. SEALING.—The law does not require a will to be sealed; it has precisely the same force and effect without as with a seal. Where, however, the will is executed by virtue of a power requiring such paper to be under hand and seal, a seal is essential to the valid execution of the power. Pollock v. Glassell, 2 Gratt. 499.

Where a marriage settlement gives the power to a wife to dispose of the settled estate by gift, or devise, under her hand and seal, attested by two or more witnesses, a testamentary paper signed by the wife, with a scroll annexed to her name, and attested by the requisite number of witnesses, is a valid will under the power, though the scroll is not recognized in the body of the instrument. In such case parol testimony is admissible to show that the scroll was put upon the paper as a seal by the direction of the testatrix. Pollock v. Glassell, 2 Gratt. 499.

Where a will is executed by virtue of a power requiring said paper to be under hand and seal, a paper duly executed referring to and recognizing another testamentary paper, previously executed according to the statute concerning wills, but not according to the power, will constitute the paper recognized a valid, testamentary paper. To give validity to the paper recognized, it is not necessary that it should be incorporated into the paper recognizing it. Pollock v. Glassell, 2 Gratt. 499. See this case cited in American Surety Co. v. Worcester Cycle Mfg. Co., 100 Fed. Rep. 48.

H. PUBLICATION.—"What is meant precisely by the publication of a will is not entirely clear. It is supposed to be the declaration by which a person designates that he means to give effect to a paper as his will, although it does not seem to be necessary that he should describe it as being his will; and his *silently* signing it, and procuring witnesses duly to attest it according to the statute, would doubtless be a sufficient declaration." 2 Min. Inst. (4th Ed.) 1089.

"It seems to be somewhat doubtful whether publication ever was necessary to the validity of a will. 1 Jarm. on Wills, 71. If ever necessary, it might have been inferred from slight circumstances. 8 Lomax Dig. 42, § 24. The statute of 20 Ch. II., did not require it; but on the contrary, seems to have dispensed with its necessity, if it previously existed; or at least substituted the requisitions thereby prescribed in place of any other publication, in cases to which the statute was applicable. 'All other requisitions (says JUDGE LOMAX), would seem necessary to be excluded, but those which are embraced in the statute; and publication, as a distinct act of the testator, is not one of those which are enumerated.'

Lomax Dig. 43. 'Signing and acknowledgment of a will before witnesses (says JUDGE TUCKER) amount to what is called a publication of the will, though they are not informed that it is a will and though the testator even calls it a deed.' 1 Tuck. Com. pt. 2, p. 204." Beane v. Yerby, 12 Gratt. 239.

The Act of 1849, Va. Code 1849, ch. 152, § 4, p. 516, Va. Code 1887, § 2514, does not change the former law, as to what shall constitute an acknowledgment or a publication of a will. Beane v. Yerby, 12 Gratt. 239.

In Beane v. Yerby, 12 Gratt. 239, it was held that there was a sufficient publication of the will, though the testator spoke of the paper as an instrument, and did not speak of it to the witness as his will. The witness in this case was acquainted with the contents of the paper and knew that it was a will.

The time of publication is not necessarily fixed by the date of the will; and it may be proved to have been published on a subsequent day, by two subscribing witnesses; although it has previously been admitted to probate, without any particular notice that it was published on a different day from its date. Bagwell v. Elliott, 2 Rand. 190.

I. EVIDENCE OF EXECUTION.

1. VALUE OF ATTESTATION CLAUSE AS EVIDENCE.—

Upon the death or absence of the subscribing witnesses, the attestation clause becomes *prima facie* evidence that the will was executed with the formalities recited therein. 29 Am. & Eng. Enc. Law (1st Ed.) 199; Clarke v. Dunnivant, 10 Leigh 13.

Upon an issue of *deviseavit vel non*, a certificate of attestation signed by the subscribing witnesses, showing that all the requirements of the statute for the valid execution of a will have been complied with, is proper to go to the jury with the other evidence on the question of the due execution of the will. Upon such an issue it is proper to instruct the jury, that the acts and conduct of the testator on the alleged occasion of the execution of the will, together with the attestation clause and the genuineness of the signatures of the subscribing witnesses thereto, are to be considered in determining whether the paper was in fact the will of the testator. Webb v. Dye, 18 W. Va. 376.

2. VALUE OF TESTIMONY OF SUBSCRIBING WITNESSES.

a. *In Support of Will.*—The evidence of witnesses who were present at the execution of the will is entitled to peculiar weight, and especially is this the case with attesting witnesses. Kerr v. Lunsford, 81 W. Va. 659, 8 S. E. Rep. 493; Nicholas v. Kershner, 20 W. Va. 251; Jarrett v. Jarrett, 11 W. Va. 584.

The question of the due execution of a will is to be determined in view of all the legitimate evidence in the case; and no controlling effect is to be given to the testimony of the subscribing witnesses. Their direct participation in the transaction must of course under ordinary circumstances give great weight to their testimony; but it is liable to be rebutted by other evidence, either direct or circumstantial. Webb v. Dye, 18 W. Va. 376; Martin v. Thayer, 37 W. Va. 88, 16 S. E. Rep. 489.

No person is justified in putting his name as a subscribing witness to a will unless he knows from the testator himself that he understands what he is doing. The witness should also be satisfied, from his own knowledge of the state of the testator's mental capacity, that he is of sound and disposing mind and memory. By placing his name to the instrument, the witness, in effect, certifies to his knowledge of the mental capacity of the testator; and that the will was executed by him freely and understandingly, with a full knowledge of its contents. Such is the legal effect of the signature of the witness when he is dead, or is out of the jurisdiction of the court. Tucker v. Sandidge, 85 Va. 546, 8 S. E.

Rep. 660; *Martin v. Thayer*, 87 W. Va. 88, 16 S. E. Rep. 489.

It was certainly never intended by the framers of our new statute, to require the subscribing witnesses to prove that they saw the signature of the testator at the time of the acknowledgment of the will. That would be to make the validity of wills "depend upon the memory and good faith of a witness, and not upon reasonable proof that all the requirements of the statute had in fact been complied with." *Nock v. Nock*, 10 Gratt. 115; *Jesse v. Parker*, 6 Gratt. 57; *Clarke v. Dunnivant*, 10 Leigh 18.

b. Against Validity of Will.—The testimony of a subscribing witness against the validity of a will ought to be viewed with suspicion. *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 660; *Lamberts v. Cooper*, 29 Gratt. 61; *Young v. Barner*, 27 Gratt. 103; *Webb v. Dye*, 18 W. Va. 376.

Attesting witnesses of a will who are introduced to impeach the will on the grounds of want of proper execution, unsoundness of mind, or undue influence, will not be excluded; but their evidence will be viewed with much suspicion, and it is proper to so instruct the jury. *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488.

The general rule is that one signing his name as a witness to a will by this act solemnly testifies to the testator's sanity. If he afterwards attempts to impeach the validity of the will, his testimony is not to be positively rejected but received with the most scrupulous jealousy. *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. Rep. 660; *Lamberts v. Cooper*, 29 Gratt. 61; *Young v. Barner*, 27 Gratt. 103.

But this rule ought not to be rigorously applied where such witnesses, suddenly called upon by the propounder to attest the will without time for due deliberation, testify in his behalf and are bound to detail the circumstances, affording the only reliable data from which the court can deduce its conclusions. *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. Rep. 660.

When part of the attesting witnesses testify against the will, it is error to instruct the jury that the evidence of the witness present at the execution of the will is entitled to peculiar weight. *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488.

Where a will has been prepared by and executed in the presence of a lawyer of ability and high standing, and two of the attesting witnesses attempt to impeach the will, and the person under whose supervision it was executed is dead, evidence of his character and capacity is admissible. *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488.

c. Presumption Where Subscribing Witness Forgets Facts of Execution.—Where the attesting witnesses to a will have forgotten whether material requirements of the statute were observed in the execution and attestation or not, compliance with these requirements may nevertheless be properly inferred by a court of probate from the circumstances of the case. *Clarke v. Dunnivant*, 10 Leigh 18. See *Smith v. Jones*, 6 Rand. 33; *Boyd v. Cook*, 3 Leigh 32; *Dudleys v. Dudleys*, 3 Leigh 436.

A will more than eight years old attested by three witnesses was offered for probate. One of the witnesses proved, that while he was casually present at the testator's house on a particular occasion, which he minutely described, the will was produced, read to the testator (who, it appeared, could neither read nor write), signed for him by the witness, and acknowledged by him as his will in the presence of the witnesses, who thereupon subscribed as attesting witnesses in the presence of the testator. The other witnesses proved merely their own signatures, and that they would not have subscribed unless they

had been requested by the testator and had thought that all things were regular; having forgotten all the circumstances of their attestation except they were present at the testator's house on the occasion as described by the first witness: and one of them stated that if requested by the testator to attest his will, he would have done so, whether the testator were present or not at the time he subscribed his name; while the other admitted that he did not know in what manner the law required a will to be witnessed. *Held*, that the proof of due execution of the will was sufficient to admit it to record. *Clarke v. Dunnivant*, 10 Leigh 18.

3. NUMBER OF WITNESSES REQUIRED TO PROVE DUE EXECUTION.—The circumstances required for the validity of a will may be proved by one witness, either an attesting witness, or, if no attesting witness be procurable, by any other; for although there must be satisfactory evidence that every statutory provision has been complied with, in respect to signing, attestation by subscribing witnesses, etc., no particular mode of proof is prescribed. The statute prescribes the number of witnesses by whom a will shall be attested, but not the number by whom it shall be proved. 4 Min. Inst. (3d Ed.) 107; *Dudleys v. Dudleys*, 3 Leigh 436; *Pollock v. Glasell*, 2 Gratt. 459; *Jesse v. Parker*, 6 Gratt. 57, 52 Am. Dec. 102; *Johnson v. Dunn*, 6 Gratt. 636; *Lamberts v. Cooper*, 29 Gratt. 61; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 660; *Webb v. Dye*, 18 W. Va. 389; *Davis v. Davis*, 43 W. Va. 302, 27 S. E. Rep. 323.

A will need not be proved by two subscribing witnesses, but may be admitted to probate upon extrinsic evidence, even where one of them denies the due execution. *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 660.

4. HOW DUE EXECUTION PROVED WHERE WITNESSES ARE DEAD OR OUT OF JURISDICTION.—If the subscribing witnesses to a will are dead, or insane, or absent from the country, so as not to be amenable to process, their handwriting may be proved; and it is then a question for the jury, whether, under the circumstances of the case, it is probable that all the formalities of the statute were regularly observed. *Clarke v. Dunnivant*, 10 Leigh 18.

When the witnesses to a will reside out of the state, or, although within it, are in confinement in another county or corporation, under legal process, or unable from sickness, age, or other infirmity, to attend the court before which the will is offered, the court may cause a commission to take any such witness' deposition, to be issued annexed to the will; and such deposition may be taken and certified as in other cases, except that no notice of the time and place of taking it need be given, unless the probate is opposed by some one who has made himself a party; and the proof so given shall have the same effect as if given in court. Va. Code 1887, § 2587; W. Va. Code 1890, ch. 77, § 27, p. 710; 4 Min. Inst. (3d Ed.) 107. See *Nalle v. Fenwick*, 4 Rand. 585; *Pollard v. Lively*, 2 Gratt. 216.

It is a general rule, that the evidence of a subscribing witness to an instrument is the best, and must be adduced if it can be had, and if it cannot, proof of his handwriting will be required. *Gilliam v. Perkinson*, 4 Rand. 325.

It seems that a will of lands, where two of the three attesting witnesses reside out of the state, and cannot be procured by any legal means, may be proved by the remaining witness, he proving the attestation of the absent witnesses. *Nalle v. Fenwick*, 4 Rand. 585.

But, if a subscribing witness, who merely makes his mark, is dead, proof of the handwriting of the party executing the instrument will be proper. *Gilliam v. Perkinson*, 4 Rand. 325.

In a case of probate, a witness unable to attend the court was examined as to the handwriting of a testamentary paper which had been shown to him by the propounder of the will, but which was not before him at the time he gave his deposition. *Held*, that the testimony was admissible; its weight depending upon the certainty of the proof that the paper propounded for probate was the paper that was shown to the witness. *Nuckols v. Jones*, 8 Gratt. 267.

The evidence of a witness as to handwriting, who has formed an acquaintance with it from seeing the party write, or from a course of correspondence, is not rendered incompetent, nor is its weight impaired by the fact that the witness has referred to papers in his possession, known to have been written by the party, for the purpose of refreshing his memory. *Redford v. Peggy*, 6 Rand. 316.

An administrator was appointed at a time when the testator was supposed to have died without a will. A will was afterwards found. The administrator had never seen the testator write but had acquired a knowledge of his handwriting from an examination of his papers after his death, and testified from his knowledge of the handwriting thus acquired, that the will was wholly in the handwriting of the testator. *Held* that this was competent evidence of the handwriting. *Sharp v. Sharp*, 2 Leigh 249.

A witness called to prove the handwriting of a paper offered for probate, may be impeached by proof of what she has said about the paper at another time. But neither her capacity to judge the handwriting nor her credit is to be impeached by what she may have said about some other paper. *Nuckols v. Jones*, 8 Gratt. 267. See *foot-note* to this case.

5. EVIDENCE OF EXECUTION IN CASES OF HOLOGRAPHIC WILLS.—The only evidence which is ordinarily necessary or admissible at the probate of a holographic will is evidence of the testator's handwriting. This may be proved by any competent witness who has a sufficient knowledge of the testator's handwriting to enable him to testify thereto. Page on Law of Wills, § 446. As to what constitutes such knowledge, see *Redford v. Peggy*, 6 Rand. 316.

In *Redford v. Peggy*, 6 Rand. 316, two judges (CARR and COULTER) were of opinion that the evidence of a witness who had frequently seen the testator write his name to receipts, and who had resorted to those receipts before he gave his testimony, to refresh his memory as to the handwriting, and who testified that he believed the body of the will and signature to be in the handwriting of the testator, though he had formed such belief from comparison and would not have been able to prove the handwriting except from comparing it with the signature to the said receipts, was competent evidence to prove the handwriting, and when supported by the evidence of another witness to the handwriting, and by corroborating circumstances, was sufficient to establish a testament of chattels. Two other judges (GREEN and CABELL) were of opinion that the evidence was not competent.

A witness as to the handwriting of the testator stated that some thirteen years previous, the testator dug a well for him, and drew several orders on him for money which he paid, and which the testator recognized afterwards. He never saw the testator write, but from his recollection of these orders he believed the paper to be in his handwriting. *Held* that this was competent testimony. *Cody v. Conly*, 27 Gratt. 313.

VI. TESTAMENTARY CAPACITY.

A. OF INFANTS.—It is provided by statute in Virginia and West Virginia, that no person under the age of twenty-one years shall be capable of making a will, except that minors eighteen years of age or upwards may by will dispose of personal estate. Va. Code 1887, § 2513; W. Va. Code 1899, ch. 77, § 2.

B. OF MARRIED WOMEN.—Under the present statute, Acts 1899-1900, p. 753, a married woman has the same power as if she were a *feme sole* as to all her property—saving her husband's curtesy consummate, and such restrictions as the grantor of her equitable separate estate may prescribe in the instrument of grant. See 6 Va. Law Reg. 488. For a discussion of the testamentary capacity of married women, see monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

C. OF BLIND PERSONS.—A blind person is, so far as such disability is concerned, perfectly competent to make a will. *Boyd v. Cook*, 8 Leigh 82. See also, *Nell v. Nell*, 1 Leigh 6.

D. OF PERSONS ADDICTED TO USE OF OPIUM AND ARDENT SPIRITS.—Proof that the testator's intellect was greatly impaired by the use of opium and ardent spirits, and that in consequence thereof he was frequently incapable of transacting business, is not sufficient to repel the presumption of testamentary capacity, in the absence of proof that such was his condition at the time the writing was executed. *Temple v. Temple*, 1 Hen. & M. 476.

E. OF AGED PERSONS—FAILURE OF MEMORY.—Old age is not of itself sufficient evidence of incapacity to make a will. *Kerr v. Lunsford*, 31 W. Va. 669, 8 S. E. Rep. 493.

When a will executed by an aged person differs from his previously expressed intentions, and is made in favor of those who stand in relations of confidence or dependence towards him, it raises a violent presumption of fraud and undue influence, which must be overcome by satisfactory testimony in order that the will may stand. *Hartman v. Strickler*, 82 Va. 238; *Whitelaw v. Sims*, 90 Va. 588, 19 S. E. Rep. 113.

When an old man, eighty-five years old, of greatly impaired health and enfeebled mind, away from his next of kin, and in the custody of persons of no kin, is induced to make a will, giving to such persons his entire estate, the law requires that such persons must clearly prove that the will was the free and voluntary act of the testator, and an intelligent expression of his wishes respecting the disposition of his property. *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314.

The court was requested to instruct that while it may be true that an enfeebled old man, whose mind has to some extent become debilitated, may have capacity to make a will, yet, if the jury believe that the testator was, several months previous to the date of his will, afflicted with a disease which then materially affected his mind, and which progressed in its effects upon the mind to the date of the will, and continued to progress for sixteen months afterwards, when, because thereof, the testator was mentally unable to transact business, then they should weigh the testimony tending to show mental capacity with great care, and be satisfied that it was sufficient to overcome the doubts of the testator's capacity, existing both by reason of said disease, as well as by reason of the presumption of incapacity which the law fixes. *Held*, that the instruction was properly refused, as assuming that the evidence raised in the minds of the jury a doubt of the testa-

tor's capacity. *Kerr v. Lunsford*, 81 W. Va. 659, 8 S. E. Rep. 493.

In the *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 141, the court instructed the jury, that neither sickness, nor old age, nor impaired intellect, even if the jury believed from the evidence that any or all of them existed in the case, is sufficient to render void the provisions of said paper, or any of them, if the jury also believe from the evidence that the testatrix, at the time of executing the said will, was capable of recollecting what property she was about to dispose of, the manner of distributing it, and the objects of her bounty. See *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. Rep. 650.

If failure of memory be merely such as is incident to old age, it does not affect testamentary capacity. *Montague v. Allan*, 78 Va. 592.

F. OF PERSONS UNDER INSANE DELUSION—MISTAKE OF FACT.—Where the testator wrongly believes that those who would naturally be the objects of his bounty are hostile to him, and this belief is not based on evidence and is not removable by evidence, it amounts to an insane delusion; but if founded upon evidence, though slight and inconclusive, it is not an insane delusion. Page on Law of Wills, § 106; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489.

The fact that the testator, at the time that he made his will, was mistaken in a matter of fact, does not of itself even tend to show that he was then suffering from an insane delusion. *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489.

Affections Poisoned by Mental Disorder.—It is essential to the exercise of the power to make a will that the person making it be able to comprehend and appreciate her relations to others who might, or ought to be, the objects of her bounty, and that no disorder of the mind shall have so far impaired her mind or poisoned her affections, perverted her sense of right, or prevented the exercise of her natural faculties as to render her incapable of such comprehension and appreciation, and bring about a disposal of her property which, if her mind had been otherwise, would not have been made. *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

Morbid Delusions—Abnormal Nervousness.—In the *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149, the court gave the following instruction: "If the jury shall believe from the evidence that the testatrix, at the time of making her will, was an old woman, that her nervous system had become more than ordinarily sensitive, that she was apprehensive that the mother of contestants would do her some injury, that such an apprehension was an unfounded and morbid delusion, such as to destroy her testamentary capacity, and that the will was the result thereof, then the jury shall find against the will."

Prejudice against Kinswoman without Cause Amounting to Monomania.—In the *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149, the following instruction was granted: "If the jury shall believe from the evidence that at the time of making the will the testatrix was laboring under a prejudice towards her daughter-in-law, Virginia Daingerfield, without cause, which was a monomania, and that the will was the direct offspring of such prejudice, then the jury must find against the will, even though the general capacity of the testatrix to do ordinary business be unimpeached, provided such monomania so affected the testatrix in the making of the will as to render her of unsound mind in that particular; but the jury are further instructed that if they believe from the evidence the testatrix had testamentary capacity at the time

of making the said will, and was not controlled by such unfounded delusion or monomania, she had the right to disinherit said Virginia Daingerfield and her children with or without cause, as it pleased her.

G. OF ECCENTRIC PERSONS.—Eccentricity has of itself no effect upon testamentary capacity. Wills of persons eccentric to the verge of insanity have been sustained. *Mercer v. Kelso*, 4 Gratt. 106. See *foot-note* appended to this case. See also, *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. Rep. 383; *Beverley v. Walden*, 20 Gratt. 147.

H. OF PERSONS IN EXTREMIS.—Where the testator is so feeble in body from disease and approaching death that his mind is not capable of grasping the nature and extent of his property, the natural, proper objects of his bounty and the nature of the act which he is about to perform, he has not sufficient capacity to make a valid will. *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. Rep. 650; *Walters v. Walters*, 89 Va. 849, 17 S. E. Rep. 515.

As bearing upon the question of testamentary capacity, the fact of the testator's illness if its nature was such as to cause him to lapse in fits of stupor or unconsciousness, may be particularly proper to be considered by the jury, with other evidence, as proof of incapacity. *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. Rep. 650; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489.

I. DEGREE OF MENTAL CAPACITY REQUIRED.

1. **GENERAL RULE.**—It is not necessary that a person should possess the highest qualities of mind in order to make a will, nor that he should have the same strength of mind he may formerly have had; the mind may be in some degree debilitated, the memory may be enfeebled, the understanding may be weak, the character may be eccentric, and he may even want capacity to transact many of the ordinary business affairs of life; it is sufficient if he have mind enough to understand the nature of the business in which he is engaged, to recollect the property which he means to dispose of, the objects of his bounty, and the manner in which he wishes to distribute it among them. *Nicholas v. Kershner*, 30 W. Va. 251; *Kerr v. Lunsford*, 81 W. Va. 659, 8 S. E. Rep. 493; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489; *Greer v. Greers*, 9 Gratt. 332; *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. Rep. 650; *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314. See also instructions in *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

Mere weakness of the understanding is no objection to a man's disposing of his own estate. Courts cannot measure people's capacities, nor examine into the wisdom and prudence of the disposition. If a man be legally *compos mentis*, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his actions. The test of legal capacity is said to be that the party is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the objects of his bounty. But, of course, the particular act must be attended with the consent of his will and understanding. *Greer v. Greers*, 9 Gratt. 332; *Samuel v. Marshall*, 3 Leigh 567; *Beverley v. Walden*, 20 Gratt. 147; *Miller v. Rutledge*, 82 Va. 863, 1 S. E. Rep. 202.

Although the grantor or testator may labor under no legal incapacity to do a valid act or make a contract, yet if the whole transaction taken together with all the facts, mental weakness being one of them, shows that the particular act was not attended with the consent of his will and understanding, it is void. *Greer v. Greers*, 9 Gratt. 330. See *C. & O. Ry. Co. v. Mosby*, 93 Va. 94, 24 S. E. Rep. 916.

2. **DEGREE OF MEMORY REQUISITE.**—The rule for

testamentary capacity does not require a perfect memory. *Montague v. Allan*, 78 Va. 592, 49 Am. Rep. 384.

In order to execute a valid will, the alleged testator must be shown to have possessed, at the time of making it, sufficient active memory to recall his family and his property, and to form some rational judgment in regard to the claims of one and the disposition of the other, with reference to the claims of family and blood. *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. Rep. 650; *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314. See *Nicholas v. Kershner*, 20 W. Va. 251; *Kerr v. Lunsford*, 81 W. Va. 659, 8 S. E. Rep. 493; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489. See also, instructions in *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

That a testator had sufficient mind to answer ordinary questions is not evidence of testamentary capacity if he did not have sufficient active memory to collect in his mind, without prompting, particulars of the business to be transacted and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other and to be able to form some rational judgment in relation to them. *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314.

It is recommended as a safe rule for subscribing witnesses to a will that the testator be made to repeat substantially the leading provisions of his will from memory, and, if a dying or sick person cannot do this without prompting or suggestion, there is reason to believe he has not a sane and disposing mind, and that no person is justified in putting his name as a subscribing witness to a will unless he knows from the testator himself that he understands what he is doing. *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314.

It is not necessary for proponents to prove that the testator actually recollected all his property, the objects of his bounty, etc.; it is sufficient if he was, at the time, mentally capable of doing so. *Kerr v. Lunsford*, 81 W. Va. 659, 8 S. E. Rep. 493.

3. CAPACITY TO MAKE CONTRACTS AND WILLS COMPARED.—It requires less mental capacity to make a will than it does to make a deed or contract. *Kerr v. Lunsford*, 81 W. Va. 659, 8 S. E. Rep. 493; *Jarrett v. Jarrett*, 11 W. Va. 584.

J. TIME WHEN CAPACITY MUST EXIST.—The time to be looked to by the jury, in determining the capacity of a testator to make a will, is the time when the will was executed. *Kerr v. Lunsford*, 81 W. Va. 659, 8 S. E. Rep. 493; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489; *Montague v. Allan*, 78 Va. 592; *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. Rep. 650. See also, *Dinges v. Branson*, 14 W. Va. 100; *Greer v. Greer*, 9 Gratt. 380.

Upon the trial of an issue *destatu vel non*, where want of mental capacity is relied on as one of the grounds for invalidating a will, the vital question is as to the testator's mental condition at the time the instrument purports to have been executed. *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489.

The West Virginia statute provides that on jury trials the court may direct special findings in addition to the general verdict: that this action of the court shall be reviewable; and also that where such special finding shall be inconsistent with the general verdict the former shall control. On a contest of a will made in April, 1881, the court was requested to submit to the jury the following questions: "(1) Was the late Lewis Lunsford in August, 1880, suffering from a disease known as *senile dementia*? (2) If so, is that disease curable? (3) Had that disease so far progressed in August, 1882, as to render him (Lewis Lunsford) imbecile

and incapable of transacting business? (4) Does a person suffering from such disease have any lucid intervals?" *Held*, that it was proper to refuse to submit these questions to the jury, as the answers to them would not show incapacity at the date of the will. *Kerr v. Lunsford*, 81 W. Va. 659, 8 S. E. Rep. 493.

K. EVIDENCE OF TESTAMENTARY CAPACITY.

1. BURDEN OF PROOF.—When a will is propounded for probate, the burden is on the propounder to prove that at the time of the execution thereof the testator was of sound mind and authorized under the statute to make a will. *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *Nicholas v. Kershner*, 20 W. Va. 251; *Riddell v. Johnson*, 26 Gratt. 152; *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. Rep. 650. See instructions in *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

Upon the question of testamentary capacity, the burden is upon the party who seeks to set up the instrument, and the proof must be clear and convincing. *Gray v. Rumrill*, 101 Va. 44, 44 S. E. Rep. 697.

The party propounding the instrument must establish the fact by competent evidence that it is truly the will of the decedent and that the alleged testator was, at the time of making and publishing it, of sound and disposing mind and memory. The burden of proof is on the propounder from the start, and is not removed or shifted by proof of the factum of the will, and of the testamentary capacity by the attesting witnesses, but rests on the propounder until the conscience of the court is judicially satisfied that the paper in question is in reality what it purports to be. *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. Rep. 650.

"The reason of the rule * * * is that the heir at law ought not to be disinherited without every requirement of the statute having been complied with. Wills are often admitted to probate in common form, no one is present except the propounder and the subscribing witnesses; and it seems to me to be a salutary rule to require proof, before the heir is to be disinherited, that not only were the forms of law observed in the execution of the will, but that the testator was authorized by statute to execute the will and was of sound mind. Wills are often made by persons in *extremis*, and it is but right that proper safeguards should be thrown around a testator under such circumstances." *JOHNSON, J.*, in *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682.

2. PRESUMPTION FROM FACT THAT WILL WAS WHOLLY WRITTEN BY TESTATOR.—The circumstance that a writing, exhibited for probate as a last will and testament was wholly written by the testator himself is *prima facie* evidence that he was in his senses and able to make a will, so that the burden of proof to repel that presumption lies on those who wish to impugn it. *Temple v. Temple*, 1 Hen. & M. 476. See *Mercer v. Kelso*, 4 Gratt. 106; *Beverly v. Walden*, 20 Gratt. 147.

3. NATURE OF WILL AS EVIDENCE OF CAPACITY.—In all questions of testamentary capacity, particularly where the evidence is conflicting, the courts are much inclined to consider the dispositions contained in the will. If such dispositions be in themselves consistent with the situation of the testator, in conformity with his affections and previous declarations—if they be such as might justly have been expected—this of itself is said to be persuasive evidence of testamentary capacity. The rationality of the act goes to show the reason of the person. *Young v. Barner*, 27 Gratt. 96; *Hartman v. Strickle*—

83 Va. 225. See *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489.

Unjust or Unreasonable Provisions.—Where a testator has the legal capacity to make a will, he has the legal right to make an unequal, unjust or unreasonable will. "*Voluntas stat pro ratione.*" *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489; *Couch v. Eastham*, 29 W. Va. 734, 3 S. E. Rep. 23. See instructions in *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

The law recognizes the sovereign right of every man to dispose of his property as to him may seem best, and when it has been disposed of by a man of sufficient mental capacity to make a will, and without any undue influence or fraud practiced upon him, no matter how unreasonable or unjust the disposition may seem to others, a sufficient answer to all objections is to be found in the fact that such is his will, and the disposition therein made conforms to his wishes. *Coffman v. Hedrick*, 32 W. Va. 119, 9 S. E. Rep. 65.

While a person is not to be regarded as of unsound mind simply because the provisions of his will may be unjust, yet if the jury, from the will and the evidence, find them to be unjust, in view of the claims his relatives may have had upon him, the jury have a right to consider this fact in connection with all the other facts and circumstances of the case in determining whether or not the testator was of unsound mind. See instructions in *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

Omission of Near Relatives from Will.—Where there is doubt as to the competency of the testator to make a will, the fact that he has given his property to persons other than those related to him in a reasonable degree by blood, is proper to be considered by the jury. *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488. See instructions in *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

Although the testator was influenced by feelings of resentment and dislike towards a part of his children and by feelings of affection and attachment towards others, and though these feelings influenced him to give his whole estate to the one part, and nothing to the others, this is not sufficient to make the will invalid. *Nicholas v. Kershner*, 20 W. Va. 251.

In order to make a valid will it is not necessary that the testator should name all his children in it, or give to each of them a portion of his estate. If he was mentally capable of understanding the disposition which he was making of his property, and acted freely, it is immaterial to whom he gives his property,—whether all to one, or some, of his children, or to strangers. If he has a disposing mind and memory, he has a right to do as he pleases with his property. *Kerr v. Lunsford*, 31 W. Va. 650, 8 S. E. Rep. 493; *Nicholas v. Kershner*, 20 W. Va. 251.

The fact that the testator excluded a grandchild from his will, on account of an erroneous suspicion that the latter had stolen a previous will, will not of itself invalidate the will from which the grandchild is excluded. *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489.

The alleged will of testator was made five days before his death, while very ill, being sometimes unconscious. The dispositions were unjust and unnatural; some of his children—an infant among them—being unprovided for, and his wife being given a pittance only. The draughtsman, who was named executor, and was the proponent, though living near testator, was not respected by him while in health. Proponent testified that he wrote the will in testator's direction, after receiving directions from him, and took it with the subscribing

witnesses (one of whom proponent suggested) to testator's house. Upon going to testator, proponent thought him dying, but afterwards discovered that it was sleep, instead of death. When he awakened, the others went out, and proponent read the will to testator loudly, asking him, at the end of each clause, if it was right, to which he assented. The witnesses were then brought in, and testator, in answer to a question from proponent, said that it was his will, and he desired the witnesses to sign it, whereupon proponent raised him up, and one of the witnesses guided his hand, and assisted him in signing, and then the witnesses signed, after which he requested proponent to keep the will. The subscribing witnesses testified that they heard the reading of the will in part, and the questions of proponent, but not testator's answers. While in the room, testator did not speak to them nor recognize them. One of them stated that, when asked if it was his will, he only nodded, and spoke but once, which was to ask for water. The witnesses and proponent were not related to testator or his family in the least. *Held* not sufficient evidence of testamentary capacity to sustain a verdict for proponent. *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. Rep. 650.

Bequest of Article Not Belonging to Testator.—The fact that a testator bequeaths, among other things, an article of property which does not belong to him, is, at most, only a circumstance from which to infer a state of mind unfavorable to the making of a testament, and ought not to prevail against positive testimony showing his competency to make a will at the time in question. *Marks v. Bryant*, 4 Hen. & M. 91.

But if the jury believe from the evidence that the testator in one or more of the provisions of the will undertook to dispose of articles of personal property not owned by him, they may take that circumstance into consideration and may, if they think proper from the evidence, infer therefrom the existence of a state of mind of the testator unfavorable to the making of a valid will. See instructions in *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

4. FORMER WILL AS EVIDENCE OF CAPACITY.—A will executed about two years before the will in issue, at which former date it is shown the testator was competent, is admissible on the question of his capacity at the time the will was executed. *Kerr v. Lunsford*, 31 W. Va. 650, 8 S. E. Rep. 493. See also, instructions in *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

5. EVIDENCE OF BUSINESS TRANSACTIONS.—Evidence of business transactions by the testator, both before and after the execution of the will, indicating his mental condition, are admissible on the question of his capacity at the time the will was executed. *Kerr v. Lunsford*, 31 W. Va. 650, 8 S. E. Rep. 493.

6. DECLARATIONS OF TESTATOR.—The declarations of a testator, made either before or after the execution of the will, are admissible in evidence, for the purpose of showing the state, condition and operations of the mind of the testator at the time of the execution of the will. *Thompson v. Updegraff*, 3 W. Va. 629; *Dinges v. Branson*, 14 W. Va. 100.

The fact that a will is in accord with the previous declarations and affections of the testator is persuasive evidence of testamentary capacity. See instructions in *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

Where the declarations of the testator were rejected because too remote from the execution of the instrument, and the record does not show the circumstances under which they were made, the ac-

tion of the court will not be disturbed on appeal. *Dinges v. Branson*, 14 W. Va. 100.

7. **ACTS AND CONDUCT OF TESTATOR.**—Evidence of the acts and conduct of the testator tending to show soundness of mind at or near the time of the execution of the will, is entitled to more weight than the opinions of witnesses based upon the erratic conduct and eccentricities of the party of whom they speak. *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488; *Temple v. Temple*, 1 Hen. & M. 476; *Mercer v. Kelso*, 4 Gratt. 106.

8. **FAILURE OF MEMORY AS EVIDENCE OF INCAPACITY.**—It is essential to the making of a valid will that the testator shall, at the time of its execution, be of disposing mind and memory. Failure of memory, if the jury find it to have existed, may be considered in connection with all the other facts and circumstances of the case in determining the testator's capacity, and should have such weight as the jury, in the exercise of their sound judgment and discretion, may think it entitled to. *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

In the *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149, the following instruction was given: "If the jury shall believe from the evidence that the testatrix, in signing her first name, spelled it one way up to October, 1895, and thereafter in signing said first name spelled it in another way, they may take that circumstance into consideration in determining the question of the impairment or loss of memory of the testatrix, and her capacity to execute the will in issue."

In the *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149, the following instruction was granted: If the jury shall believe from the evidence and the said will itself that the testatrix misnamed certain of her grandchildren, whose names had been well and familiarly known to her, they may take such fact into consideration and give it such weight as they may think proper in considering the question of the capacity of the testatrix.

9. **ADMISSIBILITY OF RECORD OF INQUIRY OF LUNACY.**—The record of an inquisition *de lunatico inquirendo* is admissible on the trial of an issue *de testavit vel non*; but it was not error to refuse to permit to be read such portion of the order of adjudication as instructed the committee appointed as to the scope of his duties. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493.

10. OPINION TESTIMONY.

a. *Opinions of Subscribing Witnesses.*—The evidence of witnesses who were present at the execution of the will is entitled to peculiar weight and especially is this the case with attesting witnesses. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493; *Nicholas v. Kershner*, 20 W. Va. 251; *Jarrett v. Jarrett*, 11 W. Va. 584.

The attesting witnesses to a will are regarded in law as placed around the testator to guard against fraud, and to ascertain and judge of his capacity, and their testimony is entitled to peculiar weight. *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

Great weight is attached to what subscribing witnesses may have to say concerning the testator's apparent mental condition, and all the circumstances surrounding the execution of the will. *Shouler on Wills*, § 178; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489.

The statement of a subscribing witness that the testator knew what he was about is not sufficient where the evidence shows that the testator did not recognize any one and was unconscious. *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314.

b. *Opinions of Physicians.*—The opinion of a witness as to the testator's mental soundness depends for

its weight on the capacity of the witness and his opportunity to judge. Physicians are considered as occupying a high grade on such questions, both because they are generally men of cultivated minds and observation, and because, from the course of their education and pursuits, they are supposed to have turned their attention more particularly to such subjects and therefore to be able to discriminate more accurately; especially a physician who has attended the patient through the disease which is supposed to have disabled his mind. *Burton v. Scott*, 3 Rand. 399; *Parramore v. Taylor*, 11 Gratt. 228; *Simmerman v. Songer*, 29 Gratt. 9; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Montague v. Allan*, 78 Va. 592, 49 Am. Rep. 384; *Shacklett v. Roller*, 97 Va. 639, 54 S. E. Rep. 492; *Jarrett v. Jarrett*, 11 W. Va. 588; *Nicholas v. Kershner*, 20 W. Va. 251; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493, 2 L. R. A. 668.

Evidence of physicians as to testamentary capacity is entitled to greater weight than that of nonprofessional persons, provided they have had personal observation and knowledge of the person whose mental capacity is in question; otherwise it is not. *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488.

Expert testimony, except under special circumstances, is entitled to only such weight as the jury may deem it entitled when viewed in connection with all the evidence and circumstances; and it is error to instruct the jury that the evidence of physicians testifying as experts only, on the trial of an issue *de testavit vel non*, is entitled to great weight. *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488.

It is error to classify witnesses in respect to the weight and value of their evidence by an instruction to the jury, unless the classification is based upon a well-defined distinction as to the opportunities and powers of the witnesses to know the truth. *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488.

The court having properly instructed the jury that the testimony of physicians, especially those who attended the testator during the time it was charged that he was of unsound mind, is entitled to great weight, it is improper to single out one witness, though he was the family physician, and instruct that his evidence is entitled to great weight. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493, 2 L. R. A. 668.

Testamentary capacity is not established by the opinion of the attending physician alone that the testator was mentally competent when he executed the will, where there are numerous facts at and before its execution tending to show the contrary and where such physician's testimony is itself inconsistent, and he states that he is in doubt as to what constitutes mental competency, and would rather state the circumstances, and such circumstances as stated by him indicate lack of a sound disposing mind and memory. *Chappell v. Trent*, 90 Va. 859, 19 S. E. Rep. 314.

The opinion of medical experts, founded on testimony already in the case, can only be given on a hypothetical case; and the hypothesis must be clearly stated, so that the jury may know with certainty upon precisely what state of assumed facts the expert bases his opinion. In putting hypothetical questions to expert witnesses, counsel may assume facts in accordance with their theory of them: it is not essential that counsel should state the facts as they exist, but the hypothesis should be based on a state of facts which the evidence in the cause tends to prove. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493, 2 L. R. A. 668.

When a medical expert is asked to give his professional opinion to a jury, not upon matters within his own knowledge, but upon a hypothetical case

founded upon the testimony of witnesses previously examined in the case, the questions to him must be so shaped as to give him no occasion to mentally draw his conclusion from the whole evidence, or a part thereof, and from these conclusions, so drawn, express his opinion, or to decide as to the weight of evidence, or the credibility of witnesses, and his answers must be such as not to involve any such conclusion so drawn, or any opinion of the expert as to the weight of the evidence, or the credibility of witnesses. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493, 2 L. R. A. 668.

Where, on the trial of an issue *deviseavit vel non*, a medical expert was permitted to answer two improper hypothetical questions, which he did, fully covering the whole case, and the court refused to permit him to answer two proper hypothetical questions which embrace no more than the two he was permitted to answer, the party who was thus deprived of having his proper hypothetical questions answered was not, and could not have been, prejudiced by the error; and for such error the appellate court will not reverse the decree and set aside the verdict. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493, 2 L. R. A. 668.

c. Opinions of Other Persons.—The opinions of witnesses long acquainted with the testatrix, as to her mental incapacity and incompetency on account of bodily infirmity and duress, are admissible as evidence in a suit to set aside the will, though they be not subscribing witnesses. *Whitelaw v. Sims*, 90 Va. 568, 19 S. E. Rep. 118; *Young v. Barner*, 27 Gratt. 103.

The opinions of witnesses not experts are entitled to little or no regard, unless they are supported by good reasons founded on facts which warrant them. If the reasons and facts upon which they are founded are frivolous, the opinions of such witnesses are worth little or nothing. *Nicholas v. Kershner*, 20 W. Va. 251; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493, 2 L. R. A. 668; *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488.

Where the mental capacity of a party to make a will, deed or other instrument is under consideration, the testimony of witnesses present at the *factum* and the written acts of the party attesting his capacity are entitled to far more weight than the opinion of witnesses based upon the erratic conduct and eccentricities of the party of whom they speak. *Beverley v. Walden*, 20 Gratt. 147; *Mercer v. Kelso*, 4 Gratt. 106; *Temple v. Temple*, 1 Hen. & M. 476; *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488.

The testimony of a tailor of whom the testator, after making the will, purchased clothes, is admissible as to his opinion of the testator's mental condition at the time. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493.

VII. WHO MAY BE DEVISEES OR LEGATEES.

It appears that property may be devised to any person who is definitely ascertained. But where the devisee is an alien enemy, or a corporation not empowered by its charter to acquire and hold lands, the lands are liable to be forfeited to the commonwealth, the devisee not being able to hold, although capable to take, and in case of a devise to one laboring under a disability, as of infancy, insanity or coverture, the devisee may disclaim, after the removal of the disability. 2 Min. Inst. (4th Ed.) 1001. See *Bryan v. Hyre*, 1 Rob. 94; *Pack v. Shanklin*, 43 W. Va. 304, 27 S. E. Rep. 389. For a discussion of the subject of who may be devisees or legatees, see monographic note on "Legacies and Devises" appended to *Early v. Early*, Gilm. 124.

Both the thing given and the person to whom it is given must, in testamentary dispositions of prop-

erty, be set forth with sufficient certainty. *Pack v. Shanklin*, 43 W. Va. 304, 27 S. E. Rep. 389.

A devise of personal and real estate to A. subject to the support of C, according to her condition in life, is not void for uncertainty as to quantity for the reason that that is certain which may be made certain. *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. Rep. 527.

A will purporting to devise a tract of land in general terms, but which contains no specific description and no fixed boundaries, is insufficient to constitute a link in the title to such devisee as against one in possession of a portion only of such tract, and claiming the same adversely. *Blakey v. Morris*, 39 Va. 717, 17 S. E. Rep. 126.

When a foreign corporation is improperly described in the will, the bequest will not fail, if it be clearly shown by proper proof what corporation was meant by the description. *University v. Tucker*, 31 W. Va. 621, 8 S. E. Rep. 410.

If a trust is created by a will, but the beneficiary is not disclosed or cannot be discovered from the will itself, the trustee holds the devise or bequest for the benefit of the heirs or distributees of the testator. *Sims v. Sims*, 94 Va. 580, 27 S. E. Rep. 486.

A devise to two trustees, or to "the survivor of them or to whomsoever they may select in case of their death, in trust for the benefit of the New Jerusalem Church (Swedenborgian) as they shall deem best," is too vague and indefinite to be enforced by a court of equity, and is therefore void. There is nothing either in the will, or in the extrinsic evidence, which shows that the claimant corporation, "The General Convention of the New Jerusalem in United States of America," was intended to be either the beneficiary, or the agency by which it was to be administered. *Fifield v. Van Wyck*, 94 Va. 557, 27 S. E. Rep. 446. See monographic note on "Charities" appended to *Kelly v. Love*, 20 Gratt. 124; "Church Property" appended to *Brooke v. Shacklett*, 13 Gratt. 301.

A devise to a married woman, since May 1, 1888, for her sole and separate use, restraining her power to alien and encumber, creates in the devisee an equitable separate estate; and her powers over the estate are measured and controlled by the provisions of the will. *Dezendorf v. Humphreys*, 95 Va. 478, 26 S. E. Rep. 880, 3 Va. Law Reg. 793.

VIII. WHAT MAY BE DEVISED OR BEQUEATHED.

Present Statutory Provision.—A competent testator may by his will dispose of any estate to which he may be entitled at his death, and which, if not so disposed of, would devolve upon his heirs, personal representatives, or next of kin. This power, under the present statutes in Virginia and West Virginia, extends to any estate, right or interest to which the testator may be entitled at his death, notwithstanding he may become so entitled subsequently to the execution of the will. Va. Code 1887, § 512; W. Va. Code 1887, § 2512; W. Va. Code 1899, ch. 771, § 1, p. 705; 2 Min. Inst. (4th Ed.) 1001.

Future and Contingent Interests—Possibility of Reverter.—It by no means follows that because an estate is contingent, it is nontransmissible; for many contingent executory interests are transmissible by descent, and, if so, they are alienable by will. The criterion by which to determine whether an estate is devisable is, is it descendible. *Carney v. Kain*, 40 W. Va. 758, 23 S. E. Rep. 650. See *Underhill on Wills*, § 47; 2 Min. Inst. (4th Ed.) 421.

Where a testator devises land in fee in trust for persons who are unborn, the possibility of a resulting trust exists in favor of his heirs until such persons are born. The same principle is applicable where the trust created is invalid, or there remains

a surplus after the trust is executed. And this possibility of a resulting trust in favor of the heirs of the testator, being coupled with an interest, is descendible and also devisable by the heirs by a will going into effect after the death of the testator, but not during his lifetime. Underhill on Wills, § 49, citing Carney v. Kain, 40 W. Va. 758, 23 S. E. Rep. 650. In support of the proposition that a resulting trust contingent upon the failure of issue of certain specified persons is devisable, see Page on Wills, § 145, citing Carney v. Kain, *supra*.

A mere possibility of reverter is devisable and passes under a general or residuary devise of the estate of the grantor. Underhill on Wills, § 47, citing Watts v. Cole, 2 Leigh 653.

Slaves to Which Wife Is Entitled in Remainder or Reversion.—A husband dying in the lifetime of his wife has no right to bequeath away slaves, to which she is entitled in remainder or reversion, the particular estate not having expired. Upshaw v. Upshaw, 2 Hen. & M. 381; Taylor v. Yarbrough, 13 Gratt. 183.

In such case, however, if the husband does bequeath such slaves away from the wife, and devises other property to her for life with remainder over to other persons in fee simple, and she takes possession of the estate devised to her by him, holds it for many years, and then disposes of part of it to those entitled in remainder, in consideration of their enlarging her interest in the residue to a fee simple; she thereby makes her election to accept the provision made for her in the will, and precludes herself from holding the slaves also. The circumstances together with her taking possession of the slaves, being sufficient evidence of her having such knowledge of the two funds as is requisite to make such election obligatory. Upshaw v. Upshaw, 2 Hen. & M. 381.

Wife's Chattels Real.—A husband cannot dispose of his wife's chattels real by will. Such a disposition will not prevail against her right by survivorship, for, as this takes effect immediately upon his death, it takes precedence of the bequest in the will, which cannot take effect until after his death. Harcum v. Hudnall, 14 Gratt. 384. See Henry v. Graves, 16 Gratt. 244.

Right to Custody of Child.—A mother cannot, by will, dispose of or defeat the natural right which the father enjoys to the custody of their child, and the duty which nature imposes upon him to rear and support it, but where such disposition has been made by the mother, and acquiesced in for years by the father, and the affections of the child and the person into whose custody it has been committed have been mutually engaged, and the child is well cared for, the father cannot reclaim possession unless he can show that the change of custody will be materially to the interest of the infant. He might have asserted his right as father to the custody of his child on the death of his wife, but not after such lapse of time and acquiescence on his part. Stringfellow v. Somerville, 95 Va. 701, 29 S. E. Rep. 685, 40 L. R. A. 623.

Income from Trust Fund.—Where a testator devised a certain share of his estate to his son and wife for a home for their family, to be divided among their descendants at the death of the last survivor, a daughter of such son, though taking a vested remainder on the testator's death, could not pass by will any interest in the income accruing on the trust fund; her mother still living at the time of such daughter's decease. Neilson v. Brett, 99 Va. 673, 40 S. E. Rep. 32.

Lands Held Adversely.—A mere right of entry is devisable in Virginia. Actual possession or seizin of the land is not now required to be in the testator; and he may devise real property of which he is dis-

seised at the date of his death, and his devisee may bring ejectment to recover possession. Underhill on Wills, § 46, citing Watts v. Cole, 2 Leigh 653; Hyer v. Shobe, 2 Munf. 200. In support of the proposition that a testator may now devise all the interest that he possesses in land of which he is disseised, see also, Page on Wills, § 144, citing Watts v. Cole, 2 Leigh 653.

But the rule, in the absence of statute, according to the early cases following the English rule, was that land of which the testator was disseised could not be devised, except to that person by name who held adversely, in which case the devise to him operated as a release. Underhill on Wills, § 46, citing Watts v. Cole, 2 Leigh 653.

Hence a testator who died before the statute of 1785 took effect, could not devise a tract of land of which he was actually disseised when he made his will and at the time of his death. Davis v. Martin, 8 Munf. 285.

And if A be tenant of the freehold and B tortiously enter upon and turn the sub-tenant of A out of possession, claiming the land as his absolute property; and he, or those claiming under him, continue to hold the same by actual adverse possession until the death of A, this is an actual disseisin of A, so that (in such a case before the statute of 1785) he could not, for the purpose of being enabled to devise the land, elect to consider himself as not disseised. Davis v. Martin, 8 Munf. 285.

Personalty Not in Testator's Possession.—The owner of a specific article of personal property may bequeath it by his will, although he may be out of possession at the time of his death. The property will pass by the will as in other cases, on the executor's giving his assent; which assent is only a perfecting act, for the security of the executor. The assent being once given, the legatee is the complete owner and may sue in his own name, upon the same principle as if he were a devisee of lands of which the testator was out of possession at the time of his death. Smith v. Townes, 4 Munf. 191.

After-Acquired Realty—Common-Law Rule.—In devises of realty it was settled, at common law, that a will could operate only upon the land owned by the testator at the time he executed the will, and that after-acquired property could not pass. 2 Min. Inst. (4th Ed.) 1001; Raines v. Barker, 13 Gratt. 128.

Same—Early Statute.—By the Virginia statute of 1785 it was provided, "that every person * * * shall have power * * * to devise all the estate * * * which he hath, or at the time of his death shall have, of, in, or to lands," etc. But the courts held that this act only gave a power to devise after-acquired lands, leaving it to the discretion of the testator to dispose of them or not; that in order to produce that effect there should be something indicating an intention to exercise the power, and that where there was nothing in the language of the will to show that the testator evidently contemplated a disposition of his after-acquired lands, a devise of his lands should be held to refer to the lands owned by him at the date of the will. Allen v. Harrison, 3 Call 289; Raines v. Barker, 13 Gratt. 128, 67 Am. Dec. 763; Gibson v. Carrell, 13 Gratt. 136. See also, Turpin v. Turpin, 1 Wash. 75; Davies v. Miller, 1 Call 127.

After-acquired lands are not within the clause "with every article of property belonging to me, excepting the wearing apparel," annexed to a direction in a will, under the Virginia statute of 1785, to sell certain specific tracts of land and shares of stock, "with all my household and kitchen furniture, all of my stocks of all kinds, plantation tools and implements." Raines v. Barker, 13 Gratt. 128, 67 Am. Dec. 762.

After-acquired lands do not pass by the words

"balance of my estate," in a will under the Virginia statute of 1785. *Raines v. Barker*, 13 Gratt. 128, 67 Am. Dec. 762.

After-acquired lands do not pass by the words "all the balance of my property of every description, real and personal," in a will under the Virginia statute of 1785. *Gibson v. Carrell*, 13 Gratt. 136.

In 1789 a testator devised certain lands which he had possession of, but did not own. He afterwards acquired the land. *Held*, that the devise was valid under the statute of 1785. *Turpin v. Turpin*, Wythe 187.

The addition of a codicil to a will is not sufficient to operate as a devise of lands purchased by the testator between the date of the will and the date of the codicil; there being no words in the codicil indicating such to be the intention of the testator. *Kendall v. Kendall*, 5 Munf. 272.

Same—Present Statute.—Under the present statute, any estate, right or interest is devisable to which the testator may be entitled at his death, notwithstanding he may become so entitled subsequently to the execution of the will, a will being declared by statute, with reference to the real as well as the personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. Va. Code 1887, §2512; W. Va. Code 1899, ch. 771, §1, p. 705; 2 Min. Inst. (4th Ed.) 1001.

Where a testator bequeathes and devises all of his property, both real and personal, after the death of his widow, to his children, and at the time of the making of the will he owns certain real estate but before his death acquires additional land, the after-acquired real estate passes to the devisees. *Dearing v. Selvey*, 50 W. Va. 4, 40 S. E. Rep. 478.

Same—Present Statute Not Applicable to Will Not Previously Made.—The Virginia statute of 1849 (now Va. Code 1887, §2512) does not apply to a will previously made, so as to determine its validity or effect, though the testator died after that statute was enacted, such wills being expressly excepted from its operation. *Raines v. Barker*, 13 Gratt. 128, 67 Am. Dec. 762.

After-Acquired Personality.—A will of personality was always understood at common law to speak as of the death of the testator, and therefore even at common law personal property might be disposed of by a will executed before the testator became the owner thereof. *Allen v. Harrison*, 8 Call 289; *Turpin v. Turpin*, Wythe 187; *Raines v. Barker*, 13 Gratt. 128, 67 Am. Dec. 762.

It is a well-established rule of the common law that while no remainder can be limited after a limitation in fee, yet two contingent fees, by way of remainder, may be limited as substitutes or alternatives, one for the other, the latter to take effect in case the prior one should fail to vest in interest, and is immediately avoided if the first does vest in interest. *Walker v. Lewis*, 90 Va. 578, 19 S. E. Rep. 258; 1 Lom. Dig. 417; 2 Min. Inst. (4th Ed.) 395; *Cooper v. Hepburn*, 15 Gratt. 551, 559.

IX. UNDUE INFLUENCE AND MISTAKE.

A. WHAT CONSTITUTES UNDUE INFLUENCE.

—Undue influence is any means employed upon and with the testator which, under the circumstances and conditions by which the testator was surrounded, he could not well resist, and which controlled his volition and induced him to do what otherwise he would not have done. *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314.

The influence to vitiate a will must amount to force and coercion, destroying free agency. It

must not be the influence of affection and attachment. It must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act. Moreover, there must be proof that the act was obtained by this coercion, by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear. *Jarman on Wills*, 29; *Parramore v. Taylor*, 11 Gratt. 220; *Simmerman v. Songer*, 29 Gratt. 24; *Hartman v. Strickler*, 82 Va. 225; *Carter v. Carter*, 82 Va. 641; *Orr v. Pennington*, 93 Va. 273, 24 S. E. Rep. 928; *Forney v. Ferrell*, 4 W. Va. 729. See *Davis v. Strange*, 86 Va. 793, 11 S. E. Rep. 406, 8 L. R. A. 261.

To make a good will a man must be a free agent, but all influences are not unlawful; appeals to the affections or ties of kindred, to gratitude for past services, or pity for future destitution, or the like, are all legitimate, and may be fairly urged on a testator. On the other hand, pressure of whatever character, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity which the testator has not the will or strength to resist, and to which he yields for peace and quiet, if carried to a degree in which the testator's judgment, discretion, or wish is overborne, will constitute undue influence, though no force is used or threatened. In other words, his will must be the offspring of his own volition, and not the record of the wishes and desires of some one else; and in considering whether the testator's free volition had been overborne or controlled, the jury must consider his age, his physical and mental condition, and all the circumstances surrounding the testator. *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314. See *Instructions in Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

If the provisions of the will were induced by the extreme kindness and attention to the testator on the part of the principal devisees, that will not constitute undue influence which will invalidate the will. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493.

A competent testator may give his property to whom he pleases, and the kindness and attention of those who are recipients of his bounty, however extreme that kindness and attention may have been, cannot be regarded as "undue influence" exerted upon the testator. It would show a greater reason for making such a will. It is natural that a father should prefer a kind and attentive child to one who was unkind, thankless and ungrateful. *Nicholas v. Kershner*, 20 W. Va. 257. See *Forney v. Ferrell*, 4 W. Va. 742; *Parramore v. Taylor*, 11 Gratt. 220; *Simmerman v. Songer*, 29 Gratt. 24.

Persuasion, entreaty and urgency may lawfully be carried far, so long as the will remains supreme. *Hartman v. Strickler*, 82 Va. 225.

The question as to what is undue influence, such as to overcome the will or control the judgment of a testator, largely depends upon the circumstances of each case, the chief of which are the dispositions contained in the will, the situation of the testator, and his mental and physical condition at the time the will is made. And the better opinion seems to be that whenever influence is successfully employed to induce a testator to make a grossly unequal disposition of his property, or disregard the ties of blood without sufficient cause, it should be viewed as illegitimate, and may be treated as undue. On the other hand, where the provisions of the will accord with the affections and previous declarations of the tes-

tator, and are such as might have been justly expected, that is persuasive evidence both of testamentary capacity and freedom of action. *Hartman v. Strickler*, 83 Va. 226; *Walters v. Walters*, 80 Va. 849, 17 S. E. Rep. 515; *Dalingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

It is not essential to the application of the principle, that unsoundness of mind on the part of the testator should be shown; and the question is not whether the testator knew what he was doing, but how the intention was produced; and if it appears that it arose from the controlling influence of force, imposition, or fraud, that is sufficient ground for setting aside a will. *Hartman v. Strickler*, 83 Va. 225.

In *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314, it was held that, under the peculiar circumstances of the case, an instruction that the influence to vitiate a will must amount to force and coercion destroying free agency, and not the mere influence of affection and attachment nor the mere desire of gratifying another's wishes, was misleading as being calculated to impress the jury that only physical force or threats of personal violence would be sufficient to vitiate a will.

Amount Varies with Weakness or Strength of Testator's Mind.—The amount of undue influence sufficient to invalidate a will may vary with the strength or weakness of mind of the person making it. The influence which would not subdue or control a mind unimpaired by age, disease, or other cause, might subdue or control a mind thus impaired, even though the mind had not become so impaired as to render the person incapable of a testamentary act, free from such undue influence. *Dalingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

Jury to Consider All Surrounding Facts and Circumstances.—The jury, in determining whether there was undue influence, should consider the age and physical and mental condition of the testator, all the circumstances by which he was surrounded including the condition, character, and conduct of the persons around him, his family relations, the extent and nature of his estate, and the dispositions of the will. *Dalingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149; *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314.

B. CIRCUMSTANCES TENDING TO SHOW UNDUPLICATE INFLUENCE.

1. PHYSICAL CONDITION OF TESTATOR.—Evidence of the fact that when he executed the will the testator was seriously ill, and that he was very feeble physically as the result of old age, in connection with other facts, as, for example, that the will was drawn up by the principal legatee under it, may justify a finding that it was procured by undue influence. *Walters v. Walters*, 80 Va. 849, 17 S. E. Rep. 515.

A will will be set aside as having been obtained by undue influence where, at the time of its execution, the testator was weak, feeble, and nearly unconscious, and it was less the will of the testator than of the attending physician who drew it, and urged its execution, and who wholly omitted his duty of testing testator's mental capacity before taking part in procuring its execution. *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314.

When an old man, eighty-five years old, of greatly impaired health and enfeebled mind, away from his next of kin, and in the custody of persons of no kin, is induced to make a will, giving to such persons his entire estate, the law requires that such persons shall clearly prove that the will was the free and voluntary act of the testator, and an intelligent expression of his wishes respecting the disposition

of his property. *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314.

Even though the jury may believe from the evidence that the testatrix was mentally capable of making a will, yet in determining whether the will in question was procured by undue influence, the jury must consider any evidence showing, or tending to show, that at the time of the execution of the will her faculties had become so weakened by age, disease, or other cause, or so perverted by morbid and unreasonable prejudice, as to render her more subject to undue influence than she would otherwise have been. *Instruction in Dalingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

2. FACT THAT WILL WAS WRITTEN BY BENEFICIARY.—A will is not invalidated by the mere fact that it was written by the attorney, agent, physician, priest or other confidential adviser of the testator, who is himself a beneficiary, though such relations between the testator and beneficiary, coupled with the fact that the beneficiary wrote the will, "certainly engender suspicion and arouse the vigilance of the court and jury, and if unexplained or repelled, they would annul the transaction." *Montague v. Allan*, 78 Va. 592.

If a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument; in favor of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased. *Riddell v. Johnson*, 26 Gratt. 152.

While the fact that the draftsman of a will takes a benefit under it, imposes upon the court the duty of a careful scrutiny, it does not invalidate the will. *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650.

An unmarried man with a large property, having a large amount in bonds, employed, for the purpose of preparing his will, an attorney who had been his counsel for years, in whom he had great confidence, and for whom he had a strong regard. By his will he gave most of his estate to his illegitimate children. He did not then dispose of his bonds, which were in the attorney's hands for collection. Some months afterwards he sent for the attorney to write a codicil to his will, and after some provisions as to real estate among the same parties, and providing for the payment of his debts and expenses of administration, and any orders he might draw upon the attorney in his lifetime out of the collections from the bonds, he gave whatever remained of the bonds in the attorney's hands at his death to the attorney absolutely. The testator had a number of next of kin, and among them two sisters, but to none of them did he leave anything. It was proved that the testator was entirely competent to make a will; that he dictated the bequest in favor of the attorney without any suggestion from the attorney or any other person and repeated it; that it was read to him, and he clearly understood it and intended it as it was written. It appeared further that he had been on bad terms with his family for years and had more than once expressed his determination that none of them should have any of his estate. *Held*, that the bequest to the attorney was valid. *Riddell v. Johnson*, 26 Gratt. 152.

3. FACT THAT WILL IS IN FAVOR OF THOSE HAVING CONTROLLING INFLUENCE OVER TESTATOR.—There are few things in which mankind more generally agree, than in the wish that their property should devolve after death on their descendants, and

where a will which runs counter to this sentiment is made in favor of one who is so placed as to have a controlling power over the testator's mind, it is not unreasonable to require him to show that he did not bring about a result that would not have ensued in the normal course of events. *Hartman v. Strickler*, 82 Va. 225.

The fact that at the time of the execution of the will the testator was under the actual physical control of the beneficiaries and that the natural objects of the testator's bounty were excluded from the testator's presence is admissible in evidence and usually of great weight. Evidence of such conduct is said to raise a presumption of undue influence. *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314.

Where the will of an aged person differs from his previously expressed intention, and is made in favor of those who stand in relations of confidence or dependence towards him, it raises a violent presumption of fraud and undue influence which should be overcome by satisfactory evidence before the will is admitted to probate. *Hartman v. Strickler*, 82 Va. 225; *Whitelaw v. Sims*, 90 Va. 588, 19 S. E. Rep. 113.

By his will, made the night before his death, a testator devised his three farms to two of his four children for life, remainder to the infant children of one of the two with whom he lived, disinheriting his two other children—an afflicted son and daughter, with eight helpless children, who had always lived wholly on his bounty. A suit was brought to set aside the will on the ground of fraud. The attesting witnesses testified that the testator did not ask them to sign the will; that they did so at the request of one of the devisees, and that they did not believe that the testator saw them sign it, or was competent to make a will. It was also in evidence that the son with whom the testator lived had complete control over him, and could make him do almost anything he wished. *Held*, that the will should be set aside. *Walters v. Walters*, 89 Va. 849, 17 S. E. Rep. 515. See *Hartman v. Strickler*, 82 Va. 225.

4. **UNNATURAL PROVISIONS OF WILL**.—Where a testator has the legal capacity to make a will, he may dispose of his property as he pleases *voluntas stat pro ratione*. The mere fact that the provisions of the will are unequal, unjust or unreasonable, does not show undue influence. *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489; *Couch v. Eastham*, 29 W. Va. 784, 8 S. E. Rep. 23; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493.

It is no valid objection to carrying out the obvious intention of the testator, if it be not illegal or against good morals, that it is strange, unnatural, or absurd. *Bell v. Humphrey*, 8 W. Va. 1.

Although the testator may, perhaps, have been influenced by feelings of resentment or dislike to one or more of his children, and by feelings of affection and attachment towards others, and though these feelings may have influenced him to give his whole estate to the one part, and little or nothing to the others, this is not sufficient to make the will invalid. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493; *Nicholas v. Kershner*, 20 W. Va. 251; *Jarrett v. Jarrett*, 11 W. Va. 584.

Where a party is shown to have mental capacity sufficient to make a will, in the absence of fraud or undue influence, the validity of the will cannot be impeached, however unreasonable or unaccountable it may seem to others. *Coffman v. Hedrick*, 32 W. Va. 119, 9 S. E. Rep. 65.

Merely discrimination between next of kin of the same degree, or the entire exclusion of a part or all of them, does not of itself, and standing alone, authorize an inference that such discrimination was

the result of undue influence. *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

A testator who was eighty-five years old died about a month after the will was made. He left two children, a married daughter and a son with whom he lived. The evidence showed that the testator was in evident fear of and subjection to his son; that the son prevented him from visiting his married daughter, who lived in the neighborhood, and threatened him with personal chastisement; that the testator had often expressed the intention of leaving no will; and that the son, in whose favor the will was made, had said that he intended to have all of the testator's property. *Held*, that the will was properly set aside for undue influence. *Hartman v. Strickler*, 82 Va. 225. See *Walters v. Walters*, 89 Va. 849, 17 S. E. Rep. 515.

C. **DECLARATIONS OF TESTATOR AS EVIDENCE OF UNDUE INFLUENCE**.—The declarations of testator are admissible in evidence for the purpose of showing that undue influence was exerted over him at the time of the execution of the will. *Dinges v. Branson*, 14 W. Va. 100; *Thompson v. Updegraff*, 3 W. Va. 639.

The testator's known wishes and previous declarations are admissible on an issue of fraud or undue influence as tending to show knowledge of the contents of the instrument. *Montague v. Allan*, 75 Va. 593, 49 Am. Rep. 384.

It is proper to admit to go in evidence to the jury, a conversation in the presence of the testator, and other conversations of the testator, as to what he would do, at the time of his decease, with property devised by him. *Forney v. Ferrell*, 4 W. Va. 729.

It is proper for the jury to consider whether the will offered for probate, and alleged to be caused by undue influence, is consistent with the previous intentions of the testator or not. *Whitelaw v. Sims*, 90 Va. 588, 19 S. E. Rep. 113.

Where the will of an aged person differs from his previously expressed intention, and is made in favor of those who stand in relations of confidence or dependence towards him, it raises a violent presumption of fraud and undue influence, which should be overcome by satisfactory evidence before the will is admitted to probate. *Hartman v. Strickler*, 82 Va. 225; *Whitelaw v. Sims*, 90 Va. 588, 19 S. E. Rep. 113.

In the *Daingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149, the following instruction was granted: "The court instructs the jury that the declaration contained in the will of Eliza R. Daingerfield, deceased, that the contestants, the widow and children of her son Henry, who do not participate equally with the widow and children of her other deceased son, Reverdy J., in the disposition of her estate thereunder; that the said widow and children of her son Henry are comfortably provided for, must have great weight with them in determining that her will was her free and voluntary act, and not procured by undue influence, provided that they believe from the evidence that they are so comfortably provided for, and that the said Eliza R. Daingerfield, at the time of her executing said will, had sufficient testamentary capacity." In support of this instruction, the court cites *Greer v. Greers*, 9 Gratt. 330; *Riddell v. Johnson*, 26 Gratt. 155.

D. **BURDEN OF PROVING UNDUE INFLUENCE**.—The burden of proof of fraud or undue influence exercised to induce a testator to execute a will is upon the party alleging it; that is, upon the contestant. It is not upon the propounder of the will. *McMechen v. McMechen*, 17 W. Va. 701; *Coffman v. Hedrick*, 32 W. Va. 119, 9 S. E. Rep. 65. See *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 314.

While the burden is on the propounder of the

will to prove that the will was duly executed according to the requirements of the statute, and that at the time of the execution thereof the testator was of sound mind and authorized under the statute to make a will. It does not follow that the burden is on him to prove that the will was executed by a free testator. "The very reason which places the burden on the propounder to show that the will was executed by a competent testator, excludes the idea that it is on him to show that it was the will of a free testator. The only reason, why the burden is on him in the one case, is, that the statute requires certain prerequisites to a valid will, which must be shown *prima facie* by the propounder of the will; that the testator was free when he executed the will is not among them. Of course the common law, before it would hold the heir bound by the will, would require that the will, like any other instrument, should not have been procured by unfair means. But the common law presumes that all men are honest and demean themselves properly, until the contrary appears, and therefore he, who would allege that a will or other instrument was procured by fraud or other unfair means, must prove it; the burden is on him to show it." *McMechen v. McMechen*, 17 W. Va. 688, 41 Am. Rep. 682. See *contra*, *Riddell v. Johnson*, 26 Gratt. 152.

Upon the trial of an issue of *deviseavit vel non*, undue influence, in order to overthrow the will, must not only be alleged, but must be proved by the contestants, it will not be inferred. *Coffman v. Hedrick*, 83 W. Va. 119, 9 S. E. Rep. 65.

Where a man eighty-five years of age, feeble in body and mind, and away from his kin, makes a will giving all his property to others than relatives, the burden is on the beneficiaries to show that the will was the voluntary act of the testator, and an intelligent expression of his wishes. *Chappell v. Trent*, 90 Va. 849, 19 S. E. Rep. 814.

In the *Dalingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149, the following instruction was given: The court further instructs the jury that undue influence (which is a species of fraud) must not be presumed, but must be clearly and distinctly proved, and the burden of proving it rests upon him who alleges it; but if undue influence is proved by evidence, the burden of repelling such undue influence by evidence is on the plaintiffs in this case; in other words, the burden of proof in this case lies on the plaintiffs to satisfy the jury by evidence that the instrument propounded is the last will of a free and capable testatrix. In support of this instruction the court cites *Riddell v. Johnson*, 26 Gratt. 152; *Hartman v. Strickler*, 83 Va. 236.

E. TIME TO WHICH QUESTION RELATES.—Upon the trial of an issue of *deviseavit vel non*, where want of mental capacity is relied on as one of the grounds for invalidating a will, the vital question is as to the testator's mental condition at the time the instrument purports to have been executed. *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489; *Forney v. Ferrell*, 4 W. Va. 729.

If undue influence be proved to have been exercised over the testator, both before and after the execution of the will, the facts may be given in evidence to the jury, from which they may infer, if they see proper, that undue influence was exercised over the testator at the time the will was made. *Forney v. Ferrell*, 4 W. Va. 729.

It is not necessary to show that undue influence was exercised at the very time the will was executed. It is sufficient that the will was executed afterwards, under the control of such influence. *Hartman v. Strickler*, 83 Va. 236; *Dalingerfield Will Case* (Cir. Ct. Alexandria), 5 Va. Law Reg. 149.

If a testator makes a disposition of his estate which he did not desire and did not intend, and such disposition was made by reason of the undue influence exerted upon him, and operating at the time of making the same, it is such undue influence as will avoid the will, notwithstanding the testator was not controlled by any act of force, coercion, or persuasion put forth at the time of signing the paper; for the freedom of the will is effectually overcome, and the act obviously more the offspring of another's will, than of the testator. *Forney v. Ferrell*, 4 W. Va. 729.

F. MISTAKE.—A mistake which will avail to set aside a will is a mistake as to what it contains, or as to the paper itself, not a mistake either of law or fact in the mind of the testator as to the effect of what he actually and intentionally did. *Couch v. Eastham*, 37 W. Va. 796; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489.

A mistake in an inducement exists where the testator is mistaken as to the facts which cause him to draw up and execute the will that he does, where he intends to execute the very instrument that he does, but where he would not execute such a will with a full knowledge of the facts. The rule upon this subject is, that a will is valid, even though made by reason of mistake of fact. Page on Wills, 141; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489.

Although a testator, in making his will, is prompted by a mistaken apprehension of fact to make an alteration in his will, and excludes thereby a grandchild from participating in his bounty, such mistake will not invalidate the will, if made by a competent testator, and legal in other respects. *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489.

Equity has jurisdiction of an issue *deviseavit vel non* to set aside a will, on the ground that it was executed by mistake and therefore is not the true will of the testator. *Couch v. Eastham*, 37 W. Va. 796.

Declarations of Testator as Evidence of Mistake.—Upon the trial of an issue *deviseavit vel non* to set aside a will for mistake of the testator in executing it, declarations of the testator made before and after the execution of the will are inadmissible to prove the mistake. *Couch v. Eastham*, 37 W. Va. 796.

X. REVOCATION OF WILLS.

A. DEFINITION OF REVOCATION.—"By revocation is meant the destruction of the operative force of the will, either in part or entirely, by some extrinsic act in regard to it, or by making and publishing a later instrument in the nature of a will *animo revocandi*, or by operation of law from the testator's marriage and birth of issue, or the alteration of his estate." 20 Am. & Eng. Enc. Law (1st Ed.) 266. See *Underhill on Wills*, § 221.

B. REVOCATION BY CUTTING, TEARING, BURNING, ETC.—It is provided by statute in Virginia and West Virginia that a will may be revoked "by the testator, or some person in his presence and by his direction, cutting, tearing, burning, obliterating, cancelling, or destroying the same, or the signature thereto, with the intent to revoke." Va. Code 1887, § 2518; W. Va. Code 1899, ch. 77, § 7, p. 706. See article on "Revocation of a Will by Cancelling," 7 Va. Law Reg. 455.

The mere intention of the testator to revoke a valid will, without the performance of any of the acts required by the statute, is not a revocation. Nor will the performance of one or more of the acts required by the statute alone constitute a revocation. But at least one of the acts specified, however slight it may be, must be done with the intent to revoke. The act and the intent must coincide. For, as Mr. Jarman says, "the mere physical act of destruction is equivocal, and may be deprived of all re-

voking efficacy by explanatory evidence, indicating the *animus revocandi* to be wanting. The act of destruction is of uncertain meaning until it is shown that it was accompanied by the intention that it should be a revocation." Jarman on Wills, ch. 7, § 11, p. 180; Underhill on Wills, p. 808; 3 Min. Inst. (4th Ed.) 1024; Boyd v. Cook, 3 Leigh 32.

The revocation of a will requires the concurrence of an intent to revoke and of some act of destruction or cancellation of the will. A mere intent to revoke, evidenced by the parol declarations of the deceased, is not sufficient. *Malone v. Hobbs*, 1 Rob. 346, 39 Am. Dec. 263.

On the other hand if any of the acts specified in the statute, however slight they may have been, are accompanied by the intent to revoke; and the testator, with that intent, has done all he designed to do, in pursuance of his purpose, the revocation is thereby accomplished; but not if he abandons his purpose before he completes the act which he designed. 2 Min. Inst. (4th Ed.) 1024.

Mere Direction to Destroy Not Revocation.—Although a testator has directed his will to be destroyed, and believes that it has been destroyed as requested, yet if it be not in fact destroyed, such direction and belief will not operate as a revocation of the will, even in relation to the personal estate. *Malone v. Hobbs*, 1 Rob. 346, 39 Am. Dec. 263; *Dower v. Seeds*, 28 W. Va. 137.

In a note in 29 Am. & Eng. Enc. Law (1st Ed.) p. 273, it is said: "The fact that the testator was deceived into believing that the will was destroyed, as required by the statute to work a revocation, will not revoke it if such was not the case. *Clingan v. Mitcheltree*, 81 Pa. St. 26; *Boyd v. Cook*, 3 Leigh 32; *Malone v. Hobbs*, 1 Rob. 366; *Hise v. Fincher*, 10 Ired. (N. Car.) 189."

Thus, where a blind testator orders a will made by him to be destroyed, and believes it is destroyed accordingly, but it is not destroyed, and no act towards destruction done, this is not a revocation by destruction or cancellation, within the statute, 1 Rev. Code, ch. 104, § 3. At least, a court of probate cannot consider this as amounting to a revocation. *Boyd v. Cook*, 3 Leigh 32.

And, where a testator destroys a codicil and directs a will in another person's custody to be also destroyed but no act is done towards its destruction, such direction is not a revocation of the will. *Malone v. Hobbs*, 1 Rob. 346, 39 Am. Dec. 263.

Destruction of Codicil No Revocation of Will Kept in Different Place.—The cancellation or destruction of a will, to operate as a revocation thereof, must be directed against the will as a whole. The destruction of a codicil cannot operate as a revocation of the will, though this was declared by the testator to be his intention, where the codicil and the will are on detached papers, and where, because of being in different places, the destruction of the codicil cannot be intended as a destruction of the will. *Malone v. Hobbs*, 1 Rob. 346, 39 Am. Dec. 263.

Cancellation of Will Not Necessarily Revocation of Postscript to Will.—A testator annexed a postscript to a second will, by which he "revoked all former wills." He afterwards cancelled the second will by cutting his name out from the body of it, but leaving the postscript with his name subjoined to it. *Held*, that the cancellation of the second will was not a cancellation of the postscript so as to set up the first will as the will of the testator. *Bates v. Holman*, 3 Hen. & M. 502.

Erasures and Interlineations.—A testator wishing to make a new will, gave verbal instructions, which were committed to writing by a friend. He afterwards drew up a memorandum, in his own handwriting but not signed, which he gave to the same

friend, together with the original will, for the purpose of drawing a new will from the two. The new will was prepared and approved by the testator, but the signing of it was postponed until the testator could execute a release of a mortgage. Before the release could be executed, the testator went into a state of delirium, and so continued until he died, without having executed the release or the new will. The memorandum in the handwriting of the testator was, under the law then in force, established as a good codicil to pass personal estate. In this case, the testator having drawn his pen through certain words in the memorandum, leaving them still legible, and the writer of the draught of the new will having inserted therein, in the presence of the testator and with his assent, certain other words (mere expletives) which were erased by him after the testator's death, these erasures and interlineations were held not to vitiate the instrument. *Cogbill v. Cogbill*, 2 Hen. & M. 467.

Destruction Must Be by Testator or in His Presence.—A few days before his death a testator handed a will to his wife directing her to burn it as he had executed another will. The wife accordingly burned the will, but not in the presence of the testator, and, it appeared from the evidence, not until after his death. *Held*, that this was not a revocation by burning, as the will was not, in the language of the statute, "by the testator or some person in his presence and by his direction burned with intent to revoke." *Dower v. Seeds*, 28 W. Va. 113.

C. REVOCATION BY SUBSEQUENT WILL OR CODICIL OR WRITING DECLARING INTENTION TO REVOKE.—By statute in Virginia and West Virginia a will may be revoked "by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed." Va. Code 1887, § 2518; W. Va. Code 1899, ch. 77, § 7, p. 706. See 3 Min. Inst. (4th Ed.) 1023. Prior to the statute, a testament or will of personal property could be revoked by a writing not signed by the testator or subscribed by any witnesses. *Glasscock v. Smither*, 1 Call 476; *Dower v. Seeds*, 28 W. Va. 113.

There are two modes of written revocation contemplated by the statute, "one by a will or codicil in writing, the other by a declaration in writing. For the sake of distinction, the first may be called a testamentary revocation, and the last a declaratory revocation. It is true, the declaratory revocation may assume the shape of a last will and testament; for that is a mere matter of form, if the paper be not also testamentary in its nature. The distinction between the two modes of revocation is not formal, but essential. In the testamentary revocation, the testator contemplates a new disposition of his property, and the revocation may be implied from inconsistency in the provisions of the two instruments, in which case it is a matter of comparison and construction; or it may be express, in order that the testator may do his new testamentary work without being in any wise fettered by the contents of his former will. The declaratory revocation, on the other hand, is always express, is not a matter of comparison and construction, and is in contemplation by the testator of that disposition of his property made by the law governing in cases of intestacy." *Barksdale v. Barksdale*, 13 Leigh 636, quoted with approval in *Dower v. Seeds*, 28 W. Va. 131.

"The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revokes the former, or the two be incapable of standing

together; for though it be a maxim, as Swineburne says, that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, so as they are all clearly testamentary, may be admitted to probate as together constituting the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only which are inconsistent." Williams on Executors (7th Ed.) 162. *Gordon v. Whitlock*, 92 Va. 723, 24 S. E. Rep. 342.

"This court states the law in substantially the same way in *Schultz v. Schultz*, 10 Gratt. 558, 373, where it is said: 'A man's last will must not of necessity be confined to one testamentary paper. It may consist of several different testamentary papers, of different dates, and executed and attested at different times. * * * Nor can it be material that a testamentary paper, found after a will had been admitted to probate, should purport to be a codicil to the latter, or that it should necessarily refer to it in express terms. If its provisions are but supplemental to those of the will admitted to probate, or if they do not necessarily conflict with them, or if, though to some extent the two are conflicting, yet if there are provisions in the will of prior date not in conflict nor inconsistent with those of the other, both are, I apprehend, to be regarded as parts and parcels of the last will of the testator, constituting but one whole, and that of later date (assuming that it contains no clause of express revocation of former will) only serving to revoke the former so far as the provisions of the two are conflicting and incompatible. And where the papers are of different dates and their provisions are conflicting, the courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the latter paper; supposing, of course, that such latter paper contains no express clause of revocation.'" *Gordon v. Whitlock*, 92 Va. 723, 24 S. E. Rep. 342.

Thus a holographic will containing the words, "My will is as follows," but containing no revocatory or residuary clause, and disposing of only a very small part of the testator's estate, was held to revoke a prior will only to the extent that it was plainly inconsistent therewith, the former will having been carefully and elaborately prepared and disposing with great particularity of the entire estate of the testator. *Gordon v. Whitlock*, 92 Va. 723, 24 S. E. Rep. 342.

A testator directed that all his slaves be emancipated and sent to a country where slavery was not tolerated, if within twelve months they should elect to be emancipated on those terms, otherwise that they be sold; and then, after sundry bequests, he gave all the residuum of his estate, including a parcel of land called "Belle Air" to charitable uses. Afterwards, by a codicil, he gave "Belle Air" to a trustee for the support and maintenance of the slaves thereon. Held, that the devise to the trustee only created a trust for the support of the slaves till they should be emancipated or sold; that the devisee's interest was commensurate with and limited by the purpose of the trust, and was determined by the emancipation or sale of the slaves; and that the codicil was a revocation of the devise of "Belle Air" only *pro tanto*, yet the trustee was not accountable for any surplus of profits beyond the expense of supporting and maintaining the slaves. *Dawson v. Dawson*, 10 Leigh 602.

A testator owned two distinct lots, numbered 713

and 714, with houses on them, separated by a space consisting of 5 feet of 714 and 14½ feet of 712, a fence being on the dividing line. The 5 feet were paved as an alley to 714 as a side entrance when he bought the property as one. The testator devised the two houses and lots, and the vacant lots between them, to the defendants. Subsequently, by a codicil he devised the house and lot 712, and the vacant lot between it and 714 to the complainants. Held, that the codicil did not revoke the devise as to the 5 foot alley, which passed to the defendants as a part of 714. *Jenkins v. Lawrence*, 86 Va. 35, 9 S. E. Rep. 417.

A paper writing was in the following words: "I, 1,000. This article is to signify that if Elliott Smith survive me, I bequeath him one thousand dollars of my property, free from any lien or incumbrance. To the above bequest I herewith set my hand and seal this first day of June, 1888. (Signed) Henry E. Smith. (Seal)." Afterwards the testator made a will, dated Dec. 2, 1889, disposing of his entire estate, and containing no reference to said writing or to Elliott Smith, which was duly probated. Held, that said writing was not a contract, but was a will, and was revoked by the subsequent testament. *Swann v. Honsman*, 90 Va. 816, 20 S. E. Rep. 830.

Effect of Revoking Clause in Will Void for Testamentary Incapacity or Improper Execution.—Where a writing containing a clause expressly revoking former wills is improperly executed, or the testator is lacking in testamentary capacity, it falls altogether and *in toto*. The disposing part and the revoking part of the will are both ineffectual and fall together. Underhill on Wills, § 250; *Barksdale v. Barksdale*, 12 Leigh 535; *Dower v. Seeds*, 28 W. Va. 113.

Where the probate of a will is revoked, declaring it inoperative, such will cannot be relied on as a revocation of a former will, even by heirs who were not parties to the proceeding to set aside such subsequent will. *Dower v. Seeds*, 28 W. Va. 113.

Testator, in 1838, made a will, all written with his own hand, whereby he gave \$30,000 to his sister, \$5000 to S. S. and the residue of his estate to his father; in 1839, he signed another instrument, whereby, revoking all other wills before made, he gave T. Y. T. \$5000, and the residue of his estate to his father, but this last paper was not written by him, and it was not duly attested according to the statute of 1834-5. Held, the clause of revocation in the instrument of 1839, was not independent of the dispositions contained in it, so as to operate as a substantive declaration in writing revoking the will of 1838, but the revocation was made with a view to the new dispositions, and those being void for want of due attestation, the revocation is a nullity. *Barksdale v. Barksdale*, 12 Leigh 535.

"In every testamentary revocation, the testator always acts upon the supposition that his whole purpose will be accomplished, that his entire testamentary act will be effectual, as well in regard to the new disposition of the subject, as the revocation of that which he had made by the former instrument; and his revocation is in fact part and parcel of his new testamentary action. This is manifestly true in relation to implied testamentary revocations; and, if not so obviously, it is to my mind equally true, in relation to those which are express. That the testator should ever proceed upon the hypothesis of the invalidity of the instrument which he employs to effectuate his object, is beyond my conception; nor can I conceive, when he makes a new disposition of his property, and *eodem flatu* a revocation of a former disposition of it, how he can do so with any other expectation than that

both will share the same fate. It seems to me necessarily to follow, that the invalidity of the instrument, which defeats the new disposition of his property, must also defeat the revocation of the former instrument." *Barksdale v. Barksdale*, 12 Leigh 585, quoted with approval in *Dower v. Seeds*, 28 W. Va. 131.

Effect of Revoking Clause in Will Void on Account of Circumstances Dehors the Instrument.—A subsequent will, properly executed, but incapable of taking effect on account of the incapacity of the beneficiary to take, vagueness of the designation, illegality of its provisions, or for any reason not connected with the execution of the will, may nevertheless be set up as a revocation of a former will. *Underhill on Wills*, § 250; *Carpenter v. Miller*, 3 W. Va. 174.

Where a clause in a codicil revoked the will and devised the property "to the propagation of the Gospel in foreign lands," it was held that the will was revoked although the devise was void for uncertainty in the devisees. *Carpenter v. Miller*, 3 W. Va. 174.

The rule of construction where a second will or codicil is set up to revoke a first will is, that "wherever the words are imperative, though inoperative by reason of some incapacity in the devisee, they operate a revocation of a former will, and whenever the words are precatory, or expressing hope, desire or request, if the object of the hope, desire or request be certain and definite, the words are considered imperative, and are held by the courts to create a trust for the purpose indicated, and operate a revocation of a former will. But whenever the prior dispositions of the property are complete, and the words are precatory, or expressing hope, desire or request and the object of the hope, desire or request be uncertain and indefinite, the words will not be held to create a trust or be construed to revoke a former will." *Carpenter v. Miller*, 3 W. Va. 174.

Postscript to Cancelled Will Held Revocation of Former Will.—A testator made a will in due form of law, to which he afterwards subjoined a codicil; he then made a second will and annexed a postscript to it, by which he "revoked all former wills," and signed the postscript. The second will was cancelled by cutting his name out from the body of it, but leaving the postscript with his name subjoined to it. This paper was carefully preserved by the testator, as also his first will, both of which were found after his death. *Held*, that the postscript to the second will was a substantive revocation of the first will, and that the cancelling of the second will did not necessarily cancel the postscript also, so as to set up the first will as the will of the testator. Parol evidence is admissible in such cases to show the situation of the testator and *quo animo* the cancellation was made. *Bates v. Holman*, 3 Hen. & M. 502.

Revocation of Later Will Does Not Revive Former Will.—Where a will which revokes a former will is destroyed by the testator *animo revocandi*, with the intention that the former will shall be his will, but he does not reexecute it, or make a codicil reviving it, though he retains it uncanceled, it is not revived by the destruction of the last will. *Rudisill v. Rodes*, 20 Gratt. 147.

D. REVOCATION BY SUBSEQUENT CONVEYANCE.—No conveyance or other act, subsequent to the execution of a will, shall, unless it be an act by which the will is revoked, prevent its operation, with respect to such interest in the estate comprised in the will, as the testator may have power to dispose of by will at the time of his death. Va. Code 1887, § 2520; W. Va. Code 1899, ch. 77, § 9, p. 706.

A father executed a will in 1872 devising one third

of his real estate to his widow absolutely, and the residue to his children in equal portions. Having been harassed by law suits brought against him by his son-in-law, he executed a deed in 1887, conveying his lands to a trustee in fee for the benefit of his wife. *Held*, that the deed was a revocation of the will, and that, having been delivered in the grantor's lifetime, it was valid and binding, though not recorded until after the death of the grantor. *Collup v. Smith*, 89 Va. 258, 15 S. E. Rep. 584.

It seems that a deed of trust conveying all the property of the grantor to certain persons and their heirs "forever" with warranty, "nevertheless upon special trust that they shall pay the profits to himself during his lifetime," concluding with declaring its "true intent and meaning to be, that, at his death everything therein contained between the parties should become null and void," is a conveyance to the trustees and their heirs of an estate for the life of the grantor only, and not a revocation of a previous will. In this case a *quere* was raised as to whether parol testimony of declarations by a testator of his intention in making a deed, ought to be regarded by a court of probate as evidence to rebut an implied revocation of a will by such deed. *Hughes v. Hughes*, 2 Munf. 209.

E. REVOCATION BY MARRIAGE.—It is provided by the statute that every will made by a man or woman shall be revoked by his or her marriage, except a will made in the exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative or next of kin. Va. Code 1887, § 2517; W. Va. Code 1898, ch. 77, § 6, p. 706. See 2 Min. Inst. (4th Ed.) 1037; *Phaup v. Wooldridge*, 14 Gratt. 332.

Prior to the enactment of the statute, it was held that a subsequent marriage and the birth of issue operated as an implied revocation of a will, and in such case the will ought not to be admitted to probate. *Wilcox v. Rootes*, 1 Wash. 140. See *Phaup v. Wooldridge*, 14 Gratt. 332.

An implied revocation of a will may be rebutted by circumstances. *Yerby v. Yerby*, 3 Call 384.

But under the statute, marriage by itself, apart from the birth of issue, operates as an absolute and not merely as a presumptive revocation of the will, save in the excepted cases. 2 Min. Inst. (4th Ed.) 1021; *Phaup v. Wooldridge*, 14 Gratt. 332.

A man and his wife before their marriage entered into a marriage settlement by uniting in a deed by which the wife conveyed her property to a trustee in trust for herself, and relinquished all interest in his estate; and he covenanted that she should have the power of disposition by deed or will, and that if she survived him she should have an annuity of \$150 out of his estate, but not so as to hinder a division thereof. *Held*, that notwithstanding the marriage agreement, the man's will made before his marriage, was, under the statute, revoked by his marriage, although it appeared from the proof that he believed that it was not revoked and had expressed himself as satisfied with it. *Phaup v. Wooldridge*, 14 Gratt. 332.

The plaintiff and his sister made mutual wills, intending that the survivor should get the whole estate. The sister subsequently married, and died without issue, in the belief that her will was valid. The plaintiff allowed her will to stand in full force as originally written. *Held*, that under Va. Code 1887, § 2517, the sister's will was revoked by her marriage, regardless of her wishes or intention in the matter. *Hale v. Hale*, 90 Va. 728, 19 S. E. Rep. 739.

F. REVOCATION BY BIRTH OF ISSUE WHERE THERE ARE NO CHILDREN AT DATE OF WILL.—Where a person who has no children makes a will,

and a child is subsequently born to such person, it is provided by statute in West Virginia that the will shall be construed, except so far as it provides for the payment of the debts of the testator, as if the devisees and bequests therein had been limited to take effect in the event that the child shall die unmarried and without issue. *W. Va. Code 1899, ch. 77, § 16, p. 707; Cunningham v. Cunningham, 30 W. Va. 599, 5 S. E. Rep. 139; Beirne v. Von Ahlefeldt, 33 W. Va. 663, 11 S. E. Rep. 46.* By a similar statute in Virginia it is provided in such case that the will "shall be construed as if the devisees and bequests therein had been limited to take effect in the event that the child shall die under the age of twenty-one years, unmarried, and without issue." *Va. Code 1887, § 2527.*

Where a married woman, having no children, by will devises all her estate to her husband, and afterwards has issue, who survive her, the devise to the husband, under the *W. Va.* statute takes effect only if the children die unmarried and without issue. *Cunningham v. Cunningham, 30 W. Va. 599, 5 S. E. Rep. 139.*

A wife devised all her property to her husband, and then gave birth to a child, and died. The husband conveyed the land so devised to him to *B. Held*, that the conveyance to *B.* vested in him an estate for the life of the husband by virtue of his curtesy, with an executory interest in fee contingent upon the child dying unmarried and without issue. *Beirne v. Von Ahlefeldt, 33 W. Va. 666, 11 S. E. Rep. 46.*

G. REVOCATION BY BIRTH OF ISSUE WHERE THERE ARE CHILDREN LIVING AT DATE OF WILL.—If a will be made when a testator has a child living, and a child be born afterwards, such after-born child, or any descendant of his, if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had died intestate; towards raising which portion the legatees and devisees shall, out of what is given them, contribute ratably. But if such after-born child or descendant die under the age of twenty-one years, unmarried and without issue, his portion, or so much thereof as may remain unexpended in his support and education, shall revert to the person to whom it was given by the will. *Va. Code 1887, § 2528; W. Va. Code 1899, ch. 77, § 17, p. 707.*

The statute providing for pretermitted children was first enacted Dec. 5th, 1794, and is not applicable to the case of a testator who made his will and died prior to that date. Accordingly, where a will was made in 1792 and the testator died in October 1794, a child born after the making of the will and before the death of the testator was held to be entitled to no part of the testator's estate. *Savage v. Mears, 2 Rob. 570.*

After the act of 1792 (*Va. Code 1887, § 2527*) and before the act of 1794 (*Va. Code 1887, § 2528*) concerning wills, a man made a will by which he devised his whole estate to his children. He afterwards married a second wife, by whom he had children, and died without having altered his will. *Held*, that the second marriage and birth of children was no revocation of the will. *Yerby v. Yerby, 3 Call 334.*

The statute *Va. Code 1887, § 2528*, providing for pretermitted children was not intended to produce equality or to diminish the power of the testator, and any provision which affords evidence that the child had not been forgotten is sufficient to prevent the application to the statute; and a vested remainder, carrying with it a vested right of

property, answers its demands. *Allison v. Allison, 101 Va.—, 44 S. E. Rep. 904.*

A devise in general terms to the testator's "children" does not comprehend a posthumous child, so as to prevent it from claiming under the act of assembly as pretermitted by the will. *Armistead v. Dangerfield, 3 Munf. 20.*

A posthumous child unprovided for by settlement and pretermitted by the last will of its father is entitled to such share of the real and personal estate as it would have been entitled to if the father had died intestate, including profits of lands, hires of negroes, and interests and profits of other personal estate. *Armistead v. Dangerfield, 3 Munf. 20.*

The portion of such posthumous child is not to be raised by a division of the estate into equal parts, but by a proportionable contribution by the devisees and legatees and those claiming under them. Purchasers from the devisees and legatees are not exempted from contributing to make up the portion of such child by their having purchased without notice of such claim. *Armistead v. Dangerfield, 3 Munf. 20.*

A testator had five children, of whom one died in his lifetime. To two of the children he made considerable advancements. The testator then died leaving a will, by which he devised his estate to the four remaining children in nearly equal portions. After his death a child was born, pretermitted by the will. *Held*, that the doctrine of hotchpot does not apply to such case, but the advanced children may take their legacies without bringing in their advancements, and the pretermitted child is only entitled, under any circumstances, to one-sixth of the estate left by the father at the time of his death, to be made up by ratable contribution among the legatees. *Wilson v. Miller, 1 Pat. & H. 353.*

H. REVOCATION BASED ON ERRONEOUS ADVICE.—In 1859 a testatrix made a will in which she made certain bequests to northern friends. When the war broke out she was advised that property devised to northerners was liable to be confiscated. In consequence of this advice, she executed a codicil revoking the bequest. *Held*, that the bequests were revoked, although the advice was erroneous. *Skipwith v. Cabell, 19 Gratt. 758.*

I. REVOCATION NOT IMPLIED FROM SUBSEQUENT INSANITY OF TESTATOR.—A commission of lunacy against a testator is not a revocation of a will which he made when of sound mind. *Hughes v. Hughes, 2 Munf. 209.*

J. REVOCATORY EFFECT OF LOST WILLS.—Where it is proved that a will was executed but afterwards lost or destroyed by the testator, or some other person, without an intention to revoke it, it will not, in the absence of proof, be presumed that it contained an express clause of revocation. In such case, an existing prior will is only revoked by the subsequent lost will to the extent that the provisions of the lost will are irreconcilably inconsistent. It is not necessary for all the contents of the lost will to be proved, if enough be proved to show that it revoked the former will. *Underhill on Wills, § 366; Page on Wills, § 270; Hylton v. Hylton, 1 Gratt. 161.*

Thus it was held that evidence, that a subsequent will was made and afterwards stolen, without any proof of its contents, and proof of declarations, by the testator, that he intended to die intestate and leave his property to be distributed according to the statute, was not sufficient to constitute a revocation of a former will. *Hylton v. Hylton, 1 Gratt. 161.*

K. EVIDENCE OF REVOCATION.

Presumption of Revocation from Disappearance of Will.—Where it appears that a person has made a

will which cannot be found after his death, the presumption is that it was destroyed by the testator *animo revocandi*. This is especially true where the will is traced to his possession, and never traced out of it. *Shacklett v. Roller*, 97 Va. 689, 34 S. E. Rep. 492; *Appling v. Eades*, 1 Gratt. 286. See also, *Malone v. Hobbs*, 1 Rob. 346, 39 Am. Dec. 263.

This presumption, however, is only *prima facie*, and may be rebutted; but the burden is upon those who seek to establish such an instrument to assign and prove some other cause for its disappearance. *Shacklett v. Roller*, 97 Va. 689, 34 S. E. Rep. 492.

In a suit to set up a will which has been destroyed, it is not sufficient to show that it may have been in existence after the testator lost capacity to revoke it, but it must appear that it was in existence after that date. Courts of equity do not set up lost papers except where it is clearly shown that it should be done. *Shacklett v. Roller*, 97 Va. 689, 34 S. E. Rep. 492.

Declarations of Testator as Evidence of Revocation.—The declarations of a testator after he has made a will, as to its continued existence or destruction, where it cannot be found after his death, if admissible at all, are deemed of great weight when voluntarily made to disinterested persons. *Shacklett v. Roller*, 97 Va. 689, 34 S. E. Rep. 492.

A statement by a testator that his will had been burned by his wife at his directions, coupled with the admission by the wife that she had been directed to burn it, but that the instructions of the testator had been disobeyed, is not admissible to prove a revocation, for no act of destruction is proved or admitted from which any presumption of a revocation may arise. *Boyd v. Cook*, 3 Leigh 32.

The question of the admissibility of the declarations of a testator as to the existence or the revocation of his will cannot be raised for the first time in the appellate court. *Shacklett v. Roller*, 97 Va. 689, 34 S. E. Rep. 492.

XI. REVIVAL AND REPUBLICATION.

Prior to the statute of Frauds, 29 Car. II, ch. 8, wills of both real and personal property could be revived or republished by an informal writing or even by parol evidence of the testator's acts or declarations showing an intent to revive. 29 Am. & Eng. Enc. Law (1st Ed.) 337; 2 Min. Inst. (4th Ed.) 1929. See *Bagwell v. Elliott*, 2 Rand. 190.

By statute in Virginia and West Virginia it is provided that no will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil properly executed, and then only to the extent to which an intention to revive the same is shown. Va. Code 1887, § 2519; W. Va. Code 1899, ch. 77, § 8, p. 706.

This statute puts at rest in Virginia and West Virginia the vexed question whether, if a subsequent will revokes a former will, and be itself revoked, the former is thereby revived. It has accordingly been held that where a will which revokes a former will is destroyed by the testator *animo revocandi*, with the intention that the former will shall be his will, but he does not re-execute it, or make a codicil reviving it, though he retains it uncanceled, it is not revived by the destruction of the last will. *Rudisill v. Rodes*, 29 Gratt. 147; 2 Min. Inst. (4th Ed.) 1030.

Where a will is clearly provisional and contingent and the contingency contemplated by the will did not happen within the time specified, the recognition of the will by the testator after the failure of the contingency by mere verbal declarations does

not revive or continue the will as an absolute valid will. *French v. French*, 14 W. Va. 458.

No particular words are necessary to be used in a codicil to effect a republication of the will to which it is annexed. It is only necessary that it shall appear that the testator referred to and considered the paper as his will at the time he executed the codicil; and where this appears, even though the codicil refers to personal property only, it may operate as a republication as to realty. *Corr v. Porter*, 33 Gratt. 278.

Effect of a Duly Executed Codicil on a Will Not Duly Executed.—The effect of a duly executed codicil on a will not duly executed is to establish the will as well as the codicil, and the codicil amounts to a republication of the will, and brings it down to the date of the codicil, so that they both speak as of the date of the codicil. *Hatcher v. Hatcher*, 80 Va. 169, 1 Va. Law Reg. 551. See *Corr v. Porter*, 33 Gratt. 278.

A paper writing, dated 1858, purported to dispose of the testator's property, but was without signature or attestation. In 1864, the testator wrote another instrument, with the caption "Codicil to the above will," which instrument was duly executed and attested. *Held*, that the execution of the codicil was a republication of the will, bringing it down to the date of the codicil, so as to make both speak as of the same date. *Hatcher v. Hatcher*, 80 Va. 169.

But in order that a codicil may establish a will not duly executed and amount to a republication thereof, the execution of the codicil must be such as would have sufficed for the will, if the will had been so executed. Thus, in *Gibson v. Gibson*, 28 Gratt. 44, it was held that the following papers did not constitute a valid will in Virginia, No. 1 and No. 2 being offered together for probate: Paper No. 1: "I, Elizabeth Holmes do make the following as my last will and testament. I give all my estate, both real and personal, to my two sisters, Margaret and Sally." This was neither in the handwriting of the testatrix, nor was it signed. Paper No. 2—written on the same sheet as the foregoing and about an inch below: "As Margaret is dead, I give her share to my niece Lizzie Leigh Gibson." This was in the handwriting of the testatrix and signed by her. *Held*, that the codicil, No. 2, did not suffice to make No. 1 and No. 2 the will of Elizabeth Holmes; but it would have been otherwise if No. 1 had been wholly in the testatrix's handwriting, or if No. 2 had been attested by two witnesses. See 1 Va. Law Reg. 551.

Effect of Republication.—The effect of a republication is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time. It is the same in effect as if the testator had made a new will of the same date with the codicil. *Corr v. Porter*, 33 Gratt. 278; *Hatcher v. Hatcher*, 80 Va. 169.

Since, under the statute, Va. Code 1887, § 2521, W. Va. Code 1899, ch. 77, § 10, p. 706, wills are construed, in respect to the property they dispose of, as if made just before the testator's death, unless a contrary intention appear from the will, there is less frequent occasion than formerly to republish a will in order to make it comprehend more or other property than it would otherwise do (supposing the phraseology to be unchanged); but in respect to the persons who are to take there is no such provision, so that, as to them, republication may be as desirable as ever. 2 Min. Inst. (4th Ed.) 1081.

While the act of 1785 was in force, which only gave the testator power to devise after-acquired lands, leaving it to his discretion to dispose of them or not (see *supra*, "What May Be Devised or Be-

queathed"), it was held that the addition of a codicil to a will was not such a republication of the will as to pass lands purchased by the testator between the date of the will and the date of codicil, there being no words in the codicil indicating such to be the intention of the testator. *Kendall v. Kendall*, 5 Munf. 272.

XII. PROBATE AND CONTEST.

A. OF DOMESTIC WILLS GENERALLY.

1. **VARIOUS FORMS OF PROBATE.**—In the English ecclesiastical courts which had exclusive jurisdiction of wills so far as they operated upon personal property, but no jurisdiction in respect of devises of real estate, there were two modes of obtaining probate, one in common form and the other in solemn form or *per testes*. The probate was said to be in common form when the executor presented the will for probate in the absence of the parties, and, without citing them, proceeded *ex parte* with his proof; and it was said to be in solemn form when those in interest were cited to be present, and full proof was made by the examination of witnesses. In Virginia, we know nothing of this English practice of proving wills in common form. We do, indeed, exact from the executor an oath such as is required in England, "that the writing admitted to record contains the true last will of the deceased, as far as he knows or believes;" but this with us is no more than the executor's oath of office, in no wise contributing to the proof of the will, and indeed is not administered until the will has been fully proved. But although in Virginia we do not prove wills in common form, we yet have two modes of probate, both, however, in solemn form, *per testes*; the one *ex parte* which is the old common-law method; the other *inter partes*, wherein the parties are summoned to contest the wills; which latter originates in Virginia in a statute. 2 Min. Inst. (4th Ed.) 1086. See *Wills v. Spraggins*, 3 Gratt. 555.

For forms of entries of orders of court admitting wills to probate, see 2 Min. Inst. (4th Ed.) 1086; *Rob. Forms* 286; *Sands Forms* 305.

Proceedings to Admit Wills to Probate Ex Parte.—This proceeding is without notice or summons to any one, the evidence being heard and the clause decided by the court, and not by a jury. But any one interested may make himself a party to the proceeding, and oppose or promote it. Va. Code 1887, §§ 2544-2547; 2 Min. Inst. (4th Ed.) 1086; *Smith v. Jones*, 6 Rand. 33; *Boyd v. Cook*, 3 Leigh 32.

Proceedings to Admit Wills to Probate Inter Partes.—This proceeding, which is purely statutory, must take place in the circuit or corporation court alone and not in county court, upon summons obtained from the clerk of the court, convening all parties concerned. The court may require all testamentary papers of the decedent to be produced, and, if any party interested requests it, shall order a trial by jury to ascertain whether any, and if any, which of the papers produced is the last will of the decedent; or, if no jury trial be asked, shall itself proceed to decide the question of probate. Va. Code 1887, §§ 2538-2543; 2 Min. Inst. (4th Ed.) 1086.

2. **WHO MAY OFFER WILL FOR PROBATE.**—It is usual for a will to be submitted for probate by the executor, if one is named; but it may be propounded by any one interested. 2 Min. Inst. (4th Ed.) 1083; *Wills v. Spraggins*, 3 Gratt. 555; *Schultz v. Schultz*, 10 Gratt. 358.

An executor of a will may propound it for admission to probate, and prosecute an appeal from a decree, declaring it void, in a suit brought to impeach it. *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488.

Even slaves emancipated by a will may propound it for probate. *Redford v. Peggy*, 6 Rand. 316; *Winn*

v. Bobb, 3 Leigh 140, 23 Am. Dec. 258; *Manns v. Givens*, 7 Leigh 689; *Phoebe v. Boggess*, 1 Gratt. 129; *Mercer v. Kelo*, 4 Gratt. 106; *Reid v. Blackstone*, 14 Gratt. 366.

3. **REPROFOUNDING WILL ONCE PROBATED OR REJECTED.**—Where a will has been fairly propounded by a party interested, and fairly rejected on the merits, it cannot be again propounded by him, or by others, who may be interested, so long as the order of rejection remains unreversed. *Wills v. Spraggins*, 3 Gratt. 555; *Schultz v. Schultz*, 10 Gratt. 358; *Norvell v. Lessueur*, 33 Gratt. 222.

Exception to the Rule.—"It certainly cannot be maintained that in all cases where the probate court has admitted to probate a paper purporting to be a last will and testament, it has thereby fully exercised its entire jurisdiction over the subject of the testamentary disposition of the decedent's estate. To affirm this proposition would be in certain cases (so far as the probate courts concerned), to compel a man to die intestate as to part of his estate, though it might have been his deliberate and expressed intention to dispose of the whole. A man's last will must not of necessity be confined to one testamentary paper. It may consist of several different testamentary papers, of different dates, and executed and attested at different times. It cannot be indispensable either that they should be propounded in the court of probate at the same time. If a will has been produced and admitted to probate in the proper court, and subsequently another testamentary paper be found purporting to be a codicil to the former, it cannot be doubted that the probate court could also receive and admit it to probate at a subsequent period. *Case of Reed's Will*, 2 B. Monr. R. 80. Nor can it be material that a testamentary paper found after a will had been admitted to probate, should purport to be a codicil to the latter, or that it should necessarily refer to it in express terms. If its provisions are but supplemental to those of the will admitted to probate, or if they do not necessarily conflict with them, or if, though to some extent the two are conflicting, yet if there are provisions in the will of prior date not in conflict nor inconsistent with those of the other, both are, I apprehend, to be regarded as parts and parcels of the last will of the testator, constituting but one whole, and that of later date (assuming that it contains no clause of express revocation of former wills), only serving to revoke the former so far as the provisions of the two are conflicting and incompatible. * * * And so, as it seems to me, if the later will contains an express clause of revocation of former wills, or contains a disposition of the estate incompatible with the provisions of the former, or from its general character may be inferred to be an entire new instrument intended to supersede the former, the court of probate should receive and admit it to probate, leaving it to have such effect as the law would necessarily attach to it. And I can scarcely think that it is necessary, in such case, first to file a bill under the statute to set aside the former will; if indeed such a proceeding could be sustained." *Schultz v. Schultz*, 10 Gratt. 373.

Collusion in Former Proceeding.—In *Wills v. Spraggins*, 3 Gratt. 555, the court said: "The rule * * * that the sentence of a court of probate rejecting a propounded will as invalid, is conclusive against all persons claiming under it, is subject, however, to an important exception. If the sentence has been fraudulently obtained, by collusion between the propounder and the contesting party, it is binding only between themselves, and cannot affect the rights of others claiming under the instrument. The propounder, when acting fairly, represents the

will, and all interests created by it; but when guilty of collusion, he represents none but himself and the adverse party." In this case the court did not consider "whether if no one contests the probate of the will, and yet the court decides against it, and the sentence consequently is not *inter partes*, the instrument can afterwards be repropounded by the same person, nor whether, though there be a contestant, if by reason of some surprise, accident or mistake, the merits of the case be not heard, and a like sentence may be pronounced against the propounder, from which circumstances preclude him from appealing, he can afterwards be allowed to repropound the instrument."

4. HEARING ON APPLICATION NOT FORMALLY CONTESTED.—"It was the policy of our Legislature to authorize the probate of wills, whether of personality or realty, upon an *ex parte* proceeding, in order to avoid the injurious delays in the administration of the assets, and the disposition of the property, which might arise in cases free from controversy, if the citation of all persons interested in the subject were made a prerequisite. The statute, therefore, provided, that 'when any will shall be exhibited to be proved, the court may proceed immediately to receive the probate thereof, and grant a certificate of such probate;' without any provision for the convocation of parties, except that, 'if any person interested shall within five years afterwards appear, and b; bill in chancery contest the validity of the will, an issue shall be made, whether the writing produced be the will of the testator or not, which shall be tried by a jury, whose verdict shall be final between the parties; saving to the court a power of granting a new trial for good cause as in other trials; but no such party appearing within that time, the probate shall be forever binding; saving also (by the revised act of 1819) to infants, *femes covert*, and persons absent from the state, or *non compos mentis*, the like period after the removal of their respective disabilities.' It will thus be seen that the statute contemplated no citation of parties upon the primary probate of the instrument; but substituted for it a subsequent convocation of them, by a bill in chancery, within a given period. The propounder of the will, therefore, could gain nothing by a citation of the parties upon the primary probate; for they were not bound to appear, and those not appearing could contest the will afterwards by the subsequent proceeding. This was another departure from the ecclesiastical law, and one productive of some inconvenience; for by that law the executor has a discretion to propound the will of persons either in common form, or solemn form; and if he adopts the latter, the sentence pronounced on citation of the widow and next of kin, whether for or against the will, is conclusive. Whereas, under our statute, any one opposed to the will might voluntarily appear and contest it, and continue the controversy in the appellate forums; and after a sentence in favor of it in the court of last resort, some other person of like interest might renew the conflict by a bill in chancery, and so review before a jury the decision of the supreme court of appeals. This is to some extent remedied by our act of 1838, by which the propounder of the will may offer it at once, in the proper circuit court, for final probate, convene by citation all persons interested in the subject, and prosecute the case to a conclusive sentence, for or against the will." *Willis v. Spraggins*, 3 Gratt. 556. See *Hylton v. Hylton*, 1 Gratt. 161.

A court of probate occupies the place of a jury as to questions of fact, and its province is, like that of a jury, to draw all proper inferences from the facts

proved. *Boyd v. Cook*, 3 Leigh 32; *Smith v. Jones*, 6 Rand. 33. See *Dudleys v. Dudleys*, 3 Leigh 486.

Continuance.—It is within the discretion of the court to continue or postpone the hearing of the application. See *Smith v. Jones*, 6 Rand. 33. See generally, monographic note on "Continuances" appended to *Harman v. Howe*, 27 Gratt. 676.

5. TIME FOR CONTESTING PROBATED WILLS.—The period for contesting probated wills is limited by the present statute in Virginia to two years, and in West Virginia to five years, with the exception that in case of an infant this period is extended to one year after age, and in case of a nonresident of the commonwealth, unless personally summoned or actually appearing, two years after sentence. Va. Code 1887, §§ 2544, 2545; W. Va. Code 1899, ch. 77, § 32, p. 711.

6. PARTIES TO FORMAL CONTESTS.—All persons interested should be made parties on one side or the other of the controversy. See *Willis v. Spraggins*, 3 Gratt. 556; *Dower v. Church*, 21 W. Va. 23.

If any of the heirs refuse to join as plaintiffs, they should be made defendants. *Dower v. Church*, 21 W. Va. 23.

In *Dillard v. Dillard*, 78 Va. 208, it is held, that one who entered himself as a contestant in the original probate proceedings, but presently withdrew, was not a "party to the proceedings" under the statute debarring such person from filing a bill to contest the probate. The court held that the words quoted meant one who continued to be a party up to and including the order probating or rejecting the will.

Under the statute allowing "any person interested" to contest a will, it was held that where the interest of the plaintiff in a bill contesting a will consists in his claim under an earlier will not probated, the court will not try the validity of the former will, but it is sufficient if the contestant sets up a *bona fide* claim. *Dower v. Church*, 21 W. Va. 23.

The executor named in a will may contest the validity of a will subsequently produced. See *Schultz v. Schultz*, 10 Gratt. 358.

In a suit to contest a probated will the executor should be made a party in his representative capacity and not in his own right. *Coalter v. Bryan*, 1 Gratt. 18.

A widow has no right to contest her husband's will, for she is not bound by it, but may renounce it. *McMechen v. McMechen*, 17 W. Va. 663.

It is not error to direct an issue *deviseat vel non* without proof of the interest of the plaintiffs, unless objection has been made that they would have no interest in the estate if the will were set aside, or unless such want of interest appears from the record itself. *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488.

The executors of a will duly probated cannot compel the devisees, who are also heirs, to surrender their statutory right to impeach such will in the mode provided for by statute by filing a bill to construe such will, and, as incidental thereto, asking the court to affirm the probate thereof; but the court, if the heirs so request, should reserve to them such right to so impeach such will. *Matthews v. Tyree* (W. Va.), 44 S. E. Rep. 526.

Effect of Omitting Interested Parties.—Objection for want of necessary parties may be taken by demurrer where the defect appears on the face of the plaintiff's pleading. 16 Enc. Pl. & Pr. 1018. See *Dower v. Church*, 21 W. Va. 23.

On appeal or error the omission of a necessary defendant is no ground for reversal, where the objection is taken for the first time in the reviewing court. *Dower v. Church*, 21 W. Va. 23; *Kincheloe v. Kincheloe*, 11 Leigh 303.

Where necessary parties, such as heirs, are omitted, they may file a bill in the nature of a bill of review. *Dower v. Church*, 21 W. Va. 23; *Connolly v. Connolly*, 32 Gratt. 657.

Collateral Attack on Judgment.—A judgment or decree allowing or rejecting a will after a contest is conclusive against collateral attack by interested persons who are not, as well as those who are formal parties to the proceeding. *Wills v. Spraggins*, 3 Gratt. 555; *Schultz v. Schultz*, 10 Gratt. 358; *Dower v. Church*, 21 W. Va. 23. This rule applies though the omitted party was an infant. *Connolly v. Connolly*, 32 Gratt. 657.

"The general rule that judgments are evidence only against parties and privies, is not applicable to a proceeding like this, in which the object is not a recovery by one person against another, but the establishment of an important muniment of title, to which all persons may appeal in all time to come. The thing determined is the matter of testacy or intestacy, and the rights of persons are affected only incidentally and consequentially, and not because they were parties to the judgment, but because such a judgment has in fact been rendered. The sentence operates *in rem*, upon the instrument itself, which it establishes or condemns; and is analogous to the sentence of a court of admiralty upon a question of prize, or that of the exchequer upon a question of forfeiture; which are binding upon all persons, whether parties to the proceeding or not." *Wills v. Spraggins*, 3 Gratt. 555.

7. THE CONTESTANT'S PLEADING.—A bill to contest the validity of a will "must be framed as any other bill in equity would be framed, except that it must be confined in its aim and object to the specific relief contemplated by the statute—namely, the determination by a jury, on an issue to be directed and tried, of the validity or invalidity of the testamentary paper or papers which are drawn in question. Process to convene the parties issues, as in other cases in equity suits, and the pleadings are of the same nature." *Connolly v. Connolly*, 32 Gratt. 657.

Sufficiency of Averment.—The bill need not set out as fully the facts on which the plaintiff claims that the paper which has been probated as the will is not the will of the decedent as it would have to do under the general rules governing equity pleadings; but it will suffice in such bill to aver in general terms, that the writing of which probate has been received is not the will of the decedent. *Dower v. Church*, 21 W. Va. 23; *Malone v. Hobbs*, 1 Rob. 346, 39 Am. Dec. 263.

Averment of Interest.—A contestant should aver in his pleading the interest which entitles him to call the validity of the will in question. *Schultz v. Schultz*, 10 Gratt. 358.

8. THE DEFENDANT'S PLEADING.—In *Connolly v. Connolly*, 32 Gratt. 657, it is indicated that the pleadings of the defendant on a contest by bill in equity to contest a will are the same as in other suits in equity.

9. WITHDRAWAL OR VOLUNTARY NONSUIT.—There is nothing in the language or policy of the statute with reference to admitting wills to probate upon *ex parte* proceedings which denies a party the right to withdraw from such proceeding. Nor is a party precluded by such withdrawal from afterwards filing a bill to contest the validity of the will. *Dillard v. Dillard*, 78 Va. 308.

10. RIGHT TO JURY TRIAL OF WILL CONTESTS.—The Virginia statute with reference to proceedings by bill in equity to impeach or establish wills, requires that "a trial by jury shall be ordered, to ascertain whether any, and if any, how much of what was so offered for probate be the will of the decedent."

Va. Code 1887, § 2544; *Malone v. Hobbs*, 1 Rob. 346, 39 Am. Dec. 263.

The West Virginia statute provides that a trial by jury shall be ordered in such case "if required by either party." W. Va. Code 1890, ch. 77, § 82, p. 711; *Dower v. Church*, 21 W. Va. 23.

11. THE ISSUE IN WILL CONTESTS.—In Virginia and West Virginia, the sole issue in will contests is whether the paper offered for probate is or is not the will of the decedent. When this question is decided, the function of the suit is exhausted. *Ford v. Gardner*, 1 Hen. & M. 72; *Malone v. Hobbs*, 1 Rob. 346, 39 Am. Dec. 263; *Coalter v. Bryan*, 1 Gratt. 18; *Connolly v. Connolly*, 32 Gratt. 657; *Penn v. Ingles*, 82 Va. 65; *Hartman v. Strickler*, 82 Va. 233; *Kirby v. Kirby*, 84 Va. 627, 5 S. E. Rep. 539; *Dower v. Church*, 21 W. Va. 23; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493.

In such case, it is sufficient if the issue is made up in the words of the statute, and feigned pleadings are unnecessary. *Coalter v. Bryan*, 1 Gratt. 18; *Dower v. Church*, 21 W. Va. 23.

Whether a bequest actually made is valid, cannot be inquired into upon a bill filed to test the validity of a will. That question is properly raised upon a bill to construe and expound the will. *Ward v. Brown* (W. Va.), 44 S. E. Rep. 488.

12. PLAINTIFFS AND DEFENDANTS IN ISSUE.—In the issue *devisavit vel non*, the party sustaining the will is the plaintiff, and entitled to the opening and conclusion of the case before the jury; and the party contesting the will is the defendant. This is true though the contestant may propose to admit on the record a *prima facie* case in favor of the will. *Coalter v. Bryan*, 1 Gratt. 18. See *McMechen v. McMechen*, 17 W. Va. 683; *Nicholas v. Kershner*, 20 W. Va. 251; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493.

Where a party has interests under and against the will, he may be authorized by the court to choose whether he will be plaintiff or defendant in the issue. *Coalter v. Bryan*, 1 Gratt. 18.

13. TRIAL OF ISSUE BY JURY.—Upon the trial of an issue *devisavit vel non*, the mode of proceeding is substantially the same as upon the trial of common-law actions. Where parties submit to the ruling of the court without exception, they cannot be heard in the appellate court to insist on the error, if any, as ground of reversal. *Lamberts v. Cooper*, 29 Gratt. 61; *Montague v. Allan*, 78 Va. 592; *Dower v. Church*, 21 W. Va. 23.

Right to Open and Conclude.—Upon an issue *devisavit vel non*, the proponents of the will have the opening and conclusion of the evidence and argument. *Coalter v. Bryan*, 1 Gratt. 18; *McMechen v. McMechen*, 17 W. Va. 683; *Nicholas v. Kershner*, 20 W. Va. 251; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493.

Instructions.—See generally, monographic note on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.

Where an instruction has already been substantially given, the court is not bound to repeat it. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493.

It is improper to single out one witness, although he was the family physician, and instruct the jury that his evidence is entitled to great weight. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493.

Where an instruction refers to a disease by a technical name, is confused in its parts, and assumes facts as proved, it is properly refused. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. Rep. 493.

14. VERDICT.—Upon the trial of an issue *devisavit vel non*, where the question was as to the validity of two wills of different dates, and the jury found in favor of the earlier without mentioning the

later will, it was held that the verdict should be set aside as not responsive to the issue. *Forney v. Ferrell*, 4 W. Va. 729.

Conclusiveness.—The sentence of a court of probate having jurisdiction, whether it be a sentence admitting a paper to probate or excluding it, as long as it remains in force, binds conclusively not only the immediate parties to the proceeding in which the sentence is obtained, but all other persons, and all other courts; and the principle applies as well to a sentence represented by a verdict of a jury and decree thereon in the proceeding by bill under the statute as to a sentence pronounced in any other authorized probate proceedings. *Coalter v. Bryan*, 1 Gratt. 18, and *foot-note*; *Connolly v. Connolly*, 32 Gratt. 657, and *foot-note*. See also, *Wills v. Spraggins*, 3 Gratt. 555, and *foot-note*; *Dower v. Church*, 21 W. Va. 23; *Dower v. Seeds*, 28 W. Va. 113.

The verdict of a jury in favor of the will, upon an issue *devisavit vel non*, approved by the court by which the issue is tried, is conclusive as to all mere questions of fact depending upon the credit to be given to the testimony of the witnesses. *Jesse v. Parker*, 6 Gratt. 57, 52 Am. Dec. 103; *Dudleys v. Dudleys*, 3 Leigh 486, and *foot-note*; *Nock v. Nock*, 10 Gratt. 111; *Parramore v. Taylor*, 11 Gratt. 240; *Young v. Barner*, 27 Gratt. 106; *Lamberts v. Cooper*, 20 Gratt. 66; *Hartman v. Strickler*, 32 Va. 325.

15. JUDGMENT OR DECREE—JUDGMENT CONFINED TO ISSUE.—Upon a bill filed to contest the validity of a will, the jurisdiction of the court is confined to the single question whether the paper admitted to probate is the true last will and testament of the decedent, and the court has no power in such case to construe the will or adjudicate upon the rights of the parties or the validity of the dispositions therein. See *Coalter v. Bryan*, 1 Gratt. 18, and *foot-note*; *Lamberts v. Cooper*, 20 Gratt. 61, and *foot-note*; *Connolly v. Connolly*, 32 Gratt. 657; *Hartman v. Strickler*, 32 Va. 324; *Kirby v. Kirby*, 84 Va. 628, 5 S. E. Rep. 539; *Jones v. Reid*, 12 W. Va. 367; *Dower v. Church*, 21 W. Va. 23; *Couch v. Eastham*, 27 W. Va. 306; *Kerr v. Lunsford*, 31 W. Va. 656, 8 S. E. Rep. 493; *Coffman v. Hedrick*, 33 W. Va. 119, 9 S. E. Rep. 65.

In *Coalter v. Bryan*, 1 Gratt. 18, a bill was filed not only to contest the validity of a will which had been regularly admitted to probate, but also to require an account of the executors and others who had possessed themselves of the estate of the decedent under the will. It was held that it was proper for the lower court to dismiss the bill as to the executor and refuse to require or permit him or others to render any account in that suit of the funds of the estate which had come into their hands, the functions of the suit having been exhausted when the question whether the will was valid or invalid was decided.

Upon a bill filed under the statute to impeach or establish a will, the court can exercise only the special limited powers conferred upon it by the statute; it can only ascertain by the jury trial whether the paper in question is or is not the will of the testator; it can go no further, and cannot make any order respecting his estate. A decree appointing a receiver to take charge of the estate *pendente lite*, is *ultra vires* and void. *Kirby v. Kirby*, 84 Va. 627, 5 S. E. Rep. 539.

16. CONCLUSIVENESS OF PROBATE PROCEEDINGS.—A sentence pronounced by a court having jurisdiction, whether it be a sentence admitting a paper to probate, or excluding it from probate, as long as it remains in force binds conclusively, as being a judgment *in rem*, not only the immediate parties to the proceeding in which the sentence is had, but all

other persons, and all other courts; and the principle applies as well to a sentence represented by a verdict of a jury, and decree thereon in the proceeding by bill under the statute, as to a sentence pronounced in any other authorized probate proceeding. 4 Min. Inst. (8d Ed.) 111; *Connolly v. Connolly*, 32 Gratt. 657, and *foot-note*; *Norvell v. Lessueur*, 23 Gratt. 232, and *foot-note*; *Ballow v. Hudson*, 13 Gratt. 672; *Schultz v. Schultz*, 10 Gratt. 368; *Parker v. Brown*, 6 Gratt. 554; *Page v. Page*, 2 Rob. 434; *Nalle v. Fenwick*, 4 Rand. 585.

"After a will has been admitted to record, it cannot, with us, be controverted incidentally; as it frequently is in the English common-law courts, and sometimes (through the intervention of a jury) in their court of chancery, in consequence of the want of a court of probate in relation to wills of real estate. The sentence of our courts of probate cannot be drawn in question, unless in an appellate forum, except in the mode prescribed by our statute of wills." *Malone v. Hobbs*, 1 Rob. 246, 30 Am. Dec. 263.

17. COSTS.—Where a paper is offered for probate by the nominated executor, and its probate is opposed by some of the next of kin, the costs should be paid out of the estate. *Roy v. Roy*, 16 Gratt. 418. See Article 7 Va. Law Reg. 650.

If a person named executor in a paper purporting to be a will, offers it for probate in the district court, and it is there established; but the judgment is reversed by the court of appeals, the executor does not pay costs in the district court. *Spencer v. Moore*, 4 Call 423. See *Coalter v. Bryan*, 1 Gratt. 18. See generally, monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

18. NEW TRIALS.—Where a verdict has been rendered for or against the validity of a will, a new trial may be granted or refused, as a general rule, upon the same principles that govern in ordinary actions. 16 Enc. Pl. & Pr. 1059; *Connolly v. Connolly*, 32 Gratt. 657. See generally, monographic note on "New Trials" appended to *Boswell v. Jones*, 1 Wash. 323.

A new trial ought not to be granted for evidence discovered after the verdict is rendered, if this evidence be merely cumulative or such as ought not to affect the result; or if it appear, that due diligence to discover the evidence was not used before the trial. *Dower v. Church*, 21 W. Va. 23.

Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of facts or circumstances or presumptions, a new trial will not be granted merely because the court, if upon the jury, would have given a different verdict. *Montague v. Allan*, 78 Va. 502.

19. BILL OF REVIEW.—Where a bill is filed under the statute to contest a probated will, a decree establishing the will may be set aside by a bill of review for newly-discovered evidence. *Connolly v. Connolly*, 32 Gratt. 657. See generally, monographic note on "Bills of Review" appended to *Campbell v. Campbell*, 22 Gratt. 649.

20. APPEAL AND ERROR.—In every case of an appeal in a controversy concerning the probate of a will, the original paper exhibited for probate ought to be brought before the appellate court, by writ of subpoena *duces tecum*; if such paper cannot be had the order admitting it to record or rejecting it ought neither to be affirmed nor reversed, but the appeal should be dismissed. *Marks v. Bryant*, 4 Hen. & M. 91.

Upon the trial of an issue *devisavit vel non*, the mode of proceeding is substantially the same as upon the trial of common-law actions. Where parties submit to the rulings of the lower court without exception, they cannot be heard in the

appellate court to insist on the error, if any, as ground of reversal. *Montague v. Allan*, 78 Va. 592; *Lamberts v. Cooper*, 29 Gratt. 61, and *foot-note*.

B. OF NUNCUPATIVE WILLS.—The statute, 1 Rev. Code 1819, § 18, p. 378, which allowed a person interested to appear within seven years (the present statute only allows two years, see Va. Code 1887, § 2544), after probate of a will, and by bill in chancery contest the validity of the will, applies only to written and not to nuncupative wills. Page v. Page, 2 Rob. 424.

When a nuncupative will has been proved before a court of competent jurisdiction, after fourteen days from the death of the testator, and after the widow has been summoned to contest the same, as directed by the act in 1 Rev. Code 1819, § 18, p. 379, the sentence of the court admitting the same to probate is binding upon her, and cannot be impeached except by appeal therefrom, or by a bill in equity founded upon her having been prevented by fraud or accident from making her defence in the court of probate. Page v. Page, 2 Rob. 424.

C. OF LOST OR DESTROYED WILLS.—A court of probate, unless forbidden to do so by a statute, may admit to probate a will, which has been lost, suppressed or destroyed; or such a will may be established by the decree of a court of chancery upon a bill brought by the devisee or legatee against the heir or distributees. In either case the order establishing the will should set forth its contents, that it was duly executed by the testator, when he was of sound mind and disposing memory, and by whom it was witnessed, and show that it was attested in the manner required by the law. The decree should also direct this order including the will so established by it to be recorded in the proper will-book, which would be done by recording a copy of the order of the probate court or a copy of the decree of the chancery court, as the case might be. *Dower v. Seeds*, 28 W. Va. 113.

Before a will, which has been lost, suppressed or destroyed, can be thus probated by an order of a circuit court acting as an appellate probate court upon an appeal from an order of the county court either admitting or refusing to admit such will to probate, the court must, if requested by any party interested, direct an issue of *devisavit vel non* to be tried by a jury; and so too in a chancery cause to set up such lost, suppressed or destroyed will, before a decree can be rendered setting up such will, if either party to the suit requests it, the court should direct an issue of *devisavit vel non* to be tried by a jury. *Dower v. Seeds*, 28 W. Va. 113.

Before such issue of *devisavit vel non* is directed either by the circuit court acting as an appellate court of probate or by a court of chancery on a bill to establish a will, which is claimed to have been lost, suppressed or destroyed, such circuit court as appellate probate court or such court of chancery, as the case may be, must first determine, that the alleged will has been destroyed, suppressed or lost, and secondly it must determine the contents of this will. And the jury on such issue are to determine, whether the will, the contents of which are thus ascertained, is the last will and testament of the testator, or whether any part, and, if any, what part of the contents of this last will is the true last will and testament of the testator; and when the jury shall render its verdict it should be held conclusive, as to what was the last will and testament of the testator and as to whether any part of the will submitted to them was his last will, unless a new trial be awarded; and the circuit court as such appellate court of probate or the court of chancery

as the case may be, should set up and establish in the manner before stated the will as found by the jury as the last will and testament of the testator and have it recorded as such in the manner before indicated, or should refuse to establish any part of the will, which was submitted to the jury, as the will of the testator, if the verdict of the jury requires such order or decree. *Dower v. Seeds*, 28 W. Va. 113.

In a suit to set up a will which has been destroyed, it is not sufficient to show that it may have been in existence after the testator lost capacity to revoke it, but it must appear that it was in existence after that date, Courts of equity do not set up lost papers except where it is clearly shown that it should be done. *Shacklett v. Roller*, 97 Va. 630, 34 S. E. Rep. 492.

In a proceeding to establish a lost will, parol and secondary evidence of the existence and contents of the will is admissible. But where the only evidence adduced for this purpose was the deposition of a witness, eighty-five years of age, who testified that sixty-eight years before she had seen the will and heard it read, and who undertook to testify, not only to its provisions, but to the degree of estate devised, it was held that the testimony, though admissible, was not sufficient. *Apperson v. Dowdy*, 33 Va. 776, 1 S. E. Rep. 105.

D. OF FOREIGN WILLS.—A sentence of probate made in another state upon a will is not evidence in the courts of West Virginia of the validity and due execution of the will as to lands in that state devised by it, so as to pass title to such lands to the devisee. *Thrasher v. Ballard*, 33 W. Va. 235, 10 S. E. Rep. 411.

A will devising lands lying in Virginia, may be proved in Virginia, although declared void in some other of the United States. *Rice v. Jones*, 4 Call 80.

When an authenticated copy of a will proved in another or foreign state, is offered for probate in Virginia, if the probate shows that the will has been so proved in a foreign court, as that if proved in like manner by witnesses here, it could only be admitted as a will of personality, it shall be so admitted here; but if the evidence taken in the foreign court be such that, if taken in Virginia court, it would be sufficient to establish it as a will of lands, it shall be admitted in Virginia also, as a will of lands. *Ex parte Povall*, 3 Leigh 816. See *Burnley v. Duke*, 1 Rand. 108; Va. Code 1887, § 2536; W. Va. Code, ch. 77, § 25, p. 709.

A copy of a record or paper in the clerk's office of any court in the state of Virginia, attested by the officer in whose office the same is, is admissible as evidence in this state, though it has not the seal of the court or a certificate of a judge, as required by the act of congress relating to authentication of records. *Thrasher v. Ballard*, 33 W. Va. 235, 10 S. E. Rep. 411.

Where a copy of a will proved in Louisiana according to the laws of that state and offered for probate in Virginia, was not authenticated according to the act of congress of May 26, 1790, but was authenticated according to the rules of the common law, it was held that the copy was duly authenticated within the meaning of the statute of wills, 1 Rev. Code, ch. 104, § 16. *Ex parte Povall*, 3 Leigh 816.

A copy of a will having annexed the following certificate: "Virginia. In W. county court, Sept. term, 1888. The will and testament of M. S. deceased, dated 26 February, 1884, was presented in court, proved by the oaths of R. C. J. and H. B. C. B., two of the subscribing witnesses thereto, and ordered to be recorded. Teste: William B. F., Clerk, A copy. Teste: William B. F., Clerk,"—is, as regards

mere form or manner of attestation, admissible. Thrasher v. Ballard, 83 W. Va. 285, 10 S. E. Rep. 411.

Where a copy of a will with a certificate thereon that it had been admitted to probate in the county court of Louisa, was certified: "A true copy J. H., C. L. C." it was held that this was a sufficient certificate that J. H. was the clerk of the court, and that the certified copy of the record was competent evidence. Wynn v. Harman, 5 Gratt. 157.

XIII. GENERAL PRINCIPLES OF INTERPRETATION.

A. GENERAL RULE OF INTENTION.—The fundamental rule in the construction of wills is, that the intention of the testator, if not inconsistent with some established rule of law, must control. 29 Am. & Eng. Enc. Law (1st Ed.) 336; 2 Min. Inst. (4th Ed.) 1066; Kennon v. McRoberts, 1 Wash. 96, 1 Am. Dec. 428; Reno v. Davis, 4 Hen. & M. 283; Wyatt v. Sadler, 1 Munf. 537; Mooberry v. Marye, 2 Munf. 453; Land v. Otley, 4 Rand. 218; Boisseau v. Aldridges, 5 Leigh 232, 27 Am. Rep. 590; Wootton v. Redd, 12 Gratt. 196; Smith v. Smith, 17 Gratt. 268; Rhett v. Mason, 18 Gratt. 641; Hatcher v. Hatcher, 80 Va. 169; Price v. Cole, 83 Va. 243, 2 S. E. Rep. 200; Stokes v. Van Wyck, 83 Va. 724, 3 S. E. Rep. 387; East v. Garrett, 84 Va. 523, 9 S. E. Rep. 1112; McCamant v. Nuckols, 85 Va. 231, 12 S. E. Rep. 160; Neville v. Dulaney, 89 Va. 842, 17 S. E. Rep. 475; Hinton v. Milburn, 23 W. Va. 166; Couch v. Eastham, 29 W. Va. 784, 3 S. E. Rep. 23; Furbee v. Furbee, 49 W. Va. 191, 38 S. E. Rep. 511.

The cardinal rule for the construction of a will is to ascertain the intention of the testator from the entire instrument. Hays v. Freshwater, 47 W. Va. 217, 34 S. E. Rep. 831; LeSage v. LeSage (W. Va.), 43 S. E. Rep. 137.

However great may be the task of ascertaining the intention of the testator from the language used, still if it can be ascertained by any legitimate means, it must be held sacred and full effect given to it. The court will make the amplest allowance for the unskillfulness and negligence of the testator, technical informalities will be disregarded, the most perplexing complications of words and sentences will be carefully unfolded, and traces of the testator's intention will be diligently sought out in every part of the instrument, and the whole weighed carefully together. Wootton v. Redd, 12 Gratt. 196; Senger v. Senger, 81 Va. 702; Magers v. Edwards, 13 W. Va. 822; French v. French, 14 W. Va. 458; Furbee v. Furbee, 49 W. Va. 191, 38 S. E. Rep. 511.

B. LEGAL PRESUMPTIONS AND RULES OF CONSTRUCTION YIELD TO AN INTENTION SATISFACTORILY EXPRESSED.—Legal presumptions and rules of construction, which would otherwise prevail, yield to an intention satisfactorily expressed in the instrument itself; and, indeed, in the face of such expression of intent, have no application. This proposition is expressed in the maxim *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fenda est*.—It is not allowable to interpret what has no need of interpretation, nor will the law make an exposition against the express words and intent of the parties. 2 Min. Inst. (4th Ed.) 1062; Tebbs v. Duval, 17 Gratt. 349.

Where a will affords no satisfactory clue to the real intention of the testator, the court must, from the necessity of the case, resort to legal presumptions and rules of construction; but such rules must yield to the intention of the testator apparent in the will, and have no application where the intention thus appears. Tebbs v. Duval, 17 Gratt. 349; Moon v. Stone, 19 Gratt. 261; Withers v. Sims, 80 Va. 661; Bradley v. Zehmer, 82 Va. 689; Hurt v. Brooks, 89 Va. 500, 16 S. E. Rep. 358; Couch v. Eastham, 29 W. Va. 793, 3 S. E. Rep. 23; Cresap v. Cresap, 24 W. Va. 315, 12 S. E. Rep. 528.

C. INTENTION MUST BE GATHERED FROM THE WORDS AS USED BY THE TESTATOR.—While the intention of the testator is the "polar star" of construction, it must be found in his expressed words; the meaning of the words as used by the testator being the equivalent of the legal intention, i. e. the intention which the law recognizes as operative and dispositive. And it is not proper for the court to speculate upon what the testator may be supposed to have intended to do, instead of giving strict effect to his words. "The true inquiry," as has been frequently said, "is not what the testator meant to express, but what the words he has used do express." Wootton v. Redd, 12 Gratt. 196; Burke v. Lee, 76 Va. 386; Hatcher v. Hatcher, 80 Va. 169; Senger v. Senger, 81 Va. 687; Stokes v. Van Wyck, 83 Va. 724, 3 S. E. Rep. 387; East v. Garrett, 84 Va. 523, 9 S. E. Rep. 1112; Waring v. Boshier, 91 Va. 286, 21 S. E. Rep. 464; Couch v. Eastham, 29 W. Va. 784, 3 S. E. Rep. 23; Cresap v. Cresap, 24 W. Va. 310, 12 S. E. Rep. 527; Pack v. Shanklin, 43 W. Va. 304, 27 S. E. Rep. 389.

This principle has been expressed by Prof. Graves: "What the judicial expositor seeks to ascertain is not the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer. It is not the meaning of the words in the abstract, for the meaning of words varies with the circumstances under which they are used; and not the meaning of the writer apart from his words, for the question is one of interpretation, and what the writer meant to have said, but did not, is foreign to the inquiry; and *voluit sed non dixit* is the law's epitaph on a will which thus fails of its purpose. We must seek the meaning of the writer, but we must find it in his words; and we must seek the meaning of the words, but it must be the meaning of his words—of the words as he has used them—the meaning which they have 'in the mouth of this party.' " Paper on Extrinsic Evidence in respect to Written Instruments (read before the Va. State Bar Association August 2, 1896).

"We do not mean to say that where the intention of the testator is left in doubt by the language he employs in his will, extrinsic evidence cannot be resorted to for the purpose of showing the intention of the testator, the state of his family and of his property at the time of making his will, or that evidence may not be received as to any facts known to the testator, which may reasonably be supposed to have influenced him in the disposition of his property, and as to all the surrounding circumstances at the time of making the will. *Wootton v. Redd's Error*, 12 Gratt. 208. But as was said by KIRK, P., in *Waring v. Boshier*, 91 Va. 286, 21 S. E. Rep. 434: 'The object of courts in construing wills is to arrive at the true intent of the testator, but that intent is to be gathered from the language used. "Conjecture." It has been said, "cannot be permitted to usurp the place of judicial conclusion, nor supply what the testator has failed sufficiently to indicate." The intention must be collected from the words of the will, for the object of the construction is not to ascertain the presumed or supposed, but the expressed intention of the testator, that is, the meaning, which the words of the will, correctly interpreted, convey.'" CALDWELL, J., in *Wildberger v. Cheek*, 94 Va. 524, 27 S. E. Rep. 441.

If the testator uses language, which can be construed so as to carry the general intent and purpose into effect, it is the duty of the court so to construe the language as to accomplish that object. But the court is not authorized to supply omissions by adding words even for such a purpose. The testator must express his intention or use such language

as will enable the court to ascertain what his intention is, in order to make it effectual. *Liston v. Jenkins*, 2 W. Va. 62; *Graham v. Graham*, 23 W. Va. 36; *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. Rep. 527.

In *Moon v. Stone*, 19 Gratt. 130, the question was as to the meaning of the word "children." *MONCURE, P.*, in delivering the opinion of the court, said: "Now it is very probable that if the testator had been asked when he gave instructions for his will, whether he intended by the use of the word 'children' to exclude the descendants which might be living of any child that might be dead, supposing the will to have that effect, he would have answered 'No,' and would have directed such words to be used as would plainly express his intention. But whatever may be our conjecture on that subject, we cannot give effect to any supposed intention which is not expressed by the words of the will. The most we could say in such a case is, *voluit, sed non dixit*. We sit here not to make wills for testators but to expound them. And we must give effect to every will as it is written by the testator, provided it be legal, however strange and capricious it may seem to have been."

D. SENSE IN WHICH WORDS ARE PRESUMED TO BE USED.

1. **ORDINARY WORDS PRESUMED TO BE USED IN THEIR ORDINARY SENSE.**—In construing wills and all written instruments, the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical, and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but *no further*. *East v. Garrett*, 84 Va. 523, 9 S. E. Rep. 1112. See also, *Robinsons v. Allen*, 11 Gratt. 735; *Senger v. Senger*, 81 Va. 667.

Unless the presumption that the words are used in their ordinary sense is rebutted by the context, or there is difficulty in applying the words to the facts of the case, or they are insensible when brought into contact with the facts, the maxim of Vattel applies: "It is not permitted to interpret what has no need of interpretation," and the testator is taken to mean what he says. See Paper on Extrinsic Evidence in respect to Written Instruments, by Prof. Graves (read before the Va. St. Bar Assn., Aug. 2, 1902); *Couch v. Eastham*, 29 W. Va. 784, 8 S. E. Rep. 23; *Tebbs v. Duval*, 17 Gratt. 349.

Where, however, in the context of a will the testator has explained his own meaning in the use of certain words, that should be the guide, without resorting to lexicographers to determine their abstract signification, or to adjudged cases to discover what they have been held to mean in other wills. 2 Min. Inst. (4th Ed.) 1055; *Carnagy v. Woodcock*, 2 Munf. 234; *Randolph v. Wright*, 81 Va. 608.

Presumption Not Affected by Unreasonableness of Will.—The inconvenience or absurdity of a devise is no ground for varying the construction, where the terms are unambiguous; but when the intention is obscured by conflicting expressions, it is to be sought in a rational and consistent rather than in an irrational and inconsistent purpose. *Graham v. Graham*, 23 W. Va. 36.

"This presumption that words are used in their strict and primary sense will not be affected by the mere fact that when so interpreted the will may seem capricious and unreasonable, or even cruel and unjust. For the court must interpret the will of the testator, not make his will for him; and he may have had secret motives of which the court is ignorant. At all events, to the suggestion that his will is unreasonable, he has the legal right to reply, as does the Roman matron in the satire of Juvenal,

'Hoc volo, sic jubeo, sit pro rationis voluntas.'" Paper by Prof. Graves on Extrinsic Evidence in respect to Written Instruments (read before the Va. St. Bar Assn., Aug. 2, 1902).

When the language of the testator is plain, and his meaning clear, the courts have nothing to do but to carry the expressed will of the testator into effect, if it is not inconsistent with some rule of law. *Couch v. Eastham*, 29 W. Va. 784, 8 S. E. Rep. 23; *Whelan v. Reilly*, 5 W. Va. 355.

Where there is an express disposition, though it may be the result of oversight or mistake on the part of the testator, it cannot be controlled by inference which is not necessary and indisputable. *Harrison v. Haskins*, 2 Pat. & H. 388.

3. **TECHNICAL WORDS PRESUMED TO BE USED IN THEIR TECHNICAL SENSE.**—Where technical words or phrases are used in a will they are presumed to be used according to their technical signification unless the contrary appears, for the courts have no right to suppose that the testator did not understand the meaning of the words he employed, or that he did not mean what the words properly import; yet where other expressions are used in conjunction with such technical words, which plainly indicate what the intention was, and that it was not in accordance with the technical signification, the intention will control the legal operation of the words. 2 Min. Inst. (4th Ed.) 1055; *Kenyon v. McRoberts*, 1 Wash. 95, 1 Am. Dec. 428; *Findley v. Findley*, 11 Gratt. 434; *Robinsons v. Allen*, 11 Gratt. 738; *Senger v. Senger*, 81 Va. 667; *Wallace v. Minor*, 86 Va. 550, 10 S. E. Rep. 423; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. Rep. 345; *Waring v. Waring*, 96 Va. 641, 33 S. E. Rep. 150; *Allison v. Allison*, 101 Va. 44, 4 S. E. Rep. 904; *Hinton v. Milburn*, 23 W. Va. 166; *Baer v. Forbes*, 48 W. Va. 208, 36 S. E. Rep. 364; *Collins v. Feather* (W. Va.), 43 S. E. Rep. 325.

3. **WORDS PRESUMED TO BE USED WITH INTENT CONSISTENT WITH OTHER PROVISIONS OF WILL.**—When the words of one part of a will are capable of a twofold construction, that should be adopted which is most consistent with the intention of the testator as ascertained by other provisions in the will. *Price v. Cole*, 83 Va. 348, 2 S. E. Rep. 200.

In construing wills, courts are not bound to give a strict and literal construction to the words used, and by adhering to the letter defeat the manifest object and design of the testator. *Hill v. Huston*, 15 Gratt. 350.

4. **VALUE OF ADJUDGED CASES IN CONSTRUING WORDS.**—"Established rules of construction, however wise and just, can at best only serve as aids to a just conclusion. Such is the rule, especially when construing plain words and expressions in common use, which have not acquired a definite legal signification. Hence, in the old case of *Jeffereys v. Poyntz*, 3 Wils. 141, it was said: 'Cases in the books upon wills may serve to guide us with respect to general rules in the construction of devises in wills, but unless a case cited be in every respect directly in point, and agree in every circumstance with that in question, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star directing them in the construction of wills.' This language was substantially quoted, and with approbation, by *PENDELTON, P.*, in *Kenyon v. McRoberts*, 1 Wash. 97." *East v. Garrett*, 84 Va. 523, 9 S. E. Rep. 1112. See also, *Smith v. Smith*, 17 Gratt. 268; *Rhett v. Mason*, 18 Gratt. 541; *Cheshire v. Purcell*, 11 Gratt. 771; *Randolph v. Wright*, 81 Va. 608; *Bartlett v. Patton*, 83 W. Va. 71, 10 S. E. Rep. 21.

"As was said by *JUDGE RICHARDSON* in *Carr v. Effinger*, 76 Va. 208: 'We should remember, as a great truth, the remark made by *JUDGE PENDLETON* in

Kennon v. McRoberts, 1 Wash. 97, and quoting from able judges who had gone before him, "that cases on wills seem rather to obscure than illuminate questions of this sort; that cases on wills may guide as to general rules of construction, but, unless a case be in every respect directly in point and agree in every circumstance, it will have but little or no weight with the courts, which always look upon the intention of the testator as the polar star to direct them in the construction of wills." Yet the language of courts, when they speak of the prevailing intention as the 'governing principle,' must be 'understood with this important limitation, that here, as in other instances, the judges submit to be bound by precedents and authorities in point and endeavor to collect the intention upon grounds of a judicial nature, as distinguished from arbitrary occasional conjecture.' 2 Jarman on Wills, 888. LACY, J., in Hall v. Palmer, 87 Va. 354, 13 S. E. Rep. 618, 11 L. R. A. 610.

In Madden v. Madden, 2 Leigh 577, it was said: "There are no technical words or forms of expression used in the will. It is, evidently, the production of a plain man, who, though he understood very well what he meant to say, and was able to express himself quite intelligibly, knew nothing of legal forms or legal phrases. To ascertain his meaning, we must not look to treatises on wills, or to adjudged cases, but simply to the words he has used." Quoted with approval in Miller v. Potterfield, 86 Va. 876, 11 S. E. Rep. 486.

E. WORDS MAY BE SUPPLIED, TRANSPOSED OR REJECTED TO EFFECTUATE INTENTION OF TESTATOR.—The will must be most favorably and benignly expounded to pursue, if possible, the intention of the testator. To effectuate, therefore, the clear intention as apparent upon the whole will, words and limitations may be transposed, supplied or rejected; expressions may be rectified, as by reading the words "if he should die" as if they were "when he should die," or "hereinafter" as if it were "hereinbefore," or the word "and" as if it were "or," and vice versa; and, indeed, in no case should the manifest intent be defeated by adhering to the letter of the will. 2 Min. Inst. (4th Ed.) 1057; Lynch v. Hill, 6 Munf. 114; Brooke v. Croxton, 3 Gratt. 507; Hill v. Huston, 15 Gratt. 350; Smith v. Lloyd, 16 Gratt. 311; Peyton v. Harman, 22 Gratt. 645; Eminger v. Hall, 81 Va. 94; Price v. Cole, 83 Va. 343, 2 S. E. Rep. 200; East v. Garrett, 84 Va. 523, 9 S. E. Rep. 1113; Gish v. Moomaw, 89 Va. 847, 15 S. E. Rep. 868; Chapman v. Chapman, 90 Va. 409, 18 S. E. Rep. 913; Toothman v. Barrett, 14 W. Va. 301.

The strict grammatical sense is not always regarded, but the words of the will may be transposed to make a limitation sensible, or to carry into effect the general intent of the testator. Price v. Cole, 83 Va. 343, 2 S. E. Rep. 200. See Temple v. Temple, 1 Hen. & M. 476.

Words and limitations may be transposed, supplied or rejected, when the immediate context or the general scheme of the will warrants it, but not merely on a conjecture or hypothesis of the testator's intention. Graham v. Graham, 23 W. Va. 36.

Where the testator does not use proper technical words to express his meaning, the court may supply them, in order to effectuate the manifest intention of the testator; and for such purpose only. Selden v. King, 2 Call 72; Furbree v. Furbree, 49 W. Va. 191, 38 S. E. Rep. 511.

While it is not necessary to take all the words in a will in the order in which they are placed, and the courts may by transposition so arrange them as to comply with the intention of the testator, yet in no case, where the words are plain and unequiv-

ocal, is a transposition to be made in order to create a meaning and construction different from that which they naturally had as written, much less to let in different devisees or legatees, or to exclude those already provided for. Graham v. Graham, 23 W. Va. 36.

In supplying words in a will the correct rule is to supply such only, as it is evident the testator intended to use, and not such also, as would be necessary to effectuate the supposed intention of the testator. Graham v. Graham, 23 W. Va. 36.

Introductory words, even expressions contained in the clause of attestation may assist in showing the intention. For example, the word "estate" occurring in the introductory part of the will may be transposed thence to the devising part, and there be made to enlarge the interest devised to a person from a life estate to a fee simple. 2 Min. Inst. (4th Ed.) 1057; Kennon v. McRoberts, 1 Wash. 96, 1 Am. Dec. 428; Davies v. Miller, 1 Call 137; Watson v. Powell, 3 Call 306; Wyatt v. Sadler, 1 Munf. 587; Goodrich v. Harding, 3 Rand. 280; Lucas v. Duffield, 6 Gratt. 456.

In Goodrich v. Harding, 3 Rand. 280, it was held that the words "temporal goods" might be borrowed from the preamble of a will and coupled with a devising clause to enlarge a life estate into a fee simple. See also, Wyatt v. Sadler, 1 Munf. 587.

But where a will is systematically composed and the meaning plain, the court will not, for the purpose of enlarging the estate of devisees, or creating limitations in their favor, transpose expressions occurring in other clauses and obviously relating to other subjects. Mooberry v. Marye, 2 Munf. 453.

Where the words "real estate" are not used in the operative clause of the devise itself but are introduced in another part of the will, as in the codicil by way of recital as to what was in the operative clause, such words so used cannot have the effect nor be construed to extend the meaning of the operative clause. Graham v. Graham, 23 W. Va. 36.

False Description.—Where the subject is sufficiently and clearly ascertained, though there be added particulars of description which are found to be false or mistaken, effect will nevertheless be given to the devise; and the false or mistaken particulars of description will be rejected. Here the maxim *falsa demonstratio non nocet cum de corpore constat* properly applies. Wootton v. Redd, 12 Gratt. 196. See Preston v. Heiskell, 32 Gratt. 48; Savings Bank v. Stewart, 93 Va. 453, 25 S. E. Rep. 543.

But if such particulars of description are restrictive in their character; if they serve to narrow and limit the extent of the subject pointed out by the previous words, they can never be rejected. And if there be a subject which satisfies the whole description taken together, evidence is inadmissible to show that the testator intended a greater or different subject. Wootton v. Redd, 12 Gratt. 196.

F. PUNCTUATION.—It is a settled rule in the construction of wills that the existing punctuation is not to be regarded, if any change therein will tend to bring out and render the meaning of the instrument more obvious and unquestionable. Bell v. Humphrey, 8 W. Va. 1.

G. ALL PARTS OF WILL TO BE CONSTRUED TOGETHER.—In the construction of a will, all the parts of it should be examined and compared and the intention of the testator ascertained, not from a part alone, but from the whole instrument. 29 Am. & Eng. Enc. Law (1st Ed.) 341; 2 Min. Inst. (4th Ed.) 1056; Shelton v. Shelton, 1 Wash. 53; Selden v. King, 2 Call 72; Reno v. Davis, 4 Hen. & M. 253; Wyatt v. Sadler, 1 Munf. 587; Lucas v. Duffield, 6

Gratt. 456; Parker v. Wasley, 9 Gratt. 477; Cheshire v. Purcell, 11 Gratt. 771; Wootton v. Redd, 12 Gratt. 196; Smith v. Smith, 17 Gratt. 268; Randolph v. Wright, 81 Va. 606; Price v. Cole, 83 Va. 343, 2 S. E. Rep. 200; McCamant v. Nuckolls, 85 Va. 331, 12 S. E. Rep. 160; Neville v. Dulaney, 89 Va. 843, 17 S. E. Rep. 475; Houser v. Ruffner, 18 W. Va. 244; Graham v. Graham, 23 W. Va. 36; Hinton v. Milburn, 23 W. Va. 166; Rutter v. Anderson, 48 W. Va. 215, 36 S. E. Rep. 357; Furbee v. Furbee, 49 W. Va. 191, 38 S. E. Rep. 511.

H. SOME EFFECT TO BE GIVEN TO EVERY PART.—A will should be so construed as to give effect to every part thereof without change or rejection, provided some effect can be given not inconsistent with the general intent as gathered from the entire will. 29 Am. & Eng. Enc. Law (1st Ed.) 350; 2 Min. Inst. (4th Ed.) 1056; Shelton v. Shelton, 1 Wash. 59; Lucas v. Duffield, 6 Gratt. 456; Parker v. Wasley, 9 Gratt. 477; Cheshire v. Purcell, 11 Gratt. 771; Wootton v. Redd, 12 Gratt. 196; Price v. Cole, 83 Va. 343, 2 S. E. Rep. 200; McCamant v. Nuckolls, 85 Va. 331, 12 S. E. Rep. 160; Neville v. Dulaney, 89 Va. 843, 17 S. E. Rep. 475; Walker v. Webster, 95 Va. 377, 38 S. E. Rep. 570; Graham v. Graham, 23 W. Va. 36; Hinton v. Milburn, 23 W. Va. 166; Furbee v. Furbee, 49 W. Va. 191, 38 S. E. Rep. 511.

The substance of this rule is conveyed by the maxim that all transactions are to be construed *ut res magis valeat quam pereat*. The rule applies not only to the leading parts, but also to the very words taken singly, not one of which ought to be rejected if it can have a possible meaning. 2 Min. Inst. (4th Ed.) 1057; Shelton v. Shelton, 1 Wash. 59; Wootton v. Redd, 12 Gratt. 196.

"It is a plain dictate of good sense, in order to arrive at the meaning and intention of the parties, not to fix the attention exclusively on any one clause but to take the whole together, surveying every part of the instrument, and endeavoring so to construe it that every part shall have some effect, if that be practicable rather than be wholly inoperative." 2 Min. Inst. (4th Ed.) 1056, quoted with approval in Furbee v. Furbee, 49 W. Va. 191, 38 S. E. Rep. 511.

I. A CLEAR GIFT NOT TO BE DIMINISHED OR ENLARGED BY DOUBTFUL EXPRESSIONS.—Clear and unambiguous provisions in a will expressly made, cannot be controlled by mere inference and argument from general and ambiguous provisions in other parts of the will. Rayfield v. Gaines, 17 Gratt. 1; Simmerman v. Songer, 29 Gratt. 16; Withers v. Sims, 80 Va. 651; Gish v. Moomaw, 89 Va. 345, 15 S. E. Rep. 868; Bartlett v. Patton, 33 W. Va. 71, 10 S. E. Rep. 21.

A clearly-expressed intention in one portion of the will is not to yield to a doubtful construction in any other portion of the instrument. Bell v. Humphrey, 8 W. Va. 1; Houser v. Ruffner, 18 W. Va. 244; Bartlett v. Patton, 33 W. Va. 71, 10 S. E. Rep. 21; Waring v. Boshier, 91 Va. 236, 21 S. E. Rep. 464.

Where an estate is conveyed, or an interest given, or a benefit bestowed in one part of the instrument, by clear, unambiguous and explicit words, such estate, interest or benefit is not diminished or destroyed by expressions in another part of the instrument, unless the terms which diminish or destroy the estate before given are as clear and decisive as the terms by which it was created. 2 Min. Inst. (4th Ed.) 1057; Barksdale v. White, 23 Gratt. 224, 26 Am. Rep. 344; Stark v. Lipscomb, 29 Gratt. 332; Haymond v. Jones, 33 Gratt. 317; Senger v. Senger, 81 Va. 687; Smith v. Fox, 83 Va. 763, 1 S. E. Rep. 200; Gaskins v. Hutton, 93 Va. 523, 23 S. E. Rep. 385; Houser v. Ruffner, 18 W. Va. 244.

"It has been a rule of construction that a clear gift is not to be cut down by any subsequent provi-

sion, unless the latter is equally clear; but perhaps the better statement is that a clear gift is not to be cut down by anything which does not with reasonable certainty indicate an intention to cut it down. Whichever form be adopted, the plain intention of the testator, and not the comparative lucidity of the two parts of the will, is to be regarded." 29 Am. & Eng. Enc. Law (1st Ed.) 359, quoted in Le Sage v. Le Sage (W. Va.), 43 S. E. Rep. 137.

J. IF TWO CLAUSES ARE IRRECONCILABLY REPUGNANT, THE LAST WILL PREVAIL.—If two clauses in a will are totally irreconcilable, the subsequent clause is to be taken as evidence of a subsequent intention and will prevail. But this rule is only adopted from necessity to prevent the avoiding of both provisions for uncertainty. It is only applied to those cases where the intention of the testator cannot be discovered, and when the two provisions are so totally inconsistent that it is impossible for them to coincide with each other, or with the general intention of the testator. 2 Min. Inst. (4th Ed.) 1059; Price v. Cole, 83 Va. 343, 2 S. E. Rep. 200; Barksdale v. White, 23 Gratt. 224, 26 Am. Rep. 344; Haymond v. Jones, 33 Gratt. 317; Houser v. Ruffner, 18 W. Va. 244. See Cresap v. Cresap, 24 W. Va. 310, 12 S. E. Rep. 537.

If two provisions of a will are inconsistent, the latter must prevail. And if there be inconsistency between a general and specific provision, the specific must prevail, no matter in what order they come. Waring v. Boshier, 91 Va. 236, 21 S. E. Rep. 464.

After certain specific legacies to his two daughters, a testator devised to them also "all income from the ferry and all other sources during their natural lives." By another clause in his will, he left "the city and marine stocks" to certain other persons named. *Held*, that the daughters were not entitled to the income of such stocks. Waring v. Boshier, 91 Va. 236, 21 S. E. Rep. 464.

In the construction of a will in which a section containing a specific devise of land is followed by a second section containing a general devise of all the testator's property, inconsistent with, but not mentioning the former, it was held that the intention of the testator, to be ascertained from the whole instrument, must govern, in spite of the rule that of two irreconcilably repugnant clauses of a will the last prevails, and that, there being no apparent intention to revoke the first provision, it is not affected by the second. Price v. Cole, 83 Va. 343, 2 S. E. Rep. 200.

K. IF GENERAL AND PARTICULAR INTENT CONFLICT, THE GENERAL WILL CONTROL THE PARTICULAR.—Where there is a manifest general intent, the construction should be such as to effectuate it, though by that construction some particular or subordinate intent may be defeated, or the literal import of the words be departed from. It is not admissible, by adhering to the letter, to defeat the manifest object and design of the instrument. 2 Min. Inst. (4th Ed.) 1055; Hill v. Huston, 15 Gratt. 360; Price v. Cole, 83 Va. 343, 2 S. E. Rep. 200; Stokes v. Van Wyck, 83 Va. 724, 3 S. E. Rep. 387; Hurt v. Brooks, 89 Va. 496, 16 S. E. Rep. 358; Bell v. Humphrey, 8 W. Va. 1; Houser v. Ruffner, 18 W. Va. 244.

In the construction of wills the rule, that the general intent to dispose of the whole property should prevail in preference to any particular intent, applies to cases where there is an intention exhibited to make a certain disposition of the property, and the mode of executing that intention is erroneously, defectively or illegally prescribed in the will, and not to cases where there is a clear intention to effect another purpose, distinct and

different from the general object. *Graham v. Graham*, 23 W. Va. 26.

Where the will directs a purpose to be accomplished, and also points out the means by which the result is to be reached, which means turn out to be inadequate to accomplish the end, so that the provisions cannot both be carried into effect, it is evident that the directions pointing out the means must be sacrificed to the accomplishment of the end, if the end can be accomplished by other means. *Woerner on the American Law of Administration* (2d Ed.) § 416; *Eminger v. Hall*, 81 Va. 94.

In *Eminger v. Hall*, 81 Va. 94, "One seventh" of certain property was bequeathed to each of eight persons. The court held that the manifest intention of the testator that the property should be divided equally among the eight persons named should not be defeated by the fact that he had used the words "one seventh."

L. PRESUMPTION AGAINST PARTIAL INTES-TACY.—When a man makes a will, the presumption, in the absence of evidence to the contrary, is that he intends thereby to dispose of his whole estate. Accordingly, where two modes of interpretation are possible, that is preferred which will prevent either total or partial intestacy. *Smith v. Smith*, 17 Gratt. 274; *Gallagher v. Rowan*, 86 Va. 823, 11 S. E. Rep. 121; *Irwin v. Zane*, 15 W. Va. 646; *Houser v. Ruffner*, 18 W. Va. 244; *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. Rep. 21; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. Rep. 660.

The presumption that the testator did not intend to die intestate as to any part of his property, is especially strong where the will contains a general residuary clause. In such case, therefore, very strong and special words are required to show that the testator intended the residuary bequest to have a limited effect, and thus to rebut the presumption in favor of the residue. *Smith v. Smith*, 17 Gratt. 286; *Gallagher v. Rowan*, 86 Va. 823, 11 S. E. Rep. 121.

M. THE LAW FAVORS THE VESTING OF ES-TATES.—The law favors the vesting of estates, and where a legacy or devise is given which is not to be enjoyed in possession until some future period or event, it will, where no special intent to the contrary is manifested in the will, be held to be vested in interest immediately on the death of the testator rather than contingent upon a state of things that may happen to exist at a more distant period. And it is well settled that all devises and bequests are to be construed as vesting at the testator's death, unless the intention to postpone the vesting is clearly indicated in the will. *Hansford v. Elliott*, 9 Leigh 79; *Catlett v. Marshall*, 10 Leigh 79; *Raney v. Heath*, 2 Pat. & H. 206; *Cowan v. Epes*, 2 Pat. & H. 526; *Martin v. Kirby*, 11 Gratt. 67; *Brent v. Washington*, 18 Gratt. 526; *Corbin v. Mills*, 19 Gratt. 472; *Tallaferrro v. Day*, 82 Va. 91; *Stokes v. Van Wyck*, 83 Va. 733, 3 S. E. Rep. 387; *Jameson v. Jameson*, 86 Va. 51, 9 S. E. Rep. 480; *Sellers v. Reed*, 88 Va. 377, 13 S. E. Rep. 754; *Chapman v. Chapman*, 90 Va. 400, 18 S. E. Rep. 918; *McComb v. McComb*, 96 Va. 779, 33 S. E. Rep. 453; *Hinton v. Milburn*, 23 W. Va. 166; *Woodward v. Woodward*, 28 W. Va. 200.

For a further discussion of this subject, see *infra*, "The Vesting of Legacies and Devises."

N. THE HEIR NOT TO BE DISINHERITED EX-CEPT BY NECESSARY IMPLICATION.—In the construction of wills effect must be given to the intention of the testator, if that can be discovered and is consistent with the rules of law. But the intention to dispose of his estate must be manifested with legal certainty, otherwise the title of the heir or heirs at law will prevail; for conjecture cannot be made to supply what the testator has failed to

sufficiently indicate on the face of the will. The law has provided a definite successor to the estate in the absence of a testamentary disposition, and the heir is not to be disinherited except by express words or necessary implication. *Boisseau v. Aldridges*, 5 Leigh 222, 37 Am. Dec. 590; *Wootton v. Redd*, 12 Gratt. 196; *Sutherland v. Sydnor*, 84 Va. 880, 6 S. E. Rep. 480; *Magers v. Edwards*, 13 W. Va. 823; *Irwin v. Zane*, 15 W. Va. 646; *Graham v. Graham*, 23 W. Va. 36; *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. Rep. 21; *Baer v. Forbes*, 48 W. Va. 208, 36 S. E. Rep. 364.

By necessary implication is meant, so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed. *Boisseau v. Aldridges*, 5 Leigh 222, 37 Am. Dec. 590; *Sutherland v. Sydnor*, 84 Va. 880, 6 S. E. Rep. 480; *Graham v. Graham*, 23 W. Va. 36; *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. Rep. 21.

Under the rule that an heir will not be disinherited without an express devise or by necessary implication, a will devising all the property of the testator to his wife for life, and at her death to his married daughter, with children living, for the benefit of her heirs, will not be construed to mean that the daughter, who was the sole heir of the testator, took no interest in the property except that of trustee for her children. *Baer v. Forbes*, 48 W. Va. 208, 36 S. E. Rep. 364.

XIV. RULES OF CONSTRUCTION WHERE TESTA-MENTARY DONEES ARE DESIGNATED AS CLASSES.

A. GIFTS TO "CHILDREN."

1. MEANING OF THE TERM AS USED IN WILLS.—The word "children," where no other words are joined with it, has in general, except where the rule in *Wild's Case*, 6 Co. 17 a, applies, no other meaning but issue in the first degree, exclusive of grandchildren or other remote issue, and it is then usually a word of purchase, and not of limitation. 2 Min. Inst. (4th Ed.) 1066; *Smith v. Chapman*, 1 Hen. & M. 240; *Moon v. Stone*, 19 Gratt. 180; *Waring v. Waring*, 96 Va. 641, 33 S. E. Rep. 150.

"The word children is not a word of art; it has a natural sense, in which it is most generally used; when applied to the remote descendants of any person, it is altogether a figurative expression; thus we read of the children of Seth; the children of Ham; and the children of Israel. In the latter instance it is used to designate a whole nation. But, when not used in this figurative sense, it means the immediate offspring of a man or woman; it has indeed, in a few cases, been construed, to mean grandchildren, and even great-grandchildren. But this construction is to be admitted only where no other construction can be made." *TUCKER, P.*, in *Smith v. Chapman*, 1 Hen. & M. 240. See *Morris v. Owen*, 2 Call 520.

In *Vaughan v. Vaughan*, 97 Va. 323, 33 S. E. Rep. 603, it is said: "The word 'children,' in its legal as well as in its ordinary and popular sense, means the immediate offspring of a man or woman, and does not include grandchildren or more remote descendants. The term is never used to include grandchildren or other persons than immediate descendants, in the absence, as in this case, of something showing a contrary intent. 2 Jarman on Wills (Bigelow's Ed.) 147; 5 Am. & Eng. Ency. of Law, 1085; *Radcliffe v. Buckley*, 10 Vesey, 195; *Moon v. Stone*, 19 Gratt. 180; *Tebbs v. Duval*, 17 Gratt. 349; *Morris v. Owen*, 2 Call 520; *James v. McWilliams*, 6 Munf. 302; *Thomason v. Andersons*, 4 Leigh 118; *Smith v. Chapman*, 1 Hen. & M. 240, and *Adams v. Law*, 17 How. 417."

A testator devised a tract of land to his daughter

for her life, and the life and widowhood of any husband she might have, and at her death and the death or after-marriage of her husband, then to be equally divided among her children if she had any, and if she had no children then to be divided among all the testator's children. *Held*, that the word "children" as used in this devise was a word of purchase and not of limitation. *Moon v. Stone*, 19 Gratt. 130.

In *Bennett v. Toler*, 15 Gratt. 588, 78 Am. Dec. 638, it is held, that upon a devise to a daughter for life, and at her death the property to be equally divided among her children, an illegitimate child of the daughter will take with her legitimate children. This decision is placed on the ground that the Virginia law of descents, declaring that "bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, as if lawfully begotten" (Va. Code 1887, § 2552), has changed the general rule by giving the bastard a mother, and making him one of her children; and as he is capable of taking by descent as her child, he is also embraced under a will by the words "her children." The court says (p. 631): "And so, adhering to the principle of the rule, when the law makes the bastard child of a woman her child; endows him with every attribute of a child born in wedlock; includes him in the very class designated as children, to whom her estate is to pass in the event of her dying intestate; a testator speaking of 'her children,' the words must be construed to include in the class all who in law are her children." See article in 4 Va. Law Reg. 624.

2. MAY INCLUDE GRANDCHILDREN.—While the word "children" properly includes only the immediate descendants of the person named, and does not therefore usually apply to grandchildren or issue generally, yet if it can have no operation, as where the testator had no children at the time of making the will but only grandchildren, or where it is clear that the testator used the words "children" and "issue" indiscriminately, and that he means *issue* when he says *children*, it will be construed according to his intention, as meaning or including grandchildren. *Woerner on the American Law of Administration* (2d Ed.) § 422; *Underhill on the law of Wills*, § 547; *Bernard v. Hopkins*, 6 Call 101; *Smith v. Chapman*, 1 Hen. & M. 240; *Moon v. Stone*, 19 Gratt. 130; *Waring v. Waring*, 96 Va. 641, 33 S. E. Rep. 150.

In order that the word "children" may be construed to mean lineal descendants of a more remote degree, there must be something on the face of the will to show that it was so intended, for no rule is better settled than that technical words are presumed to be used in their technical sense, and that words of a definite legal signification ought to be understood as used in their definite legal sense, unless the contrary appears on the face of the instrument. *Waring v. Waring*, 96 Va. 641, 33 S. E. Rep. 150.

In *Moon v. Stone*, 19 Gratt. 130, *MONCURE, P.*, in delivering the opinion of the court, says: "A testator may use words in any sense he pleases, however different that sense may be from their natural meaning; and therefore he may use the word 'children' to embrace grandchildren, or other descendants, or issue indefinitely; but then it must appear from his will, at least generally, that such was his intention. We say generally, because there may be cases in which the word 'children' in a will would be construed to mean 'grandchildren,' although there might be nothing in the will to show such a meaning; as when the gift is to children, and the proof *de hors* the will, is that the testator had not, and in the nature of things could

not have, children, but had grandchildren; then the children would take under the will *ut res magis valeat quam pereat*; and so in the like cases."

A devise to "the youngest child which shall hereafter be born of all my said children," was held to mean the testator's youngest grandchild. *Otterback v. Bohrer*, 87 Va. 548, 12 S. E. Rep. 1018.

Power to Appoint to "Children" Does Not Usually Include Grandchildren.—A power to appoint to children will not authorize an appointment to grandchildren or other persons, unless a contrary intention appears from the instrument creating the power. *Morris v. Owen*, 3 Call 520, and *foot-note*. See also, *Hood v. Haden*, 82 Va. 588; *Knight v. Yarbrough*, Gilm. 37, and *foot-note*.

When a testator empowers his widow to dispose of certain slaves "among his children," (in general terms,) "as she shall think proper," she cannot give them all to one, nor wholly exclude any; nor can she give any of them to his grandchildren; and if she make an appointment violating this principle, it will be avoided in equity and the property distributed among all the children and their representatives. *Hudsons v. Hudson*, 6 Munf. 352.

3. MAY MEAN "ISSUE."—To effect the manifest intention of the testator, the word "children" may be taken as synonymous with "issue." Thus a devise of slaves to a married woman "to her and her children forever" was construed to be a devise to her and her issue; the court being of opinion that the word "children" was not intended to denote the devisee or devisees who were to take, nor to reduce the portion of the interest of the mother in the slaves before given to her by the same clause, but to declare the duration of her interest therein. *Merrymans v. Merryman*, 5 Munf. 440. See *Thomason v. Andersons*, 4 Leigh 118.

One clause of a will devised lands to M, a daughter of the testator, without limitation. A subsequent clause directed that all the property willed to his daughters should be held in trust by A, "for the separate use of them and their children, free from the control of their husbands, and in no manner liable for their husband's debts. If at any time either of my daughters wishes to sell their said lands, they must notify the trustee in writing, who may sell, and reinvest for their separate use and benefit." One of the daughters had at the date of the will been married thirty years, but had no children. *Held*, that the word "children" was to be construed as equivalent to "issue" and that M. took a fee in the land devised to her. *Smith v. Fox*, 82 Va. 763, 1 S. E. Rep. 200.

4. GIFTS TO CHILDREN AS PURCHASERS—AFTERBORN CHILDREN.—"Whether, when there is a devise to children as purchasers, those born after the death of the testator are entitled to take as embraced in the class, depends upon whether the gift to the children is immediate or postponed. Thus, if the gift be immediate, as if there be a devise to A and his children, and A has children at the death of the testator, and others are born subsequently, only the children in being at his death (including a child *en ventre sa mere*) are entitled; and after-born children are excluded. But this construction is *prima facie* only, and will yield to the intention; and it is rebutted if the testator devises 'to A and his children, born or to be born' (*Woodruff v. Pleasants*, 81 Va. 37), or uses any expressions from which the intent to include after-born children can be inferred. See *Buford v. Land Co.*, 90 Va. 418, a case of a deed; 2 Devlin, Deeds sec. 864. But, on the other hand, if the gift to the children be postponed, as when the devise is 'to A for life, and after his death to the children of B,' then the rule is that the word 'children' includes any child born before the

termination of the life estate of A, although not in being at the death of the testator. Here the remainder vests at once in the children living at the death of the testator, but will open and let in all children of B born after that time, but before the death of A. *Hamletts v. Hamlett*, 12 Leigh 350; *Cooper v. Hepburn*, 15 Gratt. 551. But any children of B born after A's death will be excluded. And in this case the words 'born or to be born' applied to the children of A, will not alter the construction, because these words are taken to refer to children born between the death of the testator and the death of A. See 2 Jarman, Wills, 700-742; Hawkins, Will, 68-80; 29 Am. & Eng. Ency. Law, 410-414. And the rule as to the time at which the number of objects is to be ascertained is the same as to all classes of relations, brothers, nephews, cousins, etc., including issue when it is a word of purchase. 2 Jarman Wills, 703; Hawkins, Wills, 72." Article by Prof. Graves in 4 Va. Law Reg. 624.

"In the above statement of the law as to immediate and future gifts to children, it has been assumed that there were one or more children living at the death of the testator or at the death of the life tenant. But as to immediate gifts, if there be no child *in esse* at the death of the testator, the gift will embrace all the children who may be born afterwards by way of executory bequest or devise. And the same rule is applicable to a future gift, when not subject to the common-law rule as to the time of vesting of contingent remainders. 2 Jarman, Wills, 721, 725. See Code Va., sec. 2424." Article by Prof. Graves in 4 Va. Law Reg. 624.

5. **RULE IN WILD'S CASE.**—According to the ancient common-law rule as established in Wild's Case, 6 Co. 17 a, on a devise to a man *and his children*, if he has no children at the time of the devise, the word "children" must be taken as a word of limitation, so that he takes an estate tail; but if he has children living at the time of the devise, "children" must be taken as a word of purchase, and they take jointly with him. This rule had its origin in feudal policy, and applies only to real property. With respect to personal property, an absolute interest will pass where an estate tail would be created in real property. Nor does the rule apply where it appears that it was the intention of the testator to create a life estate in the parent, with an executory gift to the children as purchasers after the parents' death; for if such was his intention, the word "children" is a word of purchase, and the children will take as remaindermen. The rule in Wild's Case has been modified in Virginia and West Virginia by the statute abolishing entails, so that instead of taking an estate tail, the testamentary donee in such case takes an estate in fee simple. See Woerner on the American Law of Administration, (2d Ed.) § 422; Underhill on the Law of Wills, § 580; *Smith v. Chapman*, 1 Hen. & M. 240; *Moon v. Stone*, 19 Gratt. 130; *Smith v. Fox*, 82 Va. 763, 1 S. E. Rep. 200; *Mosby v. Paul*, 88 Va. 533, 14 S. E. Rep. 336; *Graham v. Graham*, 4 W. Va. 320.

A testator devised real and personal estate to his natural daughter Patsey, to her and her heirs forever; and if she should die leaving no child, the estate before given should return into his estate and be divided among his legitimate children; but should she die leaving a child or children, then the estate should be "heired" by him, her or them, as the case might be. *Held*, that Patsey took by the will an estate tail in the lands devised to her, which the statute abolishing entails converted into a fee simple, and barred the contingent remainder over limited on the estate tail. The devisee Patsey having left illegitimate children living at her death,

capable of inheriting and of transmitting inheritance on the part of their mother, in like manner as if they had been her lawful children, by the provisions of the statute of descents, a *quære* was raised as to whether the effect of the devise in this case was not the same as if she had left legitimate children. *Thomason v. Andersons*, 4 Leigh 118.

B. **GIFTS TO "SONS."**—The word "son," in its technical sense, is a word of purchase, and must be so construed, unless in the context there is something to the contrary. Nor, since the act abolishing entails, can a testator be presumed to intend to create an estate tail unless he uses such words as created such estate without implication. *Walker v. Lewis*, 90 Va. 578, 19 S. E. Rep. 358.

A devise of lands to one for life, and after his death to his sons and their heirs forever, to be equally divided among them, but in case of his dying without leaving a son or son's son who can take, then to other designated persons, does not under the rule in Shelley's Case create a fee tail in the first devisee, which becomes converted by statute into a fee simple. *Taylor v. Cleary*, 39 Gratt. 448; *Walker v. Lewis*, 90 Va. 578, 19 S. E. Rep. 358.

Where a testator devised land to his son Edward, to him and his heirs forever, and if his son Edward should die without lawful issue of his son then to his son Henry, it was held that Edward did not take an estate in fee with an executory devise over to Henry in the event of Henry dying without a son but that he took by the will an estate tail which the statute abolishing entails converted into an estate in fee simple. *Wright v. Cohoon*, 12 Leigh 370.

C. **GIFTS TO "DESCENDANTS."**—The word "descendants" is more comprehensive than "children," the former embraces the latter, and a devise to "descendants by stocks" includes all persons who would be included in a devise to "children and descendants by stocks." *Neilson v. Brett*, 99 Va. 673, 40 S. E. Rep. 32.

D. GIFTS TO "HEIRS."

1. **IN GENERAL.**—In its strict technical import the word "heirs" applies to the person or persons appointed by law to succeed to the estate in case of intestacy; but the term may be used in an instrument, and especially in a will, to describe "children" or "issue," or some particular class of heirs. Whether the term is thus used as a word of limitation or a word of purchase is a question of intention, depending on the terms of the instrument as construed in the light of surrounding circumstances. In deciding the question, great weight must be given to the technical meaning of the word "heirs," which must be presumed to have been intended to be used in such technical sense in the absence of evidence of a plain intention to the contrary. *Roy v. Garnett*, 2 Wash. 9; *Smith v. Chapman*, 1 Hen. & M. 240; *Taylor v. Cleary*, 29 Gratt. 448; *Wallace v. Minor*, 86 Va. 550, 10 S. E. Rep. 423; *Hinton v. Wilburn*, 23 W. Va. 166; *Baer v. Forbes*, 48 W. Va. 208, 36 S. E. Rep. 364; *Collins v. Feather (W. Va.)*, 43 S. E. Rep. 323.

"Like all other legal terms, the word 'heir,' when unexplained and uncontrolled by the context, must be interpreted according to its strict and technical import, in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in case of intestacy." 2 Jarman Wills (Ed. 1881) 585." *Allison v. Allison*, 101 Va. —, 44 S. E. Rep. 904.

The word "heir" is *nomen collectivum*, embraces all legally entitled to partake of the inheritance, and is interchangeable with the plural term "heirs." The term "heirs" means "next of kin,"

according to our statute of descents. Where there is a gift to the heir (in the singular), and there is a plurality of persons conjointly answering to the description "heir," all are held to be entitled. The converse is also true. Where a testator, after making several contingent dispositions of personal property, gave the ultimate interest to his own right heirs (in the plural). It was held that the testator's heir was entitled, and not his executor. *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. Rep. 387.

"The word 'heirs' may be used as *designatio personarum* with the same effect as any other word. And if it be ascertained by a proper construction of the instrument, who are the persons intended to be designated by that word in the particular instance, the instrument has precisely the same effect as if the persons thus intended to be designated had been described by their christian and surnames in the instrument." *Taylor v. Cleary*, 29 Gratt. 448.

Upon a limitation of real property to "heirs," the right heir, only, will take; upon a limitation of personal property to "heirs," the word will be construed as "distributees;" upon a limitation of blended property to "heirs at law," the persons answering that description take the whole—if there is nothing to indicate a contrary intention on the part of the testator. *Allison v. Allison*, 101 Va. —, 44 S. E. Rep. 904.

2. TIME OF ASCERTAINMENT.—Upon a devise to one for life and at his death to the heirs of the testator, the heirs are to be ascertained as of the death of the testator, and not as of the date of the termination of the life estate. *Allison v. Allison*, 101 Va. —, 44 S. E. Rep. 904.

Where a testator, in the year 1830, gave land to his daughter and her husband, but, if the daughter should die without issue surviving, the land to go to the heirs of the testator, and the daughter died in 1884 without having had and without leaving issue, the court held that the testator meant those who were his heirs at the time of his death. Hence, as the daughter was sole heir of the testator, she took the fee in either event. *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. Rep. 387.

3. DEVISE TO HEIRS OF LIVING PERSON.—A devise to the heirs of a living person to take effect immediately is to be interpreted as a devise to the heirs apparent, the word heirs in such case being interpreted to be a *designatio personarum* and not to have its usual and technical meaning, as the clear meaning of the will, that the devise should take effect immediately, would otherwise be defeated, as *nemo est hæres viventis*. *Stuart v. Stuart*, 18 W. Va. 675.

Rule Inapplicable to Devise of Future Estate.—The rule construing the word heirs used in a will in respect to living persons as merely *designatio personarum* is inapplicable to a devise of a future estate, such construction not being necessary in order to give effect to any clearly-expressed intention of the testator. In such case the word heirs has its strict legal meaning and means the parties, who would on the death of the *propositus* inherit his real estate; and they take the real estate devised in the same proportions as such persons would take as heirs. *Stuart v. Stuart*, 18 W. Va. 675; *Reid v. Stuart*, 18 W. Va. 338; *Baer v. Forbes*, 48 W. Va. 208, 36 S. E. Rep. 364.

Where a testator devised his real estate to his wife during her life, and added "at the death of my wife all the property to go to my daughter, Isabella, for the benefit of her heirs," it was held that the word "heirs" did not mean merely the children of the daughter living at the death of the wife, but was used in its technical sense as expressing the

relation of persons to a deceased and not a living ancestor, and that the daughter, surviving the life tenant, took the property in fee simple under the will. *Baer v. Forbes*, 48 W. Va. 208, 36 S. E. Rep. 364.

4. REMAINDERS LIMITED TO HEIRS OF TAKER OF AN ESTATE OF FREEHOLD—RULE IN SHELLEY'S CASE.—"The rule in Shelley's Case, as it seems to be correctly laid down in 2 Jarm. on Wills 241, simply is, 'that where an estate of freehold is limited to a person and the same instrument contains a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word 'heirs' is a word of limitation—i. e., the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body he takes a fee tail; if to his heirs general, a fee simple.'" *Taylor v. Cleary*, 29 Gratt. 448; *Walker v. Lewis*, 90 Va. 578, 19 S. E. Rep. 258.

"The rule in Shelley's Case, is a rule of law, which in its application is generally, if not necessarily, contrary to the apparent intention of the author of the estate. It therefore overrules, or is paramount to such apparent intention." *Taylor v. Cleary*, 29 Gratt. 448.

For a discussion as to the precise terms of the rule in Shelley's Case, the circumstances necessary to concur in order that it may operate, the reasons and policy of the rule, its effect when applicable, and its application, see 2 Min. Inst. (4th Ed.) pp. 400-412. For a further discussion of the rule in Shelley's Case, see *Roy v. Garnett*, 2 Wash. 9; *Carter v. Tyler*, 1 Call 165; *Hill v. Burrow*, 3 Call 342; *Tate v. Tally*, 3 Call 364; *Smith v. Chapman*, 1 Hen. & M. 240; *Eldridge v. Fisher*, 1 Hen. & M. 559; *Warners v. Mason*, 5 Munf. 242; *Bells v. Gillespie*, 5 Rand. 273; *Broadus v. Turner*, 5 Rand. 308; *Jiggetts v. Davis*, 1 Leigh 368; *Bramble v. Billups*, 4 Leigh 90; *See v. Craigen*, 8 Leigh 449; *Deane v. Hansford*, 9 Leigh 258; *Pryor v. Duncan*, 6 Gratt. 27; *Lucas v. Duffield*, 6 Gratt. 456; *Nowlin v. Winfree*, 8 Gratt. 346; *Callis v. Kemp*, 11 Gratt. 78; *Moore v. Brooks*, 13 Gratt. 136; *Mixon v. Rose*, 12 Gratt. 425; *Tinsley v. Jones*, 13 Gratt. 289; *Hall v. Smith*, 25 Gratt. 70; *Stone v. Nicholson*, 27 Gratt. 1; *Taylor v. Cleary*, 29 Gratt. 448; *Wine v. Markwood*, 31 Gratt. 443; *Hood v. Haden*, 82 Va. 588; *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. Rep. 387; *Chipp v. Hall*, 23 W. Va. 504.

A testator devised to his wife a tract of land during her natural life, and after her death to his son during his natural life, and at his death it was to descend to his heirs. Held, that the rule in Shelley's Case was applicable to such devise; and that the testator's widow took an estate for her life in the land, remainder to the testator's son in fee simple. *Chipp v. Hall*, 23 W. Va. 504.

Rule Supplanted by Statutory Provision.—In Virginia the rule in Shelley's Case, is supplanted by the statutory provision that wherever any person, by deed, will, or other writing, takes an estate of freehold in land, or takes such an estate in personal property, as would be an estate of freehold, if it were an estate in land, and in the same deed, will, or writing, an estate is afterwards limited by way of remainder, either mediately or immediately, to his heirs, or the heirs of his body, or his issue, the words "heirs," "heirs of his body," and "issue," or other words of like import used in the deed, will, or writing in the limitation therein by way of remainder, shall not be construed as words of limitation carrying to such person the inheritance as to the land, or the absolute estate as to the personal property, but they shall be construed as words of purchase, creating a remainder in the heirs, heirs of the body, or issue. Va. Code 1887, § 2423. The West Virginia Code contains a similar provision. See W. Va. Code 1899, ch. 71, sec. 11, p. 681.

"The intent of this statute as contained in the Codes of 1849 and 1873, was to abolish the rule, but as originally transcribed from the New York Code into ours, it imperfectly accomplished the result. The rule applies to all cases where the ancestor takes any estate of freehold, with remainder to his heirs, etc., whilst the statute, until the Code of 1887, prescribed a different construction only in those cases where the limitation to the ancestor is for his life. The terms of the statute, therefore, were not applicable where the limitation was to the ancestor for the life of another, nor, indeed, for any other freehold estate, save only for his own life. But the present statute obviates this incongruity, being co-ordinate with the rule itself." 2 Min. Insts. (4th Ed.) 412. See Hood v. Haden, 82 Va. 588.

In Hood v. Haden, 83 Va. 588, it was held that the statute of 1847, Va. Code 1849, ch. 146, § 11; Va. Code 1873, ch. 112, § 11, essaying to abolish the rule in Shelley's Case, applied only where the grantor or testator was competent to, and did vest in the heir a remainder in fee simple after an estate for the ancestor's life.

Accordingly, where a testatrix, by her will in 1879, in evident execution of her power under her husband's will, provided: "I devise to my son Richard, the upper half of the home place, during his life, remainder to the lawful issue of his body forever. If Richard die without such issue, he is hereby clothed with power to appoint one of my children or grandchildren as his devisee, and I give the upper half to such appointee," it was held that the statute essaying to abolish the rule in Shelley's Case did not apply, and that Richard, under the appointment of the testatrix, took a fee simple in the upper half, by application and under that rule. Hood v. Haden, 83 Va. 588.

5. DEVISE TO HEIR TO TAKE AS HE WOULD TAKE AS HEIR.—Where a testator devises property to his heir to take effect in the same manner as he would take as heir, the devise is nugatory, because in such case the donee takes under the law of descent and distribution. This doctrine, however, is said to apply only where the devisee is the sole heir to the land devised. Biedler v. Biedler, 87 Va. 300, 13 S. E. Rep. 753.

Where the testator makes the same disposition to the heir which the law would have made, or where the disposition is made in such general terms that the intention is left doubtful, the heir shall take by descent, as his better title, and not under the will. Kennon v. McRoberts, 1 Wash. 96, 1 Am. Dec. 423.

Gifts to "Family."—The word "family" has two very distinct meanings: 1st, The collective body of persons, who live in one house and under one head or manager; and it may include in this sense parents, children, servants, or in some cases even boarders or lodgers; 2d, Those who descend from one common progenitor; and in this sense it cannot include the parents and has no reference to the fact of residence in one house and under one head. When used in its first sense, it rarely includes boarders and lodgers: sometimes include servants; generally includes children; but is sometimes confined to the wife and infant children or those dependent on the head of the family by reason of their relations independent of contract. The word has this comprehensive, or more or less limited sense, as will most effectually carry out the purpose of the document, in which it is used. In a will, where the word family is used as a designation of beneficiaries, it excludes the parents and is generally confined to children, unless the apparent meaning of the testator as shown by the context is different and more comprehensive or more re-

stricted. Stuart v. Stuart, 18 W. Va. 675. See also, Whelan v. Reilly, 5 W. Va. 354.

The expression "family" in a will is held *prima facie* to mean children, and must be so construed unless some reason appears in the context of the will for extending or altering it. And where the language of the will provides that certain property shall be held in trust and the proceeds "applied to the support of John (a son of the testator) and his family, or such of them as the trustees may think proper, in such manner and in such times as the trustees may think proper, (support in this cause being meant to include education as to the children)," it is apparent that the testator meant children in the use of the word family, and the will must be construed to read: "John and his children;" and the devise is not therefore void for uncertainty and indefiniteness in the devisees. Whelan v. Reilly, 5 W. Va. 354.

A condition annexed to a devise or bequest avoiding it if the beneficiary marry into the "family" of a person named, in the absence of anything in the context to the contrary, means one of the children of such person. Phillips v. Ferguson, 85 Va. 509, 8 S. E. Rep. 241.

A testator, after devising lands to his executors to sell, provided in his will as follows: "I give the money arising from the sale of the lands and tenements aforesaid and the collection of my outstanding debts, as well as all moneys which I may have on hand at the time of my death, in trust to my said executors that they shall so dispose of the same for the purpose of aiding any members of the family, or any other person or persons who may be in distress, and whom they may think I would myself have assisted in such cases, confiding the disposition of the said trust fund entirely to their discretion." Held, that the trust for the benefit of the testator's family was sufficiently definite and precise and was not vitiated by its connection, in the same clause, with the vague and indefinite declaration of trust in favor of persons in distress. Hill v. Bowman, 7 Leigh 650. See Fontaine v. Thompson, 80 Va. 239.

Where the words "child," "children," "family," etc., are used in a will, parol evidence is admissible of any extrinsic circumstances tending to show what person or persons were intended by the testator. Phillips v. Ferguson, 85 Va. 509, 8 S. E. Rep. 241; Senger v. Senger, 81 Va. 687.

F. GIFTS TO "NEXT OF KIN."—A testator by his will provided: "I give to my brother, W, all the residue of my estate, real and personal, to be held by him in trust, and to be distributed among my next of kin who may be needy, in such proportions and at such times as in his opinion may be best." The brother was named as executor in the will. Held, that the devise was valid as to the class "the next of kin" and should be distributed among them according to the statute of descents; but was invalid as to the individuals to be selected as "the most needy." It was also held that the brother was entitled to share in the residue as one of "the next of kin." Fontaine v. Thompson, 80 Va. 239.

In Frazier v. Frazier, 3 Leigh 643, the syllabus says: "The testator bequeathed his personal estate to his brother, J., to be sold, and the proceeds to be distributed by the brother among the testator's next of kin, according to their deserts, as he should see at a future time, what may turn up; the brother dies without making any appointment: held that the testator is to be regarded as intestate *quoad* this subject; and the same is distributable among his next of kin according to law." The court however says nothing on the subject. Speaking of this case, GREEN, P., in Milhollen v. Rice, 13 W. Va. 563, says:

"The property was held to be distributable among the next of kin, I presume, not because the testator was to be regarded as dying intestate as to it, but because it was either a trust or a power in the nature of a trust, which being unexecuted, the property must go to the next of kin of the testator, as the legatees under the will."

Time of Ascertainment.—The "next of kin," or "next of kin according to the statute," are to be ascertained at the time of the death of the person to whom they stand so related. *Beach on the Law of Wills*, sec. 290; *Brent v. Washington*, 18 Gratt. 535.

In *Gundry v. Pinner*, 14 Beav. 94, the Master of the Rolls said: "I never accurately understood the meaning of the words 'the next of kin' to be ascertained at any period different from that at which the person himself dies; 'next of kin' are words having a distinct and legal meaning, which do not point to persons who are different persons at different times, but point to persons who must be ascertained at a future period, namely, on the death of the person to whom they are to be next of kin. And, therefore, if you say next of kin of a person at a period when he did not die, you really are using words with no sensible meaning or expression; but you ought to make them sensible by saying persons who would have been his next of kin if he had died at a period after that when he did die." Quoted with approval in *Brent v. Washington*, 18 Gratt. 535.

G. GIFTS TO SURVIVORS.—In the case of a gift to one for life with remainder over to his "surviving" children, the courts of this state, favoring the early vesting of estates, have held, that the word "surviving" and its equivalents refer to the period of the testator's death, in the absence of anything to show an intention that it should refer to the death of the life tenant. 2 Min. Inst. (4th Ed.) 1066; *Cowan v. Epps*, 2 Pat. & H. 530; *Hansford v. Elliott*, 9 Leigh 79; *Martin v. Kirby*, 11 Gratt. 67; *Stone v. Lewis*, 34 Va. 474, 5 S. E. Rep. 382; *Sellers v. Reed*, 88 Va. 377, 13 S. E. Rep. 754; *Gish v. Moomaw*, 80 Va. 347, 15 S. E. Rep. 808; *Chapman v. Chapman*, 90 Va. 409, 18 S. E. Rep. 913; *Crews v. Hatcher*, 91 Va. 382, 21 S. E. Rep. 811; *Stanley v. Stanley*, 92 Va. 584, 24 S. E. Rep. 229; *Cheatham v. Gower*, 94 Va. 383, 26 S. E. Rep. 853; *Allison v. Allison*, 101 Va. —, 44 S. E. Rep. 904. For a discussion of the period to which words of survivorship refer, see *infra*, "The Vesting of Legacy and Devisea."

A devise of land to two specified sons of the testator passes to the survivor upon the death of one of the sons before the testator. *Lockhart v. Vandyke*, 97 Va. 356, 33 S. E. Rep. 613, 5 Va. Law Reg. 303.

Under a will providing that, at the death of his widow, her share is "to be distributed amongst my children then living," children of deceased children are not entitled to the share their parent would have taken if living. *Vaughan v. Vaughan*, 97 Va. 323, 33 S. E. Rep. 603.

Only Original and Not Accrued Shares Survive.—The law seems well established that only original and not accrued shares survive, in the absence of a positive and distinct indication of intent in the will that the latter shall survive. *Armistead v. Hartt*, 97 Va. 313, 33 S. E. Rep. 616; *Brooke v. Croxton*, 2 Gratt. 507.

A testator, after directing that all his estate should be equally divided among his seven children, added: "It is my will and desire that if any of my children should die before they attain to legal age, or without a lawful heir, in either case, that all such property as they may receive in the division of my property, return to my surviving children, or their lawful heirs." Held, upon the death of one of the children under age, that his share of the estate

vested absolutely in the survivors, and that upon the death of another child under age, or without children, the property which such child received from the share of the first, did not pass under the limitation over to the surviving children. *Brooke v. Croxton*, 2 Gratt. 506.

H. GIFTS TO REPRESENTATIVES.—The primary sense of the word "representatives," when used in a bequest of personal property, is the same as that of "legal representatives" or "personal representatives." Each of them is equivalent to executors or administrators. *Brent v. Washington*, 18 Gratt. 536.

"But this primary sense of the word 'representatives' may be controlled, where an intention is clearly indicated to employ it in a different sense. * * * Sometimes it has been held to mean next of kin according to the statute, and sometimes to mean descendants, according to the intention to be gathered from the whole will. In the present case, the sense in which this word is employed is explained by the addition of the words, 'according to the statute of distributions.' There is no room for construction. The words, according to their plain and necessary interpretation, describe those who are entitled to take the personal property of the children after their death, according to the statute of distributions; that is to say, the distributees. And the statute must be referred to, to ascertain the persons who are to take and their respective shares. * * * And the persons, thus described take, under the gift, as purchasers. They are, in the events contemplated, direct objects of the gift. These words cannot be construed as words of limitation merely, for personal property, on the death of the owner, does not devolve upon the distributees, but upon the executor or administrator. And they cannot be construed as denoting children or descendants only. They describe all who represent the children according to the statute, whether descendants, or ancestors, or collateral kindred. There is nothing in the context to authorize us to restrict their meaning to any particular class of such representatives. * * * It is obvious that these 'representatives according to the statute' are not to take during the lifetime of the children of Mrs. Baylor, whom they are to represent. That would be impossible; for, in the nature of things, these children must be dead before they can have such representatives. The only construction which the words will admit of is, that the representatives are to take in the place and stead of the children, in case any of the children should die in the lifetime of Mrs. Baylor. The language must be construed as if it had been, 'children who may be then living, and the representatives, according to the statute of distributions, of such of the children as may have previously died,' or as if it had been, 'children, or their representatives according to the statute of distributions,' merely changing 'and' into 'or,' which is often done when the intention plainly requires it. * * * This substituted limitation in favor of the representatives of the children operates, in technical language, as a 'conditional limitation,' defeating the remainder limited to the children before its natural expiration. * * * The limitation to the representatives is, of course, contingent until the death of the children, in whose place they take." *JOYNES, J.*, in *Brent v. Washington*, 18 Gratt. 536.

In *Brent v. Washington*, 18 Gratt. 535, it was held that under a gift to "representatives according to the statutes of distribution," the husband was entitled to take, he being the distributee in effect though not in form under the statute then in force.

"If a legacy be given to several as a class and not

in their individual character, as for instance to executors in their representative character, and one die in the lifetime of the testator, the legacy will not lapse, but go to the survivors; and so in any case of a legacy to several as a class, if one, from death or any other cause, should be incapable of taking, before the legacy is payable, or has been paid, the survivors take the whole, upon the principle, that each is a taker of the whole, but not solely, for the whole is devised to all, and not a part to each." *Young v. Vass*, 1 Pat. & H. 107.

XV. IN WHAT PROPORTION BENEFICIARIES TAKE.

A. WHEN BENEFICIARIES TAKE PER CAPITA.

—As a general rule where a bequest is made to several persons, in general terms indicating that they are to take equally as tenants in common, each individual will of course take the same share; in other words, the legatees will take *per capita*. The same rule applies where a bequest is to one who is living, and to the children of another who is dead, whatever may be the relations of the parties to each other, or however the statute of distributions might operate upon those relations in case of intestacy. Thus, where property is given "to my brother A, and to the children of my brother B," A takes a share only equal to that of each of the children of B. So where the gift is to A's and B's children or to the children of A and the children of B, the children take as individuals, *per capita*. The substance of this rule of construction is that in the absence of explanation, the children in such case are presumed to be referred to as individuals and not as a class, and that the relations existing between the parties, and the operation which the statute would have upon those relations in case of intestacy, are not sufficient to control his presumption. *Hoxton v. Griffith*, 18 Gratt. 578; 2 Min. Inst. (4th Ed.) 1068; *Senger v. Senger*, 81 Va. 687; *Walker v. Webster*, 65 Va. 377, 28 S. E. Rep. 570. See also, *Brewer v. Opie*, 1 Call 213; *Crow v. Crow*, 1 Leigh 74; *McMaster v. McMaster*, 10 Gratt. 275.

Where a bequest is to one, more persons living, and to the children of another who is dead, whatever may be the relations of the parties to each other, the legatees will take *per capita*, unless it appears, from the context or some clause in the will, or from the circumstances in view of which it was made, shown by competent extraneous evidence, that the testator intended a stirpital distribution. *Collins v. Feather* (W. Va.), 43 S. E. Rep. 823.

A bequest of the income of a fund to one for life, the principal to go to her children after death, vests an absolute estate, share and share alike, in the children living at the death of the testatrix; and the share of any child dying before the death of the life tenant passes to his or her personal representative. *Stanley v. Stanley*, 92 Va. 534, 24 S. E. Rep. 229.

Where a testator said, "It is my will that all my estate be divided equally between the children of my deceased son J. and the children of my daughter E," it was held that the children of J. and of E. took *per capita*. *Senger v. Senger*, 81 Va. 687.

A testator having two sons and two daughters living, eight grandchildren of a deceased daughter, and the widow and two children of a deceased son, to provide for, gave to one of the sons valuable real estate and \$1,000 out of his personal estate; to the other valuable real estate, imposing upon him, as a condition subsequent, the support of his mother, testator's widow; and to the widow of the deceased son and her two daughters other real estate; and then disposed of the residuum of his estate as follows: "I will and bequeath that after all the be-

quests of this, my last will, is complied with, that the remainder of my personal property be equally divided between my children, and grandchildren of my daughter Sarah, who was married to Henry E. Cale; to my daughter Mary Jane, now married to Ethbell Falkenstein, my daughter Margaret, now married to Joseph Michael, J. W. Feather, and Michael E. Feather, I will and bequeath that my two daughters, Margaret Michael and Mary Jane Falkenstein, each receive one thousand dollars apiece out of my personal property before the above last-named division is made." Held, that each of the eight children of Sarah Cale takes one-twelfth of the personal property, after payment of the specific legacies charged thereon. *Collins v. Feather* (W. Va.), 43 S. E. Rep. 823.

Where a will directs that the residue of an estate shall pass in equal parts to those who would be entitled thereto under the statute of descents and distributions if the testator had died intestate, the persons so designated take the property in equal parts *per capita*. *Walker v. Webster*, 65 Va. 377, 28 S. E. Rep. 570.

B. WHEN BENEFICIARIES TAKE PER STIRPES.—Speaking of the general rule above laid down, that the beneficiaries take *per capita*, JOYNES, J. in *Hoxton v. Griffith*, 18 Gratt. 574, says: "But this rule is not inflexible, and it will yield to the cardinal rule of construction which requires that effect shall be given to the intention of the testator, to be collected from the whole will. If, therefore, an intention can be collected from the will that the children of the deceased parent are to take as a class, that intention will prevail. The general rule above referred to rests, indeed, upon a very slender foundation, and Jarman says that it 'will yield to a very faint glimpse of a contrary intention in the context.' 3 Jarman on Wills, Ed. 1861, 1863. 'Thus' he adds, 'the mere fact that the annual income, until the distribution of the capital, is applicable *per stirpes*, has been held to constitute a sufficient ground for presuming that a like principle was to govern the gift of the capital.'"

Where the testator seems to have contemplated a division *per stirpes*, the will will be so construed. Thus, where a testator said: "All the rest of my estate * * * I give in trust to my grandchildren by my sons J., L., and W., now born or hereafter born, to be divided equally between them, my sons acting as trustees, each for his own family, * * * and dividing out to each child, as he or she may come of age or marry, his due share of said estate: provided always, that the right of survivorship shall be to the rest of each family of children in case any child of either family shall die under age, unmarried and without children," it was held that the title to the property on the testator's death vested in his three sons in trust for their respective families, and that the property vested beneficially on the testator's death in the grandchildren then born, subject to open and let in after-born children. *Woodruff v. Pleasants*, 81 Va. 37.

The general rule was departed from, and the division made *per stirpes*, and not *per capita*, on the ground of a slight manifestation of intention in *Hamletts v. Hamlett*, 12 Leigh 350. In this case the testator gave the residue of his estate to be "equally divided among James Hamlett, Mary Jeffress, Patsy Wilson, Nancy Jeffress, Narcissia Jeffress, (all of whom were children of the testator,) the children of my son, George Hamlett and Lucy, his wife, the children of my daughter, Elizabeth Arnett, the children of my son, Bedford Hamlett, deceased, and the children of my daughter Obedience. The court held that the property

should be divided *per stirpes*, each family of grandchildren taking one-ninth part.

Where a residuary clause directs property to be equally divided between the heirs of the testatrix and those of her husband, the property should be divided into two equal parts giving to her heirs one-half and to her husband's heirs the other half *per stirpes* and not *per capita*, unless they all stand in the same relation to the testatrix. *Ross v. Kiger*, 42 W. Va. 402, 26 S. E. Rep. 193.

The children of a deceased sister take *per stirpes* with the living sisters under a will bequeathing the balance of testator's estate "to my sisters or their heirs equal to all." *Taylor v. Fauver*, 3 Va. Dec. 550.

A testator bequeathed, that the balance of his slaves should be divided equally between his children, to wit, the heirs of W. (a deceased son of testator), naming them, seven in number, T., M. and J. (sons of testator), and the children of his deceased daughters, M. and S. But the children of his daughters M. and S. should take, respectively, only such part as their mothers respectively would take if still alive, that is to say, a child's part. *Held*, that the seven children of the deceased son took equally *per capita* with the testator's three living sons, and the children of his two deceased daughters took *per stirpes*, the children of each taking their mother's part. *Crow v. Crow*, 1 Leigh 74.

C. PRESUMPTION IN DOUBTFUL CASES.—If the language used leaves it doubtful as to what the testator meant, he will be presumed to have intended the legatees to take as they would have taken under the statute of descents and distributions. *Senger v. Senger*, 81 Va. 687.

XVI. GIFTS TO WIFE AND CHILDREN.

"There is a numerous class of cases beginning with *Wallace v. Dold*, 3 Leigh 258, which holds that a grant or gift to a woman and her children, or to a trustee for the benefit of herself and children, passes title to the mother, and that the mention of the word 'children' in the deed or will merely indicates the motive for the conveyance or gift, without investing them with any interest therein. *Nye v. Lovitt*, 99 Va. 710, 24 S. E. Rep. 345." *Honaker v. Duff*, 101 Va. —, 44 S. E. Rep. 900. For a collection of these cases, see *foot-note* to *Stinson v. Day*, 1 Rob. 485; *foot-note* to *Leake v. Benson*, 29 Gratt. 158. See also, *Tyack v. Berkeley*, 100 Va. 296, 40 S. E. Rep. 904, where many of the authorities are reviewed and doctrine is reaffirmed.

In *Fitzpatrick v. Fitzpatrick*, 100 Va. 552, 42 S. E. Rep. 306, it was said, however, that a gift to a wife and children, without more, vests a joint estate in the wife and children in equal portions. See *dictum* of *Rixey, J.*, in *Vaughan v. Vaughan*, 97 Va. 332, 33 S. E. Rep. 603, 5 Va. Law Reg. 443; *foot-note* to *Rhett v. Mason*, 18 Gratt. 541. See also, monographic note on "Joint Tenants and Tenants in Common" appended to *Ambler v. Wyld*, *Wythe* 285.

Under a devise to a wife and her children with a provision that if she marries again the property shall go to the children, the wife takes a defeasible fee and not merely a life estate. *Findley v. Findley*, 42 W. Va. 372, 26 S. E. Rep. 433.

A devise to a wife for life for the support of herself and the maintenance of the testator's children vests an absolute life estate in the wife and creates no trust in favor of the children. *Haythe v. Pateson*, 2 Va. Law Reg. 563.

Same Rule of Construction Applies to Gift to Son and His Family.—A testator by his will gave certain real estate to his son after the death of the testa-

tor's wife. Afterwards, the son having become indebted, the testator by a codicil revoked the devise, and gave the same property to a third person; "trustee for [the son], and to be held by said trustee for the use and benefit of [the son] and his family during their lives, and then to be willed by [the son] to whom he may choose, and that said trustee is to hold said property free from all present and future liabilities of said [son] and for the benefit of said [son] and his family." The family of the son consisted merely of himself and wife. *Held*, that the entire estate in the realty vested in the son alone. The court said: "All the cases belonging to the class now under consideration have been of a gift, grant or devise for the benefit of wife and children, or daughter and children; but the same rule of construction would apply to a grant or devise to a son and his children, or his son and his family, and the same tests would with propriety be resorted to in order to ascertain, in the case of a will, whether the testator intended by the addition of the words 'and family' to a gift to his son to embrace the family as joint objects, with the son, of his bounty." *Honaker v. Duff*, 101 Va. —, 44 S. E. Rep. 900.

XVII. THE VESTING OF LEGACIES AND DEVISES.

A. THE LAW FAVORS AN EARLY VESTING.—The law leans in favor of the vesting of estates, and where the meaning of the will is doubtful, the courts instead of seeking for a construction which would postpone the vesting of the estate, and impart to the interest an additional feature of contingency, will incline rather to that construction which would regard the interest as vested on the happening of the earliest contingency. *Cooper v. Hepburn*, 15 Gratt. 551; *Catlett v. Marshall*, 10 Leigh 79; *Stone v. Nicholson*, 27 Gratt. 1; *Stokes v. Van Wyck*, 83 Va. 734, 8 S. E. Rep. 387; *Sellers v. Reed*, 88 Va. 377, 13 S. E. Rep. 754; *Chapman v. Chapman*, 90 Va. 409, 18 S. E. Rep. 913; *Hinton v. Milburn*, 23 W. Va. 166; *Woodward v. Woodward*, 28 W. Va. 200. See *supra*, "General Principles of Interpretation."

But an interest must be construed as contingent, if clearly so expressed, however absurd and inconvenient, may be the consequences to which such construction may lead. *Otterback v. Bohrer*, 87 Va. 548, 12 S. E. Rep. 1013; *Sellers v. Reed*, 88 Va. 377, 13 S. E. Rep. 754. See also, *Stone v. Nicholson*, 27 Gratt. 1; *Hinton v. Milburn*, 23 W. Va. 166; *Woodward v. Woodward*, 28 W. Va. 200.

"If the intent * * * be apparent on the face of the will, neither the technical rule respecting the early vesting of an estate, nor possible inconveniences arising from a literal adherence to such intention, are to be regarded." *Catlett v. Marshall*, 10 Leigh 79; *Cheatham v. Gower*, 94 Va. 383, 26 S. E. Rep. 853.

In *Otterback v. Bohrer*, 87 Va. 548, 12 S. E. Rep. 1013, where the testator devised land, "until the youngest child of all my said children shall have attained the age of twenty-one years," to a trustee to apply the net proceeds to the education of his grandchildren, and provided that "when the youngest child now and which shall hereafter be born, of all my said children, shall have reached, or, if living, would have reached, the age of twenty-one years, the estate shall be divided," "it was held that the majority of the youngest grandchild, and not of the youngest child of the testator, limited the duration of the trust.

B. GENERAL RULE AS TO TIME OF VESTING.—It is a settled rule of interpretation that all devises and bequests are to be construed as vesting at the testator's death, unless the intention to postpone the vesting is clearly indicated by the will

Lantz v. Massie, 99 Va. 709, 40 S. E. Rep. 50, 7 Va. Law Reg. 538; McComb v. McComb, 96 Va. 779, 32 S. E. Rep. 453, 5 Va. Law Reg. 40; Cheatham v. Gower, 94 Va. 383, 26 S. E. Rep. 853; Stanley v. Stanley, 92 Va. 534, 24 S. E. Rep. 229; Crews v. Hatcher, 91 Va. 378, 21 S. E. Rep. 811; Chapman v. Chapman, 90 Va. 409, 18 S. E. Rep. 913; Sellers v. Reed, 88 Va. 377, 13 S. E. Rep. 754; Jameson v. Jameson, 86 Va. 51, 9 S. E. Rep. 480.

C. TO WHAT PERIOD WORDS OF SURVIVORSHIP REFER.—After a bequest or devise of an estate for the life of the first taker, words of survivorship in a will are always to be referred to the period of the testator's death, when no special intent appears to the contrary. *Hansford v. Elliott*, 9 Leigh 79; *Martin v. Kirby*, 11 Gratt. 67; *Stone v. Nicholson*, 27 Gratt. 1; *Brown v. Brown*, 31 Gratt. 511; *Stone v. Lewis*, 84 Va. 474, 5 S. E. Rep. 382; *Sellers v. Reed*, 88 Va. 377, 13 S. E. Rep. 754; *Gish v. Moomaw*, 89 Va. 347, 15 S. E. Rep. 868; *Chapman v. Chapman*, 90 Va. 409, 18 S. E. Rep. 913; *Crews v. Hatcher*, 91 Va. 378, 21 S. E. Rep. 811; *Stanley v. Stanley*, 92 Va. 534, 24 S. E. Rep. 229; *Cheatham v. Gower*, 94 Va. 383, 26 S. E. Rep. 853; *Allison v. Allison*, 101 Va. —, 44 S. E. Rep. 904. For a discussion of gifts to survivors, see *supra*, "Rules of Construction Where Testamentary Donees Are Designated as Classes."

A testator provided in his will that after the decease of his wife, his plantation should be sold and the proceeds to be divided equally among his surviving brothers and sisters and the children of such as might be dead, share and share alike. *Held*, that the word "surviving" referred to those surviving at the time of the testator's death, there being nothing to show an intention that it should refer to the death of the life tenant. *Stone v. Lewis*, 84 Va. 474, 5 S. E. Rep. 382.

A testator bequeathed money in trust for his daughter E. for life, "and after her death" to be equally divided among "her surviving children and the issue of such as may be dead, such issue taking *per stirpes* and not *per capita*," etc. *Held*, that the vesting of the remainder in the children of E. or their issue depended on their surviving the testator, not E., and that the issue of E.'s children who died after the testator, but before E., took, not by substitution to the rights of their deceased parent, but as original legatees. *Jameson v. Jameson*, 86 Va. 51, 9 S. E. Rep. 480.

Only the children of the testatrix's nephew living at the death of the nephew take an interest in land devised to such nephew "during his life" * * * and at his death to his surviving children." *Cheatham v. Gower*, 94 Va. 383, 26 S. E. Rep. 853.

A will provided that, after paying testator's debts, all his real and personal estate should go to his wife, for life, and, on her death, the real estate should be equally divided among his three brothers "or their heirs if living;" but if either of the brothers should die "without heirs, before the division of the estate, the property should go to those living, or their heirs." *Held*, that at testator's death the brothers each took a vested remainder, in fee simple, in an undivided third of the real estate, defeasible only by death without issue before the termination of the life estate, in which event the property was to pass to the survivors. *Gish v. Moomaw*, 89 Va. 345, 15 S. E. Rep. 868.

Upon a devise to four children share and share alike, and in the event of the death of one or more of them, his or their share to go to the survivors, the event which is to fix the rights of the children is the death of the testator. If all survive the testator each takes his or her share of the estate devised free from any right of survivorship. *Armi-*

stead v. Hartt, 97 Va. 316, 33 S. E. Rep. 616, 5 Va. Law Reg. 387.

D. THE VESTING OF LEGACIES IN GENERAL.

—"Where a future time for the payment of a legacy is defined by the will, the legacy will be vested or contingent according as, upon construing the will, it appears whether the testator meant to annex the time to the payment of the legacy or to the gift of it. In ascertaining the intention of the testator in this respect, courts of equity have established two rules of construction: First, that a bequest, payable or to be paid at or when he shall attain twenty-one years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death, as *debitum in present solvendum in futuro*, and transmissible to his executors or administrators; for the words payable or to be paid are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate, in the same manner, in respect of its vesting, as if the bequest stood singly, and contained no mention of time. A second rule of construction established by the authorities is, that if the words to be "paid" or "payable" are omitted, and the legacies are given at twenty-one, or if, when, in case or provided the legatees attain twenty-one, or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for its payment. Consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy. While these two rules of construction seem well established, there is still another, which is the all-controlling one and which explains and limits to their proper application the various exceptions and refinement of distinctions to be found in the cases. It is this: the intention of the testator, as appearing from the whole will, must predominate over all technical words and expressions." *Major v. Major*, 33 Gratt. 819. These rules of construction are approved in *Sellers v. Reed*, 88 Va. 377, 13 S. E. Rep. 754. See also, *Jameson v. Jameson*, 86 Va. 51, 9 S. E. Rep. 480.

Where a testator by his will, gave his property, both real and personal, to the children of his brother M., "providing either of them shall live to the age of twenty-one," and "if either of them live to be twenty-one, it is my desire that my sister L. and B.'s children to have it between them equally," it was held that the bequest to the children of M. vested at the death of the testator, subject to be divested by the death of all these first takers before the age of twenty-one. *Raney v. Heath*, 3 Pat. & H. 206.

E. THE VESTING OF DEVISES IN GENERAL.

—"The courts * * * lean even more strongly in favor of the vesting of devises than of legacies. The former are always held to be vested, except estates in the devise of which a condition precedent is so clearly expressed, that to treat them as vested would be to decide in direct opposition to the intention of the testator. Hence, words of seeming condition, as 'when,' 'upon,' etc., are, if possible, held to have only the effect of postponing the right of possession. And even though the devise be clearly conditional, yet the condition will be construed, if possible, as a condition subsequent, so as to confer an immediately vested estate, subject to be divested on the happening of the contingency. *Hawk. Wills*, 223, 237; 2 Min. Inst. 357." *Sellers v. Reed*, 88 Va. 377, 13 S. E. Rep. 754.

F. GIFTS OF MIXED FUNDS.—The vesting of gifts of mixed funds is governed by the rules appli-

cable to realty. *Sellers v. Reed*, 88 Va. 377, 13 S. E. Rep. 754; *Raney v. Heath*, 2 Pat. & H. 207.

G. THE VESTING OF REMAINDERS.—A vested remainder is one limited to a certain person on a certain event, so as to possess a present capacity to take effect in possession, should the possession become vacant. 3 Min. Inst. (4th Ed.) 306; *Wallace v. Minor*, 86 Va. 550, 10 S. E. Rep. 423; *Crews v. Hatcher*, 91 Va. 378, 21 S. E. Rep. 811; *Lantz v. Massie*, 99 Va. 700, 40 S. E. Rep. 50, 7 Va. Law Reg. 538.

A contingent remainder is a remainder limited to an uncertain person, or on an uncertain event, or so limited to a certain person, and on a certain event, as not to possess the present capacity to take effect in possession, should the possession become vacant. 3 Min. Inst. (4th Ed.) 306; *Wallace v. Minor*, 86 Va. 550, 10 S. E. Rep. 423. See *Hinton v. Milburn*, 23 W. Va. 166.

"Professor Graves, in his work on Real Property, after pointing out that, in considering a remainder, we must assume that it still exists as a remainder, and judge of its character as vested or contingent under the facts as they are at the moment the question arises, gives the following very clear and satisfactory definition of a vested remainder: 'A remainder is vested when it is subject to no condition precedent, and is always ready, during its continuance, to come into the possession of a certain person, already existing and ascertained, on the determination of the particular estate, now or hereafter, in any manner whatsoever.' And adds that 'any remainder not so ready is contingent.' In a note to this definition, the learned author says: 'It will be observed that the definition requires that the remainderman, at the time the question arises, should already be in existence and ascertained; and it is not enough, in order to consider the remainder now vested, that he will become ascertained at the moment the particular estate ends and the possession becomes vacant. Thus there are cases where the same event that ends the particular estate ascertains the remainderman; and whenever the possession becomes vacant there will then be a certain person ready to take possession; as in the limitation, to A for the life of B, remainder to the heirs of B, or to A and B for life, remainder to the survivor and his heirs. Here the remainder will vest and come into possession *eo instanti* on the death of B in the one case, or the survivorship of A or B in the other, but meanwhile it remains contingent, because, as yet, there is no 'determinate person' in whom 'the estate is invariably fixed,' for *nemo est aarus viventis*, and who can now tell whether A or B will be the survivor? A test suggested by Professor J. Randolph Tucker will clearly show that these remainders are contingent, viz.: Is the remainderman a person to whom you could give livery of seisin now, if his estate were present and not future? How could livery be made to the heirs of B while B is living, or to the survivor of A and B while both are alive? * * * For the reasons above stated, Fearn's test of a vested remainder, viz.: 'The present capacity of taking effect in possession, if the possession were to become vacant,' is open to exception in omitting to add, after 'taking effect in possession,' the words 'of an already existing and ascertained person;' but the whole tenor of his discussion of remainders shows that this was intended." *Howbert v. Cauthorn*, 100 Va. 652, 42 S. E. Rep. 683.

The present capacity to take effect in possession if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contin-

gent. 3 Min. Inst. (4th Ed.) 306; *Crews v. Hatcher*, 91 Va. 378, 21 S. E. Rep. 811; *Lantz v. Massie*, 99 Va. 700, 40 S. E. Rep. 50, 7 Va. Law Reg. 538; *Howbert v. Cauthorn*, 100 Va. 649, 42 S. E. Rep. 683; *Allison v. Allison*, 101 Va. —, 44 S. E. Rep. 904.

By capacity, as thus applied, is not meant simply that there is a person *in esse* interested in the estate, who has a natural capacity to take and hold the estate, but that there is further no intervening circumstance, in the nature of a precedent condition, which is to happen before such person can take. As, for instance, if the limitation be to A for life, remainder to B, B has a capacity to take this at any moment when A may die. But if it had been to A for life, remainder to B, after the death of J. S., and J. S. is still alive, B can have no capacity to take till J. S. dies. When J. S. dies, if A is still living, the remainder becomes vested, but not before. See *Howbert v. Cauthorn*, 100 Va. 655, 42 S. E. Rep. 683.

Where the parties cannot be ascertained until the happening of the event, the remainder is contingent. *Allison v. Allison*, 101 Va. —, 44 S. E. Rep. 904.

Courts always favor the vesting of estates, and therefore, in doubtful cases, lead in favor of construing language as creating vested rather than contingent remainders. *Crews v. Hatcher*, 91 Va. 378, 21 S. E. Rep. 811; *Lantz v. Massie*, 99 Va. 700, 40 S. E. Rep. 50, 7 Va. Law Reg. 538.

Words of survivorship are to be construed as referring to the testator's death, unless a special intent to the contrary appears upon the face of the will; and if upon a fair construction of the whole will, there is a doubt as to the character of the remainder, the courts will hold it to be vested rather than contingent. *Allison v. Allison*, 101 Va. —, 44 S. E. Rep. 904; *Corbin v. Mills*, 19 Gratt. 472, and *foot-note*. See also, *Catlett v. Marshall*, 10 Leigh 79; *Martin v. Kirby*, 11 Gratt. 67; *Brent v. Washington*, 18 Gratt. 536.

The law prefers vested to contingent remainders, and this preference may properly influence a court in cases of doubtful construction, as in fixing the period to which words of survivorship relate where this is left in doubt, but it can never justify the courts in straining the language used in order to make the estate created a vested rather than a contingent remainder. *Howbert v. Cauthorn*, 100 Va. 649, 42 S. E. Rep. 683.

A remainder so limited as to have a present capacity to take effect in possession of a person *in esse* and ascertained, immediately upon the termination of a particular estate, is vested. And the fact that such a remainder is so limited that it may be divested, either in whole or in part, by reason of a condition subsequent, will not prevent it from being a vested remainder. *Lantz v. Massie*, 99 Va. 700, 40 S. E. Rep. 50, 7 Va. Law Reg. 538.

Where there is a contingent remainder in fee simple, with an alternative remainder limited as a substitute, the latter is necessarily contingent. *Allison v. Allison*, 101 Va. —, 44 S. E. Rep. 904.

Instances of Remainders Held to Be Vested.—A testator bequeathed slaves to his sister for life, remainder to her seven children; then bequeathed bank stock to his sister for life, without further disposition; and then directed that all money he might have at his death be put out at interest, and the interest applied to the education of his sister's three younger children, the principal, at his sister's death, to be divided among all her seven children, and he bequeathed the residuum of his estate to one of the said children. *Held*, that each of the seven children took a vested interest in his share of the principal of the money, so that in case of his death before his mother, his share devolved on

his personal representative. *Rowlett v. Rowlett*, 5 Leigh 21.

A testator bequeathed slaves to his wife for life, remainder to be equally divided among his seven children and their heirs, to them and their heirs forever. One of testator's children, who at the time of his death was a married woman, died before the widow, legatee for life, leaving a husband and children surviving her. *Held*, that this daughter took a vested remainder in her seventh part of the slaves, which at her death devolved to her husband, not to her children. *Wade v. Boxley*, 5 Leigh 442.

A testator, after bequeathing the residuum of his estate to his wife during life or widowhood, provided, that the whole of his personal estate, at the death of his wife, should be equally divided among his surviving children thereafter named (naming five), and that in case his wife should then be with child, such child should have an equal portion of his personal estate with the rest of his children before named. *Held*, that the word "surviving" referred to the death of the testator, not that of the tenant for life, and so children of the testator who survived him, but did not survive the tenant for life, took vested interests in remainder. *Hansford v. Elliott*, 9 Leigh 79.

Where a testator gave all his estate, real and personal, to his wife during her widowhood, and directed that at her death all his estate should be sold and equally divided among all his surviving children or their heirs, it was held that the children living at the death of the testator took a vested interest in the estate. *Martin v. Kirby*, 11 Gratt. 67.

A testator bequeathed a sum of money to his son in trust to apply the interest and profits towards the support of his daughter A., to her sole and separate benefit, free from the debts, etc., of her husband, during her natural life, and after her death to divide the principal equally among her children and their representatives, according to the statute of distributions. *Held*, that the children of A. took vested interests in the remainder on the death of the testator, subject to be divested on their dying in the lifetime of A. *Brent v. Washington*, 18 Gratt. 526.

After making a bequest to his daughter for life and at her death to his children a testator in his will provided: "In case of the death of any child of my said daughter (born, or to be born), unmarried under the age of twenty-one years, and not leaving issue the share or shares of property and estate coming to such child under this clause of my will, shall immediately vest in, and belong to his or her surviving brothers and sisters and their lineal descendants, share and share alike, the descendants of any deceased child taking such child's share." A child of the daughter, over twenty-one years of age at death of the testator, after his death married the and died in the lifetime of her mother, not having had a child. *Held*, that the legacy vested in the child at the death of the testator, and did not divest upon her death without issue, but passed to her husband as her administrator. *Corbin v. Mills*, 19 Gratt. 438.

Where a testator, dying in 1834, limited to his daughter an estate for life, with remainder to her issue in fee, and in default of issue, with limitation over to his own heirs, it was held that the limitation over to his own heirs referred to those who were the heirs of the testator at the time of his death, and not to those who might be his heirs at the time of his daughter's death; and that the daughter took a fee simple estate in the lands, which was determinable by her having issue at her death, and which became absolute upon her death without

issue. *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. Rep. 387.

After devising certain real estate to his wife for life, the testator then provided that after her death the property should be sold, and the proceeds equally divided among his surviving brothers and sisters and the children of such as might be dead, share and share alike. *Held*, that the remainder to the brothers and sisters vested on the death of the testator. *Stone v. Lewis*, 84 Va. 474, 5 S. E. Rep. 282.

A will provided that, after paying testator's debts, all his real and personal estate should go to his wife, for life, and, on her death, the real estate should be equally divided among his three brothers, "or their heirs, if living;" but if either of the brothers should die "without heirs, before the division of the estate, the property should go to those living, or their heirs." *Held*, that at testator's death, the brothers each took a vested remainder, in fee simple, in an undivided third of the real estate, defeasible only by death without issue before the termination of the life estate, in which event the property was to pass to the survivors. *Gish v. Moomaw*, 89 Va. 345, 15 S. E. Rep. 868.

A testator in his will said: "I loan to my wife all my estate not heretofore disposed of, during her natural life, and after her death I wish that estate sold and the proceeds equally divided between my four above-named children, or their lawful heirs begotten of their bodies." *Held*, that the gift to the children vested immediately, so that an assignment by one of them during the widow's life was valid. *Chapman v. Chapman*, 90 Va. 409, 18 S. E. Rep. 913.

A bequest, in terms, "I give and bequeath to S., the interest that may accrue on one-fourth part of my money, bonds, and securities that I may die possessed of, during the period of her natural life, and at her death I give and bequeath this one-fourth part of my money, bonds, and securities, from which the said S. is to derive the accruing interest for her life, to the children of S., to be equally divided," gives to S. an estate for her life, and to her children living at the death of the testatrix vested remainders in the principal, share and share alike; the share of any child dying during the lifetime of S. to pass to its personal representatives. *Stanley v. Stanley*, 93 Va. 534, 24 S. E. Rep. 229.

A devise to a son "during his natural life, and at his death to his children," creates a vested remainder in each of the children, and is unaffected by a subsequent clause of the will devising the estate over in the event of the death of the son without lineal descendants living at his death, the son having left such descendants. *Waring v. Waring*, 99 Va. 641, 32 S. E. Rep. 150.

Remainders under a will providing that at the death of the life tenants the portion which each receives under the will shall pass and belong absolutely to their respective children, vest at the death of the testator. *McComb v. McComb*, 96 Va. 779, 32 S. E. Rep. 453, 5 Va. Law Reg. 40.

A testator devised personally to his daughter for life, providing that on her death it should "pass and belong absolutely to (her children), and to their respective children, and to the descendants or descendant of any that may have died leaving issue; such to take what its deceased parent would have taken, if alive." *Held*, that the remainder vested at the testator's death. *McComb v. McComb*, 96 Va. 779, 32 S. E. Rep. 453.

A devise to testator's wife for life, "and then to be divided among my children or otherwise as she may deem best," creates a vested remainder in the children living at the testator's death, unaffected

by the power of appointment. *Lantz v. Massie*, 90 Va. 709, 40 S. E. Rep. 50, 7 Va. Law Reg. 538.

A will provided, in the fifth clause, that a certain son's share should be held in trust for the benefit of the son and his wife and children: the purpose being to provide a home for the family during the life of the son and his wife, "and the survivor of them, and at the death of the survivor to divide the trust fund among their descendants by stocks." Large discretion was given the trustees as to the investment of the fund. *Held*, that the children of the son took a vested remainder in the estate devised by the fifth clause at the testator's death; the omission of the word "children" before "descendants" in the fifth clause, and the provision for distribution "at the death of the last survivor," and the discretion given the executors in regard to investing the fund, not overcoming the presumption of vested estates. *Neillson v. Brett*, 90 Va. 673, 40 S. E. Rep. 32.

Instances of Remainders Held to Be Contingent.—A devise to A for life and at his death in fee simple to his eldest son then living, where A has no son at the death of the testator but a son is afterwards born to him, creates a contingent remainder in fee in the son dependent on his being alive at the death of A. *Baylor v. DeJarnette*, 13 Gratt. 152. See *Hinton v. Milburn*, 23 W. Va. 166; *Woodward v. Woodward*, 28 W. Va. 300.

A testator devises his whole estate to his wife for life, remainder to three nephews, with a "condition annexed" to the estates of the remaindermen "that they are to contribute equally to raise the sum of \$1000 for Thomas P. Harrison, to be paid him at the death" of the widow. He also gives him a horse, bridle and saddle, to be received as soon as he completes his education; and a watch to be received at the death of the testator. The will then proceeds, "but should he die before he receives any or all of the legacies herein given him, then such as he may not have received," are to go to his sister. *Held*, the legacy of \$1000 is contingent upon Harrison's surviving the widow, on failure of which it belongs to his sister. It is not, therefore, payable, nor any part of it, until the widow's death, though she renounces the will, and the remaindermen receive a portion of their shares of the estate. *Poythress v. Harrison*, 1 Pat. & H. 197.

Where a testator bequeaths the residuum of his estate to his daughter for her life, and at her death to be equally divided among her children, should any survive her, and if she should die without issue, or if her surviving child or children should die before becoming of age, then the property to go to the heirs of the testator according to the laws of Virginia, the bequest creates a contingent remainder in the children, for, until the death of the daughter, it cannot be ascertained which of her children will survive her, and attain the age of twenty-one years. *Allison v. Allison*, 101 Va.—, 44 S. E. Rep. 904. See *Howbert v. Cauthorn*, 100 Va. 649, 42 S. E. Rep. 683.

H. EXECUTORY DEVICES.—An executory devise or bequest over to the testator's children will always be held to refer to those living at his death, unless there is a clear indication in the will that some other period is intended. *Stone v. Nicholson*, 27 Gratt. 1, and *foot-note*.

"For a long time executory devises, which arose after the statutes of uses and of wills dispensing with the ceremony of livery of seisin, appear to have been little understood; but the law concerning them is now well settled. They are not mere possibilities, but substantial interests, and in respect to their transmissibility, they stand on the same footing with contingent remainders. On this

point the authorities are agreed, and an examination of the cases will show that no doubt respecting it has been entertained within the last century. 'An executory interest,' says Fearne, 'whether in real or personal estate, is transmissible to the representative of the devisee, when such devisee dies before the contingency happens; and if not before disposed of, will vest in such representative when the contingency happens.' Fearne on Rem. 44. Undoubtedly, if the limitation over is to children who shall attain a certain age, or survive a given period or event, the effect of the death of any child pending the contingency, will be to strike the name of such deceased child out of the class of presumptive objects. 'But where,' says Jarman, 'the contingency on which the vesting depends is a collateral event, irrespective of attainment to a given age and surviving a given period, the death of any child pending the contingency works no such exclusion; but simply substitutes and lets in the legatee's representative for himself.' 1 Jarman on Wills, 861. See also, 1 Lom. Ex'ors, marg. p. 319; 4 Kent's Comm. 261-264; 3 Lom. Dig. 324; 2 Min. Inst. 389." *Medley v. Medley*, 81 Va. 265.

A testator devised property to each of his five sons, providing that if any of them should die without issue living at his death, the property devised to such child should be divided equally among the survivors or their representatives. *Held*, that the limitation over was to the children who should survive the first taker and not to those who should survive the testator. *Dickinson v. Hoomes*, 1 Gratt. 302.

What was a contingent remainder before the act of 1776, was not by that statute turned into an executory devise. *Carter v. Tyler*, 1 Call 165.

Where an executory devise or bequest is made to the children or other descendants of the children of the testator who shall be living at the death of the last survivor of the testator's children, such devise or bequest cannot be deemed to have failed as to unborn children of the surviving child until her death, although she has passed the age of child bearing. For the possibility of issue is, in contemplation of law, only extinguished with life. *Carney v. Kain*, 40 W. Va. 758, 23 S. E. Rep. 650.

XVIII. PERPETUITIES.

No future limitation, whether executory or by way of remainder, is good unless it be so limited that it must necessarily vest, if at all, within the period of a life or lives in being, and the utmost period of gestation (reckoned in Virginia at ten months, Va. Code 1887, sec. 2556), and twenty-one years thereafter, the period of gestation being allowed only where it is an element. 2 Min. Inst. (4th Ed.) 438; *Peggy v. Legg*, 6 Munf. 229; *Woodruff v. Pleasants*, 81 Va. 37; *Whelan v. Reilly*, 5 W. Va. 356. See *Pleasants v. Pleasants*, 3 Call 319.

Two contingent fees by way of remainder may be limited as substitutes or alternatives one for the other, the latter to take effect in case the prior one fails to vest in interest, and is immediately avoided upon the first so vesting, it being limited to vest in interest within a life or lives in being and twenty-one years and ten months thereafter. 3 Min. Inst. (4th Ed.) 395; *Cooper v. Hepburn*, 15 Gratt. 551, 559; *Walker v. Lewis*, 90 Va. 578, 19 S. E. Rep. 258.

The creation of a trust does not violate the rule against perpetuities, when it must end within a life or lives in being, and twenty-one years and ten months thereafter. *Otterback v. Bohrer*, 87 Va. 548, 12 S. E. Rep. 1018.

The doctrine of perpetuities applicable to bequests of personal chattels, does not apply to bequests of

freedom to a slave. *Wood v. Humphreys*, 13 Gratt. 333. See *Pleasants v. Pleasants*, 2 Call 319.

For the purpose of determining question of remoteness men and women are deemed capable of having issue as long as they live. *Carney v. Kain*, 40 W. Va. 758, 23 S. E. Rep. 650.

XIX. LIMITATIONS OVER UPON A FAILURE OF HEIR, OR HEIRS OF THE BODY, OR ISSUE, ETC.

This subject is discussed at length in a learned article by Prof. C. A. Graves in 4 Va. Law Reg. pp. 633-661. See also, 4 Va. Law Reg. pp. 804-813; 5 Va. Law Reg. pp. 67-91.

At Common Law,—“It is very clear that any limitation, which is only to take effect upon a failure of one's heirs, or heirs of the body, or issue, or descendants, etc., at any period whatsoever, may, in the event, be postponed beyond the prescribed term of a life or lives in being, and twenty-one years and a few months, and will, therefore, be void for remoteness. Thus, where lands are given by will or grant, to A and his heirs, and upon the failure of his heirs, to Z in fee, one has no difficulty in perceiving that the limitation to Z is inconsistent with the rule against perpetuities, and is invalid. The mind easily accepts the same conclusion where the limitation to Z is to take effect upon the failure of the heirs of A's body, or of A's issue, or of A's descendants, since any of those events may, in the course of nature, be postponed for many generations, or may never occur at all. But when the limitation is to A and his heirs, and if A die without heirs, then to Z in fee, it is not so plain that an indefinite failure of heirs is contemplated. On the contrary, one would think it the more legitimate construction (Mr. Hargrave calls it the vulgar, in contradistinction to the technical construction), that the limitation over to Z was to occur, in case A had no heirs at the time of his death; in which event it would be good, and would take effect in possession in case it turned out that A did have no heirs at his decease. But these and similar phrases (e. g. 'if he die without heirs,' or 'without heirs of his body,' or 'without issue,' or 'without descendants,' or 'upon his dying without heirs,' etc.; or 'leaving no heirs,' etc.) have long been settled (unless there be other words of qualification) to refer to a general and indefinite failure of heirs, etc., at any future time. So that every executory limitation, limited to take effect on such words, is at common law void. Nor is it material in such cases how the fact actually turns out. The possibility that the event may, in point of time, exceed the limits allowed, vitiates the limitation *ab initio*; and also, defeats all the limitations that may succeed it, although not themselves too remote. (*Beauclerk v. Dormer*, 2 Atk. 308; *Hargr. Law Tr.* 519; 2 Th. Co. Lit. 646, n. (C); 3 Lom. Dig. 410; *Doe v. Fonnereau*, 3 Dougl. 487; *Thomson v. Griffith*, 1 Leigh 331; *Riddick v. Cohoon*, 4 Rand. 547; *Bells v. Gillespie*, 5 Rand. 376; *Broadbuss v. Turner*, 5 Rand. 308; *Callis v. Kemp*, 11 Gratt. 85; *Tinsley v. Jones*, 13 Gratt. 289; *Stone v. Nicholson*, 37 Gratt. 8.)” 2 Min. Inst. (4th Ed.) 439.

“The generality of the words *heirs*, or *heirs of the body*, etc., may be restrained to the period prescribed, by any other words sufficient for the purpose, and then the devise over will be good. Thus, if the limitation were to A in fee-simple, but if he die without heirs *living at his death* (or *leaving no heirs behind him*) to Z in fee, the failure of heirs would be tied up and restricted to the death of A, and so the limitation to Z would be good. But the word *lend* applied to the first taker, or a direction that the estate limited over upon the failure of issue of the first taker, shall, in the event of his leaving issue, be distributable to such issue

as he may think fit, will not confine the failure of issue within the prescribed limits, and consequently will not save the subsequent limitation from being too remote, and, therefore, void. (3 Lom. Dig. 410-11; *Porter v. Bradley*, 3 T. R. 143; *Roe v. Jeffery*, 7 T. R. 589; *Williamson v. Ledbetter*, 3 Munf. 531; *Ball v. Payne*, 6 Rand. 73; *Deane v. Hansford*, 9 Leigh 253; *Callis v. Kemp*, 11 Gratt. 85.)” 2 Min. Inst. (4th Ed.) 440.

A failure of issue is called definite when it is to take effect by the terms of the limitation at some certain time; it is called indefinite when it may occur at any time in the future. At common law the presumption is in favor of an indefinite failure, when a limitation over is to take effect on death without issue. See article by Prof. Graves on “Executory Interests,” 4 Va. Law Reg. p. 647.

A limitation over upon a failure of issue at the death of the person or persons by whose life or lives the period is measured, or occurring within twenty-one years thereafter, is definite and valid. 22 Am. & Eng. Enc. Law (3d Ed.) 710; *Royall v. Eppes*, 2 Munf. 479; *Greshams v. Gresham*, 6 Munf. 187. See *James v. McWilliams*, 6 Munf. 301.

Thus upon a devise to A. and his heirs, and if A. die without issue living at his death, remainder to B. and his heirs, A. takes a fee simple, and B. has a fee, good by way of executory devise, not too remote because of the definite failure of issue. *Burfoot v. Burfoots*, 3 Leigh 119.

And where slaves were bequeathed to W. and his heirs forever, but if he die without issue to C., it was held that the limitation to C. was good, and not too remote. *Dunn v. Bray*, 1 Call 333.

But a limitation over upon an indefinite failure of issue is too remote and void. 22 Am. & Eng. Enc. Law (3d Ed.) 710; *Lynch v. Hill*, 6 Munf. 114.

Every part of a will may be looked to to ascertain the intention of the testator in a particular devise, and thus to limit the phrase “dying without issue” to “a dying without issue living at the death of the devisee.” *Lucas v. Duffield*, 6 Gratt. 456.

“It has been long settled that words (occurring in a will which took effect before the revision of 1819) referring to the death of a person without issue, whether the terms be ‘if he die without issue,’ or ‘if he die before he has any issue’ or ‘for want or in default of issue,’ unexplained by the context, and whether applied to real or personal estate, are construed to import a general indefinite failure of issue.” *Tinsley v. Jones*, 13 Gratt. 289.

A testator “lent to his granddaughter, A. S. P., a negro woman, and one bed and furniture, for her, her heirs, executors and administrators forever, but if she should die without lawful heir of her body, then to return to his son, and his heirs forever.” This limitation over was adjudged to be upon an indefinite failure of issue, and therefore void. *Williamson v. Ledbetter*, 2 Munf. 521.

A testator gave to his son William a tract of land, “during his natural life, and then to his heirs lawfully begotten of his body, that is born at the time of his death, or nine calendar months thereafter; and, for want of such heirs then to his son Isaac's two sons, Jacob and George; one of them to set a price on the whole of it, and give or receive one-half of that sum from the other.” Held, that this was a good limitation by way of contingent remainder to Jacob and George. *Warners v. Mason*, 5 Munf. 242.

A testator having realty of his own inheritance, and personally, part acquired in his own right and part in right of his wife, devised all his worldly estate in the following manner: All the profits of my estate, after providing genteel support for my wife and daughter, to be applied to my debts; and

after my debts are paid, I wish my estate to be kept together for the mutual benefit of my wife and daughter, till my daughter attain full age or marry, or my wife wish a division or marry. After which, I wish my estate divided in the following manner: I leave my wife one-half the land I live on, and one-half of my estate during her life. If my wife die without any more issue, the whole of my estate to revert to my daughter; and if my daughter die without issue, the whole of my estate to revert to my wife; and if they both die without issue, then that part of my estate which came by my wife to revert to her brothers and sisters that may be then living, and the balance of my estate to revert to my brother J. or to his heirs, if any, if none to be equally divided between my two half-brothers. If my wife marry and again have issue, I wish her to have the whole the property that came by her. *Held*, that the daughter took an implied estate tail in the moiety of the land devised to her; and the wife took an implied estate tail in the moiety devised to her expressly for life; each of which estates was converted into a fee simple, by force of the statute abolishing estates tail; consequently, the executory limitations were contingent remainders and barred by the statute. *Jiggetts v. Davis*, 1 Leigh 308.

A testator by his will lent slaves and their increase to his grandson and his heirs of his body, and if he should die without a lawful heir, then he bequeathed them to the children of his daughter. *Held*, that this was an executory limitation after an indefinite failure of issue of the grandson and therefore void; and the slaves vested in the grandson in absolute property. *Deane v. Hansford*, 9 Leigh 353.

A testator in his will provided: I lend to my daughter Lucy, my negro woman Sidney and her child Sarah, and a negro boy named John, to her during her natural life, and to her heirs lawfully begotten of her body. And should my said daughter or her husband dispose of, convey out of the way, conceal or attempt to alienate the negroes aforesaid, I do hereby declare her title to cease, and direct my executors to take them into possession. And in such case, after her decease, they and their increase to be divided among her children, if any living, otherwise to be divided among my children, J., E., P., and C., and their heirs. *Held*, that the daughter Lucy had but a life estate in the slaves; and her children took in remainder as purchasers under the will. *Pryor v. Duncan*, 6 Gratt. 37.

Prior to 1819, a testator devised to his three daughters by name his estate "both real and personal," "to them and their heirs lawfully begotten of their bodies." "And in case either of my daughters should die without heir or heirs as above mentioned, the surviving ones to enjoy their equal part." *Held*, that this was an estate tail, which by the statute was converted into a fee, and that the limitation over was after an indefinite failure of issue, and void. *Nowlin v. Winfree*, 8 Gratt. 246.

In 1799 a testator devised a tract of land to his son during his natural life and if he should die without lawful issue, he gave the land to his grandson and his heirs forever; and it was further provided that if the son should leave lawful issue, he might dispose of the land to such of his issue as he might think fit. *Held*, that the son took an estate tail in the land, which by the statute was converted into a fee. *Callis v. Kemp*, 11 Gratt. 78. See *foot-note* to this case.

A testator gave his estate to his wife during her life, and at her death it was to be divided equally among all his children, and the shares of his two daughters were to be held by them during their natural lives and no longer, and then to be equally

divided among their heirs lawfully begotten. It was held that the words "heirs lawfully to be begotten," were words of limitation and the daughters took the whole interest in their shares of the estate. *Moore v. Brooks*, 12 Gratt. 135.

A testator died in 1807 and by his will gave a tract of land to each of his sons J. and F. He then said: "It is my will if my said son J. die without issue, and the property heretofore given him shall go to his brother F., who in that case will lose the land heretofore given him. It being my will and desire then and in that case, and in the happening of the event of my son J.'s death, that the land near W. which would otherwise be F.'s share, be sold and the money equally divided between my surviving children." J. died without issue. *Held*, that J. took an estate tail in the land devised to him, which was converted by the statute into a fee simple, and that the limitation over to F. was void. *Tinsley v. Jones*, 18 Gratt. 399.

Under the Statute.—By statute taking effect January 1, 1830, the old common-law presumption of an indefinite failure of issue was altered in Virginia, and the presumption of a definite failure was made to take its place. The language of this most important statute is as follows: "Every limitation in any deed or will contingent upon the dying of any person without heirs, or heirs of the body, or issue, or issue of the body, or children, or offspring, or descendant, or other relative, shall be construed a limitation, to take effect when such person shall die not having such heir, or issue, or child, or offspring, or descendant, or other relative, as the case may be, living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it." See 1 Rev. Code (1819), ch. 90, § 26; Va. Code 1827, § 2423; W. Va. Code 1899, ch. 71, § 10, p. 690.

A testator who died in 1865, leaving a will bearing date November 23, 1865, devised a tract of land to his son Samuel during his natural life; but if he die without issue, then over to the brothers of Samuel. The court held that Samuel took a life estate only; and that if he had issue living at his death, or born within ten months thereafter, such issue would take by implication the land devised to Samuel. The conclusion that Samuel took a life estate was placed by the court on the ground that by the revision of the statute law of 1819, the failure of issue had been made definite. The effect of the abolition of the rule in *Shelley's Case* was also stated as a sufficient ground for the same result, but the court rested the decision mainly on the definite failure of issue. Thus on p. 47, *MORCUM, P.*, says: "If the word issue in this case had been intended to mean issue indefinitely as aforesaid, instead of issue living at the death of the first taker, as under the statute aforesaid, even then the life estate of the first taker would not have been enlarged by the effect of the limitation over into an estate in fee simple. It being further provided by law that 'where any estate, real or personal, is given by deed or will to any person for his life, and after his death to his heirs or the heirs of his body, the conveyance shall be construed to vest an estate for life only in such person and a remainder in fee simple in his heirs or the heirs of his body.'" *Wine v. Markwood*, 31 Gratt. 43. For a discussion of the case, see article by Prof. Graves in 5 Va. Law Reg. 67.

In his learned article on "Executory Interests," 4 Va. Law Reg. pp. 638-661, Prof. Graves in discussing the effect of Virginia statutes on limitations contingent on dying without issue, clearly summarizes the

law governing such limitations, from January 1, 1820, to the present time, in the four following propositions:

(1) Upon a devise to A for life, and if A die without issue, remainder to B and his heirs, "A has a life estate not enlarged to a fee tail, because failure of issue is made definite by the act of January 1, 1820. And there are two remainders in fee upon a contingency with a double aspect, both of which remain contingent until the death of A, the one to the issue of A living at his death, or born to him within ten months thereafter, and the other to B. On A's death, if there is issue of A then living, etc., the first remainder vests in such issue, and the second is defeated; but if there is no issue of A, living at his death, etc., then the second remainder, to B, takes effect. See § 19, *supra*. The form of the limitation under the statute is, in effect, 'To A for life; and if A die without issue living at his death, or born to him within ten months thereafter, then to B and his heirs.' *Jiggetts v. Davis*, 1 Leigh 419; *Wine v. Markwood*, 81 Gratt. 48, 51; *Sutherland v. Sydnor*, 84 Va. 980, 6 S. E. Rep. 480. See *Warners v. Mason*, 5 Munf. 242."

(2) Upon a devise to A and his heirs, and if A die without issue, remainder to B and his heirs, "A has a fee simple, and B has a good executory devise of a fee after a fee. A's fee simple is by the original limitation to him and his heirs, and not by the effect of the statute of 1776 on an estate tail. For as the failure of issue is now definite, no estate tail can be raised by implication; and the fee simple to A remains a fee simple. And the executory devise to B does not violate the rule against perpetuities, because the failure of issue is definite, and B is to take if A has no issue living at his death or born within ten months thereafter. See *Corr v. Porter*, 83 Gratt. 278; *Randolph v. Wright*, 81 Va. 608; *Pettyjohn v. Woodroof*, 77 Va. 507; *Tomlinson v. Nickell*, 24 W. Va. 148.

"N. B. It should be observed that if in a devise since January 1, 1820, the form of limitation is, 'To A, and if A die without issue, to B and his heirs,' this is in effect, 'To A and his heirs, and if A die without issue, to B and his heirs.' See *Tinsley v. Jones*, 18 Gratt. 289, 297; *Jones v. Hughes*, 27 Gratt. 560; *Medley v. Medley*, 27 Gratt. 568; *Wine v. Markwood*, 81 Gratt. 48."

(3) Upon a devise to A and the heirs of his body, and if A die without issue, then to B and his heirs, "A has a fee simple by the operation of the statute of 1776 upon his express fee tail; B has a good executory devise of a fee on a fee, the doctrine of *Carter v. Tyler* having been abolished in 1820, and the failure of issue made definite. It is, therefore, allowed to be an executory devise; and, as such, it does not violate the rule against perpetuities.

"N. B. When a devise is 'To A and the heirs of his body,' or 'To A and his issue,' with a limitation over after a definite failure of issue ('if A die without issue living at his death,' *s. g.*), the only effect of the definite failure of issue is to make the limitation over contingent upon such failure; the words 'if he die without issue living at his death,' etc., are not considered explanatory of the species of issue included in the prior devise and, therefore, do not prevent the prior devisee from taking an estate tail under it. 3 *Jarm. Wills*, 239; *Elys v. Wynne*, 23 Gratt. 224; *Atkinson v. McCormick*, 76 Va. 791; *Stokes v. Van Wyck*, 88 Va. 724. But while a definite failure of issue does not effect an express estate tail previously limited, it prevents the implication of an estate tail, when the previous estate is for life or in fee simple; for the words 'issue living at his death,' etc., are either

words of purchase or of contingency, and not words of limitation; and only words of limitation can enlarge or reduce the express estate previously limited."

(4) Upon a devise to A and the heirs of his body, and if A die without issue living at his death, then to B and his heirs, "A has a fee simple, and B has a good executory devise, the doctrine of *Carter v. Tyler* having been abolished January 1, 1820. B's executory devise is not too remote, as it must take effect, if ever, at the death of A having no issue then living."

XX. LIMITATIONS OVER AFTER DEVISE OR BEQUEST FOR LIFE WITH POWER OF CONTROL OR DISPOSITION.

Although a legacy or devise is expressly for the life of the legatee or devisee, yet if by other clauses of the will he be permitted to use and to dispose of the subject absolutely at his pleasure, or if so much as may remain undisposed of by him at his death (which implies a power of unqualified disposition) be given over at his death, the intention of the testator is understood to have been to give a fee simple, which passes accordingly. 2 *Min. Inst.* (4th Ed.) 1063; *Shermer v. Shermer*, 1 Wash. 286, 1 Am. Dec. 460; *Goodwyn v. Taylor*, 4 Call 305; *Riddick v. Cohoon*, 4 Rand. 547; *Burwell v. Anderson*, 3 Leigh 548; *Melson v. Cooper*, 4 Leigh 408; *May v. Joynes*, 20 Gratt. 692; *Missionary Soc. v. Calvert*, 32 Gratt. 362; *Carr v. Eminger*, 78 Va. 197; *Cole v. Cole*, 79 Va. 253; *Hall v. Palmer*, 87 Va. 854, 12 S. E. Rep. 618, 11 L. R. A. 610; *Bowen v. Bowen*, 87 Va. 438, 12 S. E. Rep. 885; *Lee v. Law*, 1 Va. Dec. 808; *Farish v. Wayman*, 91 Va. 435, 21 S. E. Rep. 810, 1 Va. Law Reg. 214; *Milhollen v. Rice*, 13 W. Va. 510; *Wilmoth v. Wilmoth*, 34 W. Va. 430, 12 S. E. Rep. 732. See also, *Bank v. Green*, 45 W. Va. 176, 31 S. E. Rep. 268; article in 3 Va. Law Reg. 65.

"The subsequent limitation over is void as a remainder, because limited after a fee simple, and as an executory limitation for the uncertainty as to what will be included in it, and moreover and especially for repugnancy." 2 *Min. Inst.* (4th Ed.) 1058.

Where lands are given to one for life, with remainder over, and power is also given the life-tenant to sell or dispose of the land, the life-tenant takes the power to sell the fee. *Englerth v. Kellar*, 50 W. Va. 259, 40 S. E. Rep. 465.

The owner of a small farm devised the same to his wife for life with power to sell said farm and live on the proceeds if necessary. He also devised to her all his personal property of every kind, and provided that she should pay his debts and funeral expenses. *Held*, that the intention of the testator was to authorize and empower his wife to sell and convey the said land in fee simple, if the same should be necessary for his support and maintenance. *Rutter v. Anderson*, 48 W. Va. 215, 36 S. E. Rep. 857.

In *Robertson v. Hardy*, 2 Va. Dec. 275, it was held that the implication of absolute power of disposition from a provision in a will that all of the personal property remaining at the death of the testator's wife shall be sold and divided among his children, is not repelled by a provision authorizing her to give anything "that she may be able or think proper to give" to certain children, "whenever they leave her or need assistance." See article in 8 Va. Law Reg. 706, comparing this case with *May v. Joynes*, 20 Gratt. 692.

In *May v. Joynes*, 20 Gratt. 692, the testator gave the estate to his wife for life, but "with full power to make sale of any part thereof, and to convey absolute titles to the purchasers, and use the purchase money for investment, or any purpose that

she pleases, with only this restriction, that whatever remains at her death shall" be divided, etc. It was held that these words manifested a clear intent to give to the wife an absolute control over the estate, and consequently enlarged the life estate into an absolute estate. Speaking of this case, *KERTH, P.*, in *Honaker v. Duff*, 101 Va. —, 44 S. E. Rep. 900, says: "May v. Joynes has frequently been cited, and, while sometimes questioned, has never been overruled, and was followed by this court in *Farish v. Wayman*, 91 Va. 430, 31 S. E. Rep. 810, where the devise was to trustees for the daughter 'during her natural life, and should she die and leave no child, in that case the property devised above or what remained of same I give to my sister.' JUDGE HARRISON, delivering the opinion of the court, says: 'It cannot longer be doubted that the law is settled that an estate for life, coupled with an absolute power of alienation, either express or implied, comprehends everything, and the devisee takes the fee.'"

Where a life estate is given, with the power of disposition by deed or will, the devisee takes the fee; where the gift is for life, with a power of disposition by will added, the devisee takes only a life estate; the intention controlling in each case. *Honaker v. Duff*, 101 Va. —, 44 S. E. Rep. 900.

In *Johns v. Johns*, 86 Va. 333, 10 S. E. Rep. 2, where a testator gave all his funds to his wife during her natural life, for the benefit of herself and her children, "to be used as she may think proper," it was held that the wife took only a life estate, remainder to her children free from her debts. The court said: "This case does not fall within the ruling *rationale* of the cases of *May v. Joynes*, 20 Gratt. 692, nor of *Rhett v. Mason*, 18 Gratt. 541. In the case of *Randolph v. Wright*, 81 Va. 608, JUDGE LACY says that the case of *May v. Joynes* is authority for itself alone, and commenting upon the cases of *Biddick v. Cohoon*, 4 Rand. 547; *Burwell v. Anderson*, 3 Leigh 348; *Melson v. Cooper*, 4 Leigh 408; *Brown v. George*, 6 Gratt. 424; *Cole v. Cole*, 79 Va. 253; *Carr v. Eminger*, 78 Va. 197, he shows that in all these cases, either expressly or by necessary implication, authority was conferred on the first taker of the estate to consume it or dispose of it absolutely; but in the case under consideration the words, 'to be used as she may think proper,' are only apt and proper words to describe the use of the life estate given to Mrs. Johns by the clause of which they are a part."

A testator bequeathed that "all his movable property after the death of his wife, shall be sold, and the proceeds divided among his five daughters; after all his debts paid, all his movable property should be at the entire disposal of his wife; on her decease, the same to be disposed of as above mentioned. Held, that the wife took only a life estate in such of the movables as were capable of being used and returned in kind, and, therefore the wife's gift of a slave to one of her daughters passed only the wife's life estate therein to the donee. *Madden v. Madden*, 3 Leigh 377.

In *Miller v. Potterfield*, 86 Va. 876, 11 S. E. Rep. 496, it was held that where a power of disposal accompanies a bequest or devise of a life estate, whether such estate be given expressly or by implication, the power is limited to such disposition as a tenant for life may make, unless there are words clearly indicating that a larger power was intended. *Madden v. Madden*, 3 Leigh 377; *Johns v. Johns*, 86 Va. 333, 10 S. E. Rep. 2.

Where a testator bequeathed his estate to his two sisters for their lives, with power to sell if they deemed it advisable, but desired them to reinvest the proceeds in some safe manner and avoid con-

suming the principal, and at the death or marriage of both any property remaining to go to his adopted son, it was held that the bequest gave the sisters not an absolute fee simple, but only a life estate, with a valid limitation over to the adopted son. *Smythe v. Smythe*, 90 Va. 688, 19 S. E. Rep. 175.

Where a testator in his will uses the following language: "I give and bequeath to my beloved wife, A. C. C., in trust and for her support and maintenance during her life, all my estate both real and personal, with full power and privilege to sell and convey any, all, or so much of my real estate in such a manner as she may see fit, in as full and complete manner as I myself can do, to sell and dispose of my personal estate, or so much as she may see fit, for her own support, according to her condition in life, and for the benefit of my estate, so far as she may see proper,"—these words will not confer upon the wife either a fee simple in the testator's real estate or absolute property in his personality. *Cresap v. Cresap*, 34 W. Va. 810, 13 S. E. Rep. 527.

XXI. SUITS TO CONSTRUE WILLS.

A. JURISDICTION.—Jurisdiction in equity to construe wills is limited and special, and will only be exercised as incident to general equity jurisdiction, and then, in a particular case, only to the extent of determining whether or not the relief sought can be granted. *Martin v. Martin* (W. Va.), 44 S. E. Rep. 198.

If an executor is embarrassed in the performance of his duty on account of doubt as to the true meaning of the will, he has a right to file a bill asking the court to construe the will in advance of his action on his own construction, so as to avoid the hazard of litigation. But if he is seeking merely the construction of a clause in the will, which in the actual condition of the estate, as shown by his bill, is no present embarrassment to him in the performance of his duties, and probably never will be. The court ought to dismiss the bill on demurrer. *Rexroad v. Wells*, 13 W. Va. 812. As to the right of an executor to the advice and instruction of court, see *Osborne v. Taylor*, 13 Gratt. 117. See also, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 6 Gratt. 6.

B. PARTIES.—If a bill seeks the judgment of the court, as to the meaning of the testator in a particular sentence in a will, which is so connected with other portions of the will, that it cannot be construed without construing such other portions, all parties, interested in the construction of such other portions of the will, should be made parties to such suit, before any construction is placed upon it by the court. *Magers v. Edwards*, 13 W. Va. 822.

C. DECREE.—The decree should construe the will in a manner consistent with the intention of the testator, where such intention is discoverable and is not in conflict with any rule of law. 22 Enc. Pl. & Pr. 1207; *Booton v. Booton*, 2 Va. Dec. 576.

A decree construing the will and determining the rights of the parties to such proceeding, if rendered by a court of competent jurisdiction, is binding upon all parties to the suit to construe until attacked directly by appeal or error. Thus a decree that A. had a life estate only, binds A. where he was a party to the suit for construction, although the remaindermen were not made parties. *Hawthorne v. Beckwith*, 86 Va. 786, 17 S. E. Rep. 241.

In a suit for the construction of a will and the administration of the estate under direction of court, a decree referring the cause to a commissioner to report accounts of transactions with the executor and the debts, though it construes the will and directs the manner of distribution, is interlocutory

merely since it requires further action by the court. *Sims v. Sims*, 94 Va. 580, 27 S. E. Rep. 436.

D. REHEARING.—An interlocutory decree in a suit for the construction of a will may be reheard upon petition. *Sims v. Sims*, 94 Va. 580, 27 S. E. Rep. 436.

E. COSTS.—When the executors would inevitably have had to resort to the court for aid in construing the will, they should bear the costs of the litigation between claimants in which that construction is ascertained. *Allison v. Allison*, 101 Va. —, 44 S. E. Rep. 904.

Where the suit is unnecessary, premature, or not brought in good faith, costs may be taxed against the plaintiff personally. 22 Enc. Pl. & Pr. 1311; *Rexroad v. Wells*, 13 W. Va. 812.

XII. EXTRINSIC EVIDENCE TO AID IN INTERPRETATION OF WILLS.

A. DIVISIBLE INTO TWO CLASSES.—"The extrinsic evidence that can be offered in aid of the interpretation of a will * * * is divisible into two great classes. Of these the first consists of material facts, and these may concern the testator, his property, his family, the claimant or claimants under the will, their relations to the testator, etc. The second class, on the other hand is confined to direct evidence of the testator's actual intention, such as his declarations of intention, his informal memoranda for his will, his instructions for its preparation, and his statements to the scrivener or others as to the meaning of its language. And this division of extrinsic evidence not only exists in the nature of the case, but is of the utmost practical importance in the interpretation of wills, as the rules for the admissibility of the two kinds of evidence are not the same. Let us call the first kind the *facts and circumstances*, and use the expression *declarations of intention* to describe all extrinsic statements by a testator as to his actual testamentary intentions—i. e., as to what he has done, or designs to do, by his will, or as to the meaning of its words as used by him. And with this understanding of the terms, let us now inquire what use can be made, in the interpretation of a will, of the facts and circumstances, and what of the testator's declarations of intention." Paper by Prof. Graves on Extrinsic Evidence in Respect to Written Instruments (read before the Va. State Bar Ass'n, Aug. 2, 1903).

B. EVIDENCE AS TO FACTS AND CIRCUMSTANCES.

1. IN GENERAL.—To aid in ascertaining the true construction of a will, evidence may be received as to any facts known to the testator which may reasonably be supposed to have influenced him in the disposition of his property, and as to all the circumstances surrounding him at the time the will was made—as, for example, the situation of the parties, the ties which connected the testator with the objects of his bounty, and the motives which probably influenced him in disposing of his property. *Miller v. Potterfield*, 86 Va. 876, 11 S. E. Rep. 486; *Kennon v. McRoberts*, 1 Wash. 99, 1 Am. Dec. 428; *Shelton v. Shelton*, 1 Wash. 53; *Hamletts v. Hamlett*, 12 Leigh 850; *Wootton v. Redd*, 13 Gratt. 196; *Hooe v. Hooe*, 13 Gratt. 245; *Williamson v. Coalter*, 14 Gratt. 394; *Smith v. Smith*, 17 Gratt. 268; *Rhett v. Mason*, 18 Gratt. 541; *Hatcher v. Hatcher*, 80 Va. 169; *Randolph v. Wright*, 81 Va. 608; *Senger v. Senger*, 81 Va. 687; *Magers v. Edwards*, 13 W. Va. 823; *French v. French*, 14 W. Va. 456; *Atkinson v. Sutton*, 23 W. Va. 197; *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. Rep. 23; *Lazier v. Lazier*, 35 W. Va. 567, 14 S. E. Rep. 148; *Furbee v. Furbee*, 49 W. Va. 191, 38 S. E. Rep. 511; *Collins v. Feather* (W. Va.), 43 S. E. Rep. 823.

Parol evidence of the circumstances, situation and connection of the testator, and his transactions between the making of his will and his death, is admissible to throw light on his intention. *Randolph v. Wright*, 81 Va. 608.

"As to the facts and circumstances, the law is that they are always admissible in evidence in a case of disputed interpretation; and this is clearly right. For the object of interpretation is to ascertain the meaning of the words as used by the testator; what the words represented in his mind; what he understood to be signified by them; and for this purpose it is indispensable that the expositor should know the situation of the testator; the state of his family and property; his relations to persons and things; his opinions and beliefs; his hopes and fears; his habits of thought and of language; in a word, that the interpreter should identify himself with the testator as to knowledge, feeling, and speech, and thus, scanning the words of the will from the testator's point of view, decide as to their meaning as used by him." Paper by Prof. Graves on Extrinsic Evidence in Respect to Written Instruments (read before the Va. State Bar Ass'n, Aug. 2, 1903); 2 Min. Inst. (4th Ed.) 1060.

In *Hatcher v. Hatcher*, 80 Va. 169, it was said: "In order the better to comprehend the scheme which the testator had in his mind for the disposition of his estate, the judicial expositor is permitted to place himself, figuratively speaking, in the very shoes of the person, whose will he is called on to construe, and with the aid of such extrinsic evidence as is admissible for the purpose, possess himself of the condition of the testator and his family and of such surrounding facts and circumstances as may be reasonably supposed to have influenced him in the disposition of his property." See *Miller v. Potterfield*, 86 Va. 876, 11 S. E. Rep. 486. See also, *Wootton v. Redd*, 13 Gratt. 196, and *foot-note*.

2. TO IDENTIFY PERSONS AND THINGS DESCRIBED.—MISDESCRIPTION.—Parol evidence is always admissible for the purpose of applying the descriptions of a will to their appropriate subject and object, to point out the subject-matter described in the instrument, to identify the persons or things therein described. This must necessarily be done even when the persons and things are correctly described. So much the more is it necessary, if the description be incorrect, as where a devisee is designated by a nickname, or a common name not strictly appropriate. *Beach on the Law of Wills*, § 848; 2 Min. Inst. (4th Ed.) 1060; *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158.

Where the person or object or subject referred to in a bequest is uncertain, or does not answer precisely the description given in the will, or where there are two or more objects or subjects which answer equally the description, resort must be had to parol evidence and the surrounding circumstances to show what the testator intended by the expressions which he used; and, if such intention is so ascertained with sufficient certainty, the bequest is valid. *Roy v. Rowzie*, 25 Gratt. 599; *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158; *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. Rep. 302; *Ross v. Kiger*, 42 W. Va. 402, 36 S. E. Rep. 193. See also, *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 318; *Senger v. Senger*, 81 Va. 687.

Parol proof is not to be admitted to contradict the common meaning or legal import of plain words in a will; but is admissible to explain a person or thing intended by doubtful words, or to correct mistakes in either description. *Shelton v. Shelton*, 1 Wash. 53; *Senger v. Senger*, 81 Va. 687.

In *Roy v. Rowzie*, 36 Gratt. 599, JUDGE MONROE, in delivering the unanimous opinion of the court,

said: "Parol evidence is always admissible and even necessary to lead us to the person or object and subject referred to in a bequest. The court of construction, with the testator's will in hand, looks for the object of his bounty and the thing intended to be given, and expects them to answer precisely the term of description given of them in the will. Generally they do, and there is no difficulty. Often they do not; and sometimes there are two or more objects or subjects which answer precisely or equally the description contained in the will: In such cases resort must be had to parol evidence and the surrounding circumstances to show what the testator intended by the expressions which he used; and, almost always, his intention is thus ascertained with sufficient if not unerring certainty. If it cannot be, the bequest must then fail of effect; but the court is always reluctant so to declare. It will not require that the object or the subject shall have every ear-mark given to it by the testator. Nay, it may in some respects have different ear-marks, and yet the description contained in the bequest may be sufficient to give it effect. *Falsa demonstratio non nocet cum de corpore constat*, is a maxim which expresses a rule of construction to which the court has frequent recourse in such cases." This language is quoted with approval in *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158.

But if a subject be found which satisfies the disposition of the property as contained in the will, parol evidence cannot be admitted to show that a different subject was meant. *Burke v. Lee*, 76 Va. 386.

And where the will discloses the beneficiary but not the nature of the trust, the latter cannot be supplied by parol, and the trustee is invested with a naked trust, while the beneficiary takes an absolute equitable estate, with the equitable right to immediate possession of the *corpus* of the trust. *Sims v. Sims*, 94 Va. 580, 27 S. E. Rep. 436.

Where a bequest was made to "The Baptist Theological Seminary in South Carolina," parol evidence was admitted to show that the bequest was intended to be to "The Southern Baptist Theological Seminary." *Roy v. Rowzie*, 85 Gratt. 569.

Where money is bequeathed to a school by a testatrix, designating the object of her bounty by a wrong name, but fixing the locality, it may be shown by extrinsic testimony what school was intended in the will, and that it was the only school controlled by a certain denomination of religious people in that place." *Ross v. Kiger*, 43 W. Va. 402, 26 S. E. Rep. 193.

Where a bequest of money is made to a missionary society by a testatrix, designating the society by a mistaken name in her will, it may be shown by extrinsic testimony and surrounding circumstances what missionary society was intended. *Ross v. Kiger*, 42 W. Va. 402, 26 S. E. Rep. 193.

Where a testator devised all his negroes "to the agent of the New Colonization Society in Africa," parol evidence was admitted to show that the society meant was "The American Colonization Society," and that McPhail was the agent of that society and the person to whom the bequest by the testator was intended to be given. *Maund v. McPhail*, 10 Leigh 199. It should be noted that while this case appears to be one of misdescription and not of equivocation, declarations of the testator were admitted to show for whom he intended the bequest. This would seem to be in conflict with the rule that parol declarations of the testator as to his intention to make a particular bequest, or that he has made such a bequest cannot be admitted to control the construction of the will, except where

the terms used in the will apply indifferently and without ambiguity to each of several different subjects or persons, when evidence may be received as to which of the subjects or persons so described was intended by the testator. See *infra*, "Declarations of Intention—Equivocation."

Where a testator made a bequest to his namesake, "S. G., son of Captain J. F. S.," parol evidence was admitted to show that there was no person answering the description, and that the testator intended S. G., son of Captain J. F. H. Hawkins v. Garland, 76 Va. 149, 44 Am. Rep. 158. It should be noted that in this case also declarations of the testator as to his intentions were admitted in evidence. It would seem, however, that this was error as the case appears to be one of misdescription and not of equivocation. See *infra*, "Declarations of Testator—Equivocation."

In order to secure a legacy to a corporation for purposes within the scope of its powers and duties, parol evidence of the testator's surroundings is admissible to explain a slight discrepancy in the description of the legatee. *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 318.

A corporation styled the "Trustees of the General Assembly of the Presbyterian Church in the United States," with power to acquire property to carry on foreign missions, etc., to establish committees, etc., deemed branches, for its purposes, with a provision that any bequest to the corporation for any such committees, etc., should pass to said trustees, created a committee called the "Executive Committee of Foreign Missions," commonly known as the "Board of Foreign Missions," and its executive officer as "the secretary," and the corporation itself, as the "Southern Presbyterian Church." In a suit to construe a will leaving a legacy to "the secretary of the board of foreign missions of the Presbyterian Church in the United States," and known as "Southern Presbyterian Church," it was proved by parol, that the testator had been a member and elder in a Presbyterian church, part of the corporation, specially interested in foreign missions, and had said he meant to leave a legacy for that cause. *Held*, the legacy was not void for uncertainty of the beneficiary, but should pass to the corporation for the use of the executive committee of foreign missions. *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 318. In this case, it will be observed, declarations of the testator were admitted in evidence, but no question appears to have been raised as to their admissibility.

3. TO REBUT AN EQUITY.—Parol evidence is admissible to rebut an equity by showing an intention adverse to a presumption which would otherwise arise; as that two legacies of which the sums and expressed motives exactly coincide, are cumulative; that a portion is an ademption of a legacy; that a portion is satisfied by a legacy, etc. These presumptions may be all repelled by parol evidence; in respect to which it has been said, that it is not in this case so much adducing parol evidence to contradict or explain a writing as to show that the writing means what it says. 2 Min. Inst. (4th Ed.) 1061. See *Jones v. Mason*, 5 Rand. 577; *Kelly v. Kelly*, 6 Rand. 176; *Moore v. Hilton*, 12 Leigh 2; *Hansbrough v. Hooe*, 12 Leigh 316; *Strother v. Mitchell*, 80 Va. 149; Va. Code 1887, § 2532.

C. DECLARATIONS OF INTENTION—EQUIVOCATION.—While parol evidence as to the facts and circumstances surrounding the testator is always admissible to aid in ascertaining the true construction of the will, there is but one situation in which the judicial expositor has the right to invoke the aid of declarations of intention, and that is where the words in the will describe well, but equally well, two or more persons, or two or more things, and such

declarations are offered to show which person or which thing was meant by the testator—i. e., by the words in the will as used by him. This is the case of "equivocation," as it is called by Lord Bacon, and it is exemplified by a devise "to John Cluer of Calcot," when there are two persons who answer that description; or a devise of "the close in Kirtton, now in the occupation of John Watson," when the testator owns two closes in Kirtton, both, at the date of the will, in the occupation of John Watson. Paper by Prof. Graves on Extrinsic Evidence in Respect to Written Instruments (read before the Va. State Bar Ass'n, Aug. 2, 1898). See *foot-note* to *Middlethian Coal Mining Co. v. Finney*, 18 Gratt. 804.

Parol declarations of the testator as to his intention to make a particular bequest, or that he has made such a bequest, cannot be admitted to control the construction of the will, except where the terms used in the will apply indifferently and without ambiguity to each of several subjects or persons, when evidence may be received as to which of the subjects or persons so described was intended by the testator. *Wootton v. Redd*, 12 Gratt. 196; *Skipwith v. Cabell*, 19 Gratt. 758; *Senger v. Senger*, 81 Va. 687; *French v. French*, 14 W. Va. 458. See *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. Rep. 28. It should be noted however that in several Virginia cases, which appear to be cases of misdescription and not cases of equivocation, declarations of the testator as to his intention to make certain bequests have been admitted in evidence. See *Maund v. McPhail*, 10 Leigh 199; *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158; *Trustees v. Guthrie*, 86 Va. 126, 10 S. E. Rep. 318.

In his learned article on Extrinsic Evidence in Respect to Written Instruments (a paper read before the Virginia State Bar Association, August 2, 1898), Professor Graves, after citing *Charter v. Charter*, L. R. 7, H. L. 864; *Patch v. White*, 117 U. S. 211; *Senger v. Senger*, 81 Va. 687; *Wootton v. Redd*, 12 Gratt. 196, says: "From these authorities (and many others) it is established that in order to amount to a case of equivocation the language of the will must satisfy these two conditions:

1. The words of the will must be descriptive of concrete objects; that is, of some person or thing whose identification is the purpose of the declarations of intention. Such declarations are not now allowed (though it was formerly otherwise in equity) to explain the meaning of ambiguous expressions in a will, not even if 'the words stand in *aequilibrium*, and are so doubtful that they may be taken one way or the other.' Nor are they allowed to explain generic terms, to show the extent of their meaning as employed by the testator. Such difficulties must be solved by construction, aided, it may be, by light from the surrounding facts and circumstances, but the case is not one of 'equivocation' in the true sense, and no declarations of intention are receivable. (See *Wigram Ext. Ev.*, Pl. 209; 2 *Whart. Ev.*, S. 993.) And it is on this principle that declarations of intention cannot be received to show the meaning of the word 'increase' in a bequest of a 'negro woman, named Jenny, and her increase' (*Puller v. Puller*, 3 Rand. 88, explaining *Reno v. Davis*, 4 Hen. & M. 283); nor to show, under a devise of 'all my estate to be equally divided between the children of my deceased son Joseph and the children of my daughter Elizabeth,' that the children of Joseph and Elizabeth were meant to take *per stirpes* and not *per capita*. (*Senger v. Senger*, 81 Va. 687.)

2. The description in the will must be equally applicable in all its parts to two or more persons or two or more things. For unless there be a plurality of objects or subjects, if the doubt arises as to a single person or a single thing supposed to be de-

scribed, though imperfectly, by the words of the will, there can be no competition between subjects or objects, and without competition there is no equivocation. And though there are several competing subjects or objects, yet if no one of them 'follows out and fills the words in the will,' but the description applies in part to the one and in part to the other, this is no case of equivocation, and declarations of the testator's intention are inadmissible. For this is not a case of double vision, where the will describes well, but equally well, two or more persons or things, but rather a case of verbal strabismus, where the description in the will squints, looking partly in one direction and partly in the other. The description is balanced, and while the equipolse may be broken and a decision made between the repugnant parts of the description by the aid of surrounding facts and circumstances, the case is not one which admits of the law's heroic treatment by the admission of declarations of intention. This was decided in the great case of *Hiscocks v. Hiscocks*, 5 M. & W. 863, and has been followed in England in *Drake v. Drake*, 8 H. L. C. 172, and *Charter v. Charter*, L. R. 7 H. L. Cas. 864, and is now regarded as settled law. Thus, in *Hiscocks v. Hiscocks*, *supra*, the devise was, 'to John Hiscocks, eldest son of my son John Hiscocks.' But the eldest son of John Hiscocks was not named John, but Simon, so that while the name fitted one son the description fitted another; and it was held that no declarations of intention could be received in aid of the interpretation. But the strict letter of the above rule has been so far relaxed as to permit a case of equivocation to be made under the maxim, *falsa demonstratio non nocet cum de corpore constat*, when, after rejecting the misdescription, which is applicable to no person or thing, the remainder of the description is sufficient to describe equally and with legal certainty two or more persons or two or more things. Thus, in *Careless v. Careless*, 1 Mer. 384, the devise was 'to Robert Careless, my nephew, son of Joseph Careless.' The testator had no brother Joseph, so that the words, 'son of Joseph Careless,' were rejected as 'false demonstration.' This left the description: 'To Robert Careless, my nephew;' and as the testator had two nephews named Robert Careless, the case was treated as an equivocation.

"In the light of the foregoing principles let us consider the case of *Hawkins v. Garland's Adm'r*, 76 Va. 149, in order to determine whether it presents a case of equivocation, and whether the testator's extrinsic declarations of intention were properly received in evidence. By the fifteenth clause of his will Samuel Garland, Sr., bequeathed as follows: 'I give to each of my namesakes, Samuel G. Slaughter, son of Ch. R. Slaughter; Samuel G. White, son of Samuel G. White; Samuel, son of S. Garland, Jr., and Samuel G., son of Captain John F. Slaughter, a bond of \$1,000 of S. S. railroad.' The difficulty arose as to the person intended by 'Samuel G., son of Captain John F. Slaughter.' At the date of the will, and for three or four years thereafter, there was no son of John F. Slaughter named Samuel G., but a few months before the testator's death a son was born to John F. Slaughter who received that name. Hence the court very properly rejected the claim of 'Samuel G., the son of Captain John F. Slaughter,' and treating 'Slaughter' as a manifest mistake, were called on to consider whom the testator intended to describe by the residue of the description—viz., 'Samuel G., son of Captain John F.' And upon reasoning to which there is no objection, based on the language of the will read in the light of the facts of the case, the court was of opinion that

Samuel G. Hawkins, son of Captain John F. Hawkins, was plainly indicated as the object of the testator's bounty. But the court went further, and admitted in evidence the parol declarations of the testator that Samuel G. Hawkins was one of the namesakes to whom he had given \$1,000 by his will. And in this, it is submitted, the court erred; for the words 'Samuel G., son of Captain John F. Slaughter,' do not, either before or after the rejection of 'Slaughter,' describe well, and equally well, two or more persons. As there was no son of John F. Slaughter named 'Samuel G.' in existence at the date of the will, the after-born son cannot be considered as described at all by the words in the will; and rejecting 'Slaughter,' only Samuel G. Hawkins could claim by the description, 'son of Capt. John F.' In truth, the case was a simple one of misdescription, without the appearance even of equivocation; and while the result reached was no doubt correct, the court should have reached it on the facts, without the aid of the testator's extrinsic expressions of intention, as was done by the Supreme Court of the United States in *Patch v. White*, 117 U. S. 210,—a case quite similar to *Hawkins v. Garland*, with the difference that in *Patch v. White* the misdescription was of the *subject* devised, and not of the object of the testator's bounty. In *Hawkins v. Garland*, the case of *Maund v. McPhail*, 10 Leigh 199, is cited, where declarations of intention were received to show that by 'the new colonization society in Africa,' the testator meant 'The American Colonization Society for settling free persons of color in Africa.' But this was clearly wrong, as the case was one of misdescription only. And as to the English case of *Beaumont v. Fell*, 3 P. Wms. 141, relied on by the court in *Hawkins v. Garland*, where, in the absence of equivocation, declarations of intention were received, that has long since been overruled on this point. (See *Hiscocks v. Hiscocks*, 5 M. & W. 268; *Mostyn v. Mostyn*, 5 H. L. C. 168; 1 Jarm. Wills, 760, note 3; 2 Taylor Evid., s. 1311, note a.)"

228 *Mayor and Commonalty of Alexandria v. Hunter.*

Thursday, April 18th, 1811.

1. *Municipal Taxes—Recovery by Motion—Statute.*—Under the act of 1796, c. 81, the mayor and commonalty of Alexandria are not authorized to recover by motion money due for the town taxes; but only for 'paving the streets.'
2. *Same—Same—Notice—What It Must State.*—In such case, the notice must state the true amount of the assessments for paving the streets, due from the defendant; for if the sum in proof be different from that in the notice, the court will not give judgment for the sum actually due.
3. *Judgment by Motion—What Plaintiff Must Prove.*—Where an act of assembly authorizes a judgment, by motion in a summary way, in the court of the county where the defendant resides, the plaintiff is bound to prove the defendant's residence, though no objection be made on his part; for the court will presume nothing in favour of a summary motion.

In this case a judgment of the county court of Fairfax, in favour of the mayor and

**Appellate Practice—Record—Evidence.*—In chancery cases, the evidence is generally in the form of depositions, and is necessarily a part of the record. In all but chancery cases, the evidence is generally made a part of the record by bill of exceptions to the judgment of the court, the evidence at large, and not the facts proved in the opinion of the inferior court, being set out in the bill. *Pryor v. Kuhn*, 12 Gratt. 622, citing the principal case.

See further, monographic note on "Bills of Exceptions" appended to *Stoneman v. Com.*, 26 Gratt. 887; monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268.

commonalty of Alexandria, upon a motion in a summary way, against John Chapman Hunter, was reversed by the district court held at Hay-Market, and the motion dismissed with costs.

The judgment (which corresponded with the notice) was for 73l. 19s. 3d. "being the amount of the assessment imposed on the property of the aforesaid John C. Hunter, in Alexandria, for paving the streets of the said town."

A bill of exceptions was filed in the county court, setting forth all the evidence exhibited; from which it appeared that the sum assessed on the property of the defendant for paving the streets was only 70l. 19s. 3d. the farther sum of 3l. being charged against him for "tax on his ground."

No exception was taken to the jurisdiction of the court; neither did it appear in evidence that the defendant resided out of the county of Fairfax.

Thursday, April 18th. The judges pronounced their opinions.

JUDGE CABELL. The evidence contained in the bill of exceptions proves, incontestibly, that the county court gave judgment, not only for the amount of taxes or assessments for paving the streets, but also for the common town tax; and, in this view of the subject, this case comes completely within the principle decreed in the case of *The Mayor and Commonalty of Alexandria v. *Chapman*. (a)

But there are two other additional grounds on which I think the judgment of the county court should be reversed; 1st. The act of assembly (b) gives the right to this summary remedy only in the county where the defendant resides. But it is neither stated nor proved that the defendant resided in the county of Fairfax, where this motion was made. The plaintiffs, therefore, have not shown themselves entitled to the benefit of the act, and this court cannot presume it for them; 2d. The evidence of the plaintiffs did not entitle them to recover under the notice they had given. The act of assembly requires that the defendant shall have notice, not only of the motion intended to be made, but also of the "amount of the taxes or assessments due from him," which, in my opinion, prevents the proof or recovery of any sum different from that stated in the notice. The judgment of the district court, therefore, reversing that of the county court, should be affirmed.

JUDGES ROANE and FLEMING assented; and the judgment of the district court was unanimously affirmed.

Scott v. Hall.

Tuesday, April 23d, 1811.

1. *Writ of Certiorari—When Proper—Where Transcript Certified.*—A writ of certiorari, for defect of the record, is proper where the transcript has been certified by the proper officer, and is suggested to be defective; but not where it is not authenticated at all.
2. *Same—Same—Same—Supersedeas.*—In such case, even after the cause has been argued, the supersedeas will be quashed as having been improvidently granted.

(a) 4 H. & M. 270.

(b) Sess. Acts, 1796, c. 31.

*See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268.

Botts moved to quash the writ of superseas in this case as improvidently granted; the clerk of the district court having never certified the record.

Williams, contra. This objection was not taken until after this court had heard the cause. A certiorari was then awarded, but never executed. (1)

230 *Botts. I am driven by Mr. Williams himself to make this motion. I wished to dispense with the certiorari, but he would not agree to it.

Williams then moved for another writ of certiorari; but the court refused it; Judge Roane observing that if the record had been certified by the proper officer, and was suggested to be defective, a certiorari would be proper; but not where the record is not authenticated at all.

Supersedeas quashed.

Hardaway v. Manson.

Wednesday, April 17th. 1811.

Evidence.*—Weight—Question for Jury.—The weight of testimony, to establish any fact, (though it be a fact upon which a question of law arises,) is a question belonging exclusively to the jury, unless it be withdrawn from their determination by a demurrer to evidence.

See, to the same effect, *Fisher's Executor v. Duncan & Turnbull*, 1 H. & M. 563.

On the trial of an action of detinue, for a negro slave Jack, in the district court of Petersburg, the plaintiff, Peter M. Hardaway, gave in evidence, to support the issue on his part, a bill of sale executed to the plaintiff by his father William Hardaway, dated April 25th, 1802, and duly recorded, conveying to him, his heirs and assigns for ever, twenty-eight negroes, by name, (of whom Jack was one,) for and in consideration of the sum of 1,680l. current money. He further proved that the said William Hardaway had been frequently anxious to sell his said slaves before this sale to the plaintiff; that the sum of 1,680l. was a full price for them; that to the payment of that sum the plaintiff's own means were fully adequate, independently of the property acquired by him by the said purchase; and, moreover, he gave bond with good and sufficient security for the payment of the same; having actually paid in part the sum of 900l. or thereabouts; nearly all of which sum of 900l. was paid, not to the said William Hardaway himself, but to his creditors, in discharge of their just demands against him, and such payments were by the plaintiff accounted for, allowed as discounts, and actually credited upon the said

231 *bond; that at the time of the execution of the said bill of sale, the said William Hardaway delivered to the plaintiff all the slaves therein mentioned, though with an express verbal stipulation that part of the said slaves, of whom Jack was one, should remain with him the said William Hardaway till the Christmas following, in

order to finish the crop; but the plaintiff and the said William Hardaway lived upon the same plantation, within one hundred yards of each other, and used the same gardens, &c. and the stipulation, that part of the slaves, of whom Jack was one, should remain with the said William Hardaway until the Christmas ensuing, was a part of the original contract, which was accordingly carried into effect; that, at the expiration of that time, the plaintiff hired a part of the said slaves (including Jack) to the said William Hardaway, for a valuable consideration, for the ensuing year, (1803,) and, again, on the 23d of December, 1803, for the year 1804. It further appeared from the testimony, that the slaves had always, from the date of the bill of sale, been registered on the commissioners' books of Dinwiddie county, as the property of the plaintiff, by whom the taxes chargeable thereupon had always been paid: "And a witness of the plaintiff, who was intimately acquainted with both parties to the said bill of sale, who drew that instrument, and who lived, during a considerable portion of the time in which these transactions happened, in the family of the said William Hardaway, declared that he never heard a syllable drop from either of the said parties, or observed any part of their conduct, that justified the remotest suspicion that there was any fraudulent design in making the said contract; and that he verily believed that it was a bona fide transaction." It was further proved that, in February, 1804, the said slave Jack, then being in the possession of the said William Hardaway, by virtue of the bailment last mentioned, was seized by the sheriff of

232 *Dinwiddie county to satisfy a *fi. fa.* against him, and sold by the sheriff, though forbidden by the plaintiff, under which sale the defendant held; the debt, on which the judgment was rendered, having originated prior to the execution of the bill of sale, though the judgment was not rendered till afterwards.

This being all the evidence in the case, the defendant's counsel moved the court to instruct the jury "that the law was, that, wherever there is an absolute bill of sale for a valuable consideration, the possession must accompany and follow the deed, in order to make the conveyance valid against creditors; that, if the possession remain in the grantor, that circumstance is not only evidence of fraud, but is fraud per se, not to be controverted by any evidence of fair and bona fide intentions in the contracting parties, however strong; and that, in this particular case, the possession of the said slaves stated to have remained in the bargainor William Hardaway, under the circumstances and for the purpose above stated, after the execution of the said bill of sale to the plaintiff, was such a possession as was not only evidence of fraud, but of itself fraud, which no countervailing evidence, however strong, of bona fide intentions in the parties to the contract, could wipe away; and therefore the jury ought to find for the defendant; and the court did so instruct the jury, and added, that the possession proven to have remained in the bargainor William Hardaway was such, that counsel could not go into argument to prove to the jury that the possession,

(1) Note. The supersedeas was awarded in August, 1804: the certiorari in March, 1810, after the cause had been argued.—Note in Original Edition.

*Evidence.—See monographic note on "Evidence" appended to Lee v. Tapscott, 2 Wash. 376.
of Sale of Personality—Retention of Possession by Vendor.—Effect.—On this subject the principal case was cited in Mackey v. Bell, 2 Munf. 685; Sydnor v. Gee, 4 Leigh 546; Davis v. Turner, 4 Gratt. 448. See foot-note to this last case.

so as aforesaid proven, was not such a possession as the rule of law (sanctioned by the court as above mentioned) applied to and established as a fraud of itself." To which opinion the plaintiff by his counsel excepted.

Verdict and judgment for the defendant, and appeal taken.

Hay, for the appellant. The court 233 erred in the instruction *to the jury.

It is not law that, where possession remains with the vendor, the transaction is, in all cases, fraudulent per se. The court also went too far in deciding a question of fact, as well as law.

The doctrine of fraud per se, now brought forward, is of recent origin: we are indebted for it to Mr. Justice Buller. (a) These words have obtained possession, in defiance of the plainest principles of reason and justice. Prior to his time there was no decision, that possession must follow and accompany the deed, otherwise it is fraud per se. Lord Coke never thought a transaction, fair and honest in fact, was fraudulent in law. In *Twine's Case*, (b) the circumstance that possession did not accompany the conveyance is not said to be fraudulent per se, but only evidence of fraud, or a circumstance to be weighed with other circumstances.

I admit the modern judges have sanctioned the doctrine of Buller; as in *Hamilton v. Russell*, 1 Cranch, 309.

No counsel for the appellee.

Tuesday, April 23d, (in the absence of the president,) JUDGE ROANE reported the unanimous opinion of the court (consisting of ROANE, BROOKE and CABELL) that the judgment be reversed.

The court's opinion was entered as follows:

"It seems to the court here that there is error in the said judgment, in this, that the district court instructed the jury, at the trial, that the possession of the slaves referred to in the bill of exceptions, which remained in the father, under the circumstances and for the purposes therein stated, after the execution of the bill of sale to the plaintiff, was such a possession as was not only evidence of a fraud, but amounted to a fraud in itself,

(1) and that that possession was such 234 that counsels should *not be permitted to go into argument to prove to the jury that it did not itself amount to and establish a fraud; this court being of opinion that the weight of the evidence, touching the possession aforesaid, was a question belonging exclusively to the jury, and ought to have been left with them, without any such declaration or direction as aforesaid, unless the court had been compelled by a demurrer to evidence to decide upon it."

Judgment reversed, and cause remanded, "with direction that the court, upon the future trial, shall forbear to give any decision upon the weight of testimony as aforesaid, unless it be required in the manner herein before stated."

(a) See § T. R. 504, *Edwards v. Harben*.

(b) 8 Co. Rep. 83, b.

(1) Note. See post, *Alexander v. Deneale*.

Carnagy and Wife v. Woodcock and Mackey, Executors of Martin.

Friday, April 26th, 1811.

1. *Will*—*Devise of Realty with Crops Thereon*—*What Passes*.—By a devise of a tract of land in fee simple, together with all the crops thereon, whether gathered or growing at the time of the testator's death, not only the crops made the year the testator died, but those of the preceding year remaining on the land, and those brought thither, from other plantations, to be stored, will pass.

2. *Same*—*Bequest of "All Household Goods"*—*What Passes*.—By a bequest of "all my household goods and furniture, except my plate and watch," every thing, about the houses, that had been usually held and enjoyed therewith, and that would tend to the comfort and accommodation of the householder, will pass.

3. *Same*—*Construction*—*Explanation of Terms by Testator*.—When, in the context of a will, the testator has explained his own meaning in the use of certain words, the court should take that as their guide, without resorting to lexicographers to determine what those words ought to signify in the abstract, or to adjudicated cases to discover what they have been decided to mean under different circumstances.

The contest in this case arose on the following clause in the will of Thomas Bryan Martin: "I devise and bequeath to my present housekeeper, Betsey Powers, and her heirs, if she be alive at the time of my death, one thousand acres of land, as described by a survey made by George Bell, dated the — day of July, in the year 1794, where I now live, together with all houses thereon, and all the appurtenances and crops thereon, whether gathered or growing at the time of my death, and all the implements of husbandry used, or intended to be used, upon the said land, and one half my stock of horses, cattle, sheep and hogs, and all my household goods and furniture, (except my plate and watch,) and, moreover, the choice of ten slaves to be made by herself."

235 *The suit was brought in the county court of Frederick, by William Carnagy, and Betsey his wife, (late Betsey Powers,) claiming all the crops; not only those that were growing on the 1,000 acres the year in which the testator died, but also those that were severed at the time of his death, whether made in that year, or the preceding year; whether made on that particular tract, or on the adjoining plantations, and brought thither to be stored.

The plaintiffs also claimed the liquors, books, and various other articles mentioned in a schedule annexed to the bill, viz. "A spyglass, 7 empty double barrels, 11 do. single, a pair of large brass scales, 4 hogheads, a copper tea urn, a large mahogany chest, 2 large brass sifters, 6 hearth stones, 2 crow-bars and 2 sledge hammers, a garden pitcher, 2 grindstones, all the narrow axes, 1 steel apple mill, 1 do. corn mill, 2 large jack screws, 1 brass bushel, 77 barrels of flour, do. do. in the mill, 1 marble mortar, 1 marque, 3 backgammon tables, 1 speaking trumpet, 1 large office press, 1 corn mill iron, 4 plough plates, 2 pair large money scales, and one iron chest."

The county court rendered a decree pursuant to the construction put on the will by the plaintiffs; but, upon an appeal, the chancellor of the district court of Staunton excluded all crops except those on the 1,000 acres the year of the testator's death; being

*Wills.—See monographic note on "Wills" appended to *Hughes v. Hughes*, 3 Munf. 300.

of opinion that the words, "Whether gathered or growing," were used "to prevent such as should be severed before the 31st day of December from being assets in the hands of the executors." (a)

He also excluded the liquors, books, and all other articles that did not come strictly within the idea of household furniture and implements of husbandry. On this branch of the controversy, his opinion was in the following words: "The next difficulty arises on the devise of the household goods and furniture; for, I presume, none
236 *can arise about the implements of husbandry: whatever is necessary or useful in carrying on the business of the farm are embraced by these words. Household goods, and household furniture must receive the same interpretation; for they are the same. In *Kelly v. Powlett*, Amb. 605, household furniture is said to comprise every thing useful or convenient to the householder, or ornamental to the house; and that circumstances are to be considered in determining what will pass by it. But this definition or description of household furniture must be taken in a limited sense; for, in the same case, it is held that books will not pass by it; though there was some evidence of the testator's intention to pass them. In *Bridgeman v. Dove*, 3 Atk. 176, it is laid down that a library will not pass by a devise of furniture, and it is there said to have been so determined. In *Porter v. Tournay*, 3 Vesey, jun. 311, it is said to have been determined that the word furniture does not include books or wine. (1)

"The marke cannot pass under any construction of the will; nor the backgammon tables; for I cannot consider them more useful or ornamental than a library, and, more especially, as the devisee is a female, whom I will not presume either very skilful in the game, or inclinable to practise it. With respect to the spyglass, and speaking trumpet, I cannot bring them within any idea which I have of household furniture. It is true, that they may be useful and convenient to the proprietor: but not more so than a surveyor's compass, or a set of blacksmith's tools. The hearth stones, if intended for any of the houses upon the 1,000 acres, ought to pass: the intent of the testator must have been such. The corn mill iron (perhaps an iron corn mill is meant, as there is before mention made of a steel corn mill) if so, it
237 passes; *or, if it is the iron of a mill devised to the appellee Elizabeth, it must also pass. The liquors, as before said, do not pass: nor can I consider the empty barrels, &c. within the devise; they are not household furniture, nor implements of husbandry, though they might be useful in securing some of the products of the farm. The other articles in the schedule (except the flour, the right to which will depend on circumstances, one important one will be the crop out of which it was made) will, I think, pass by the devise.

"It has been contended that the exception

of the testator's plate and watch affords evidence that every thing else was intended to pass by the devise; and that, though the plate would pass, yet the watch would not; and therefore the exception would have been idle and useless in any other view. But it must be observed that the plate and watch were intended as specific legacies to near relations, and reserved for that special purpose. The exception of the watch might be therefore connected with the plate, out of abundant caution."

The chancellor, therefore, reversed the decree of the county court, and directed an account to be taken of the several articles to which the appellees, Carnagy and Wife, were entitled, according to the principles, and subject to the restrictions, he had mentioned. From this decree, by special leave of the court, (b) an appeal was taken.

Wickham, for the appellants.

Williams, for the appellees.

Wednesday, May 1st. The president informed the the counsel that the record was defective; a copy of the will not being inserted.

238 *Judge Roane observed there was no clause in the bill, or answer, praying the will to be taken as part thereof.

Wickham. By consent of parties, a copy of the will may now be received as part of the record. There is in the bill a reference to the will, and that is sufficient.

Williams. In the case of *Bristow v. The Commonwealth*, (MS.) (c) a whole record was admitted, by consent of parties, to be added to the transcript before the court.

On examining the order made in that case, the court was satisfied, and a copy of the will was received by consent.

Judge Cabell observed another defect. A statement of an account of sales is referred to, but does not appear.

Wickham. The failure to file that exhibit was a fault of the defendants; of which they have no right to complain.

Monday, June 24th. The judges pronounced their opinions.

JUDGE CABELL (after stating the case) proceeded as follows: This is not one of those cases in which we are obliged to bend the testator's intention to some stubborn rule of law. On the contrary, it is admitted, on all hands, that that intention (whatever it may be) must here prevail. And it appears to me that all the difficulties made in this case have arisen from attending to the common and natural acceptation of certain terms, rather than to the sense in which they are used by the testator; from considering those terms in the abstract, rather than as explained by other parts of the

239 will, and the circumstances *of this particular case. I can perceive nothing in the will calculated to restrict the devise of the crops as the chancellor has done. The expressions are broad and general, extending to all crops "gathered or growing," and correspond with the liberal provision intended by the testator. The construction of the chancellor would render almost nugatory that part of the will which gives the crops "gathered:" for, suppose the

(a) Rev. Code, vol. 1, p. 166, s. 46, 47.

(1) Note. In argument, cited *Slanning v. Style*, to show that, under a devise of "one's household goods and implements of household," malt, hops, beer, ale and other victuals in the house do not pass; also 2 Fonb. b. 4, c. 1, s. 11.—Note in Original Edition.

(b) See Rev. Code, vol. 1, c. 223, s. 1.

(c) Order Book, May 12, 1806.

testator had died on the 1st of April; to what could the term "gathered" have applied, but to the crops of the preceding year?

With respect to the books, liquors, &c. it is important to be observed that this was a devise in fee; that the devisee took the lands, with all the houses, all their appurtenances, all the implements of husbandry, half the stocks of every kind, and all the household goods and furniture; and, even if the testator had left us to collect his intention from these circumstances only, I think the inference would have been extremely strong that, although, "household goods," and "household furniture," have in some cases been decided, and may in general be considered, synonymous, yet, in this case, the testator intended, by "household goods," something more than mere "furniture;" that he intended every thing about the house that had been usually held and enjoyed therewith, and that would tend to the comfort and accommodation of the householder. But this inference is rendered irresistible when we consider the exception of the "watch," which the testator thought it necessary to make from this devise. There is not one article, in the whole list objected to by the executors, which would not fall under the idea of "household goods," with as much, if not more, propriety, than the watch; and yet the testator shows that these terms, as understood and used by himself, would have comprehended the watch, had it not been specially excepted. Of course, the articles not excepted must pass. The

240 testator having explained his own meaning in the use of these terms, I shall take that as my guide, without resorting to lexicographers to determine what the same terms ought to mean in the abstract, or to adjudicated cases to discover what they have been decided to mean under different circumstances. Without inquiring, therefore, what would, in general, not pass by the terms "household goods and furniture," but believing, from the particular circumstances of this case, that it was the intention of the testator to bequeath the articles objected to, I am of opinion that the decree of the chancellor be reversed, and that of the county court be affirmed.

JUDGES BROOKE and FLEMING said that their sentiments were expressed in the opinion just pronounced.

Decree of the chancellor unanimously reversed, and that of the county court affirmed.

Monroe (Governor) v. Redman and Others.

Tuesday, April 23d, 1811.

1. Bonds—Statute—Application.—Quære, whether the proviso in the 24th section of the district court law extends to suits upon joint and several bonds, with collateral conditions to be performed by the principal obligor only, as well as to bonds with collateral conditions to be performed by the obligors jointly or severally.
2. Jurisdiction—Non-Residence—When Objection Too Late.—It is too late, after issue joined, to object to the court's jurisdiction, on the ground of non-residence of the defendant.

In an action upon a sheriff's official bond, in the district court of King and Queen, the writ was served on Vincent Redman, (the

sheriff,) and Fouchee G. Tebbs, one of the securities; the return being that the other securities were no inhabitants. Issue was joined on the plea of nil debet; and, when the cause came on for trial, the defendants proved that the defendant Redman resided in Richmond county, out of the King and Queen district, at the time of issuing the writ; and (admitting the defendant Tebbs to have resided within the district at that time) they moved the court to dismiss the suit, as no writ of capias ad respondendum 241 had been previously issued *against the said Redman in the district in which he resided: whereupon the suit was accordingly dismissed; "The court considering that the defendant Redman was bound by the obligation for performance of a personal duty, in which the defendant Tebbs was not jointly, or jointly and severally, bound."(1)

On the motion of Archibald M'Call, (the relator, for whose benefit the suit was brought,) an appeal was taken.

Williams, for the appellant, relied on the proviso in the 24th section of the district court law, (a) as authorizing the action in this case, though one of the defendants resided out of the district.

Wirt, contra. The proviso applies to bonds, or covenants, for payment of money, or for performance of joint and several contracts; but not to bonds with collateral conditions. The contract here is, that the sheriff shall perform the duties of his office; not that the securities as well as the sheriff shall.

Williams, in reply. This is certainly "a joint and several bond for the performance of a contract," viz. that the sheriff should perform his duty.

Besides, the defendant appeared and pleaded; after which it was too late to take an objection of this nature. (b)

Wednesday, April 24th. The Judges, CABELL, BROOKE, ROANE and FLEMING concurred in opinion that, after issue joined, it was too late to take advantage of the non-residence of the defendant; Roane observing that he conceived the point settled in Bradley v. Welch, and the

true construction of the act of assembly to be, that the *writ is to be dismissed, upon condition that advantage be taken on the first calling of the cause. (2)

Judgment unanimously reversed, and cause remanded for farther proceedings upon the issue joined.

Triplett's Executors v. Jameson.

Tuesday, April 23d, 1811.

1. Executors—Account—Who May Object to.—Any person interested in the settlement of an ex-

(1) Note. The bond was in the usual form, binding the obligors jointly and severally, with a condition in the form prescribed by law. Rev. Code, vol. 1, c. 80, s. 10.—Note in Original Edition.

(a) Rev. Code, vol. 1, p. 77.

(b) Bradley v. Welch, 1 Munf. 284; Williams, &c. v. Campbell, 1 Wash. 153.

(2) Note. See 3 Tuck. Bl. Appendix, note D. p. 51. and 1 Wash. 153, 154.

N. B. No opinion was given upon the point, whether the suit might have been dismissed if the objection had been taken in time.—Note in Original Edition.

*Executors—Account—Who May Object to.—See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

*See monographic note on "Jurisdiction" appended to Phippen v. Durham, 8 Gratt. 457.

ecutor's account may object to its being allowed and recorded, and, being overruled in such objection, may appeal to a superior court.

2. **Same—Compensation—Commissions.**—A commission of more than five per cent. on the amount of sales and collections, ought not to be allowed an executor, except upon peculiar circumstances.

On the motion of Charles Little and George Triplett, executors of William Triplett, deceased, the court of Fairfax county appointed commissioners to settle their account with the estate of their testator, which was accordingly examined, and reported to be correct, by the commissioners, and, being again examined in open court, was allowed and ordered to be recorded; though objected to by Robert B. Jameson, ("one of the devisees, in right of his wife,") who filed exceptions to so much of the report as allowed a commission of 7 1-2 per cent. to the executors upon the amount of sales and collections, as "unreasonable and too much." (1) Robert B. Jameson appealed to the district court holden at Haymarket, which reversed the order of the county court, and directed a commission of 5 per cent. only to be allowed; whereupon the executors appealed.

Botts, for the appellants, insisted that Jameson had no right to appeal from the order of the county court; and cited Sayre v. Grymes, 1 H. & M. 403.

243 *Peyton Randolph, contra. The case of Sayre v. Grymes is not like this; for Sayre, who obtained the supersedeas in that case, was not a party on the record; whereas, here, Robert B. Jameson regularly made himself a party, by taking the objection in the county court.

Botts, in reply, cited Holcomb v. Purnall, referred to by Judge Tucker, 1 H. & M. 406, 407, and Dunlop v. The Commonwealth, 2 Call, 284. In Sayre v. Grymes, the court went upon the general principle, that a person not interested can neither appeal nor obtain a supersedeas. Besides, this was not a proper subject for an appeal: the county court had conclusive power on the subject, and were the best judges whether the commission of 7 1-2 per cent. was reasonable or not.

P. Randolph. The county court was bound to exercise a sound discretion; and whether they did, or not, is a question properly examinable by a superior tribunal. Nothing is to be presumed in favour of their decision. The account is brought up, and this court has all the data to enable it to form a judgment. Seven and a half per cent. is an extravagant compensation in this case. An executor is not to be allowed as an insurer of the debts; but in proportion to his trouble and expense, according to fixed principles.

Wednesday, April 24th. JUDGE ROANE pronounced the opinion of the court. "The court, considering that the appellee appeared and contested the allowance of the executors' account, as stated in the proceedings; that

†**Same—Compensation—Commission.**—On this subject the principal case was cited in *Estill v. McClintic*, 11 W. Va. 411; *Beecher v. Foster*, 51 W. Va. 806, 42 S. E. Rep. 664. See *foot-note* to *Fitzgerald v. Jones*, 1 Munf. 150.

(1) Note. The amount of sales was 27,889 dollars and 81 cents; of cash in the bank, and in the desk of the testator, at the time of his death, 1,017 dollars and 26 cents; and of collections 912 dollars and 20 cents. The commission allowed was 7 1-2 per cent. upon the total of these sums.—Note in Original Edition.

he averred himself to be interested, as a devisee, in the estate in question, and appealed from the judgment of the court of Fairfax county sanctioning the account; are of opinion that, under the decision of this court in the case of *Wingfield v. Crenshaw*, 3 H. & M. 245, the case was properly carried by him, by way of appeal, to the district court; and that that court 244 rightly reversed *the judgment appealed from; inasmuch as no facts or circumstances are stated on the part of the appellants justifying the allowance of a commission of 7 1-2 per centum to the executors. The only doubt the court had upon the subject was, whether, inasmuch as the order of allowance by the court of Fairfax county was only ex parte, an appeal would lie from the judgment; but considering that such ex parte settlement might operate injuriously to the appellee and others, in the event of the loss of testimony and documents competent to impeach that allowance, when the same might thereafter be more deliberately questioned; the court is inclined to sustain the appeal, under that provision of the act which gives a right of appeal to all who may be injured or aggrieved, by the sentence or judgment of a county court, in any suit or contest whatsoever."

Judgment affirmed.

Fenwick v. M'Murdo and Fisher.

Tuesday, April 23d, 1811.

1. **Covenant—Plea of Covenants Performed—Effect.***—In an action of covenant, upon articles, by which the defendants authorized the plaintiff to take into his possession certain mills, to put the same in complete repair, and to make such alterations in the construction thereof, as should in his opinion be best calculated to give them their full power and effect; engaging that they, at all times, would be ready to pay the amount of the expenditures incurred, on the production of proper vouchers; and that the plaintiff should retain the possession and use of the premises for a term of years, paying a certain rent: "provided, that, in all the repairs and improvements, thus left to his discretion, he would not consider his own temporary accommodation only, but the permanent advantage of the property also, and proportion the expenditures accordingly;" upon the plea of "covenants performed," and issue, the question whether the plaintiff had complied with the terms of the proviso was properly before the jury.

2. **Judgments—Equitable Relief against.**—Where a cause has been once fully heard and decided in a court of common law, having competent jurisdiction of the case, a court of equity ought not to interfere, unless fraud or surprise be suggested

***Covenant—Plea of Covenants Performed—Must Be Specially Plead.**—The general rule is that the defendant must plead specially the performance of the covenant when he desires to rely upon the same as a defense to the action, and must, in general, show specially the time and manner of the performance. *Arnold v. Cole*, 42 W. Va. 665, 26 S. E. Rep. 312, citing the principal case.

The general rule as to the mode of pleading the performance of conditions of covenants is that the party must not plead generally that he performed a covenant or condition, but must show specially the time, place, and manner of performance, and even though the subject to be performed should consist of several different acts, yet he must show the performance of each. *Norfolk, etc., R. R. Co. v. Suffolk Lumber Co.*, 92 Va. 437, 23 S. E. Rep. 737.

See further, monographic *note* on "Covenants. The Action of" appended to *Lee v. Cooke*, 1 Wash. 306.

†**Judgments—Equitable Relief against.**—Many notes on this subject have been written in this series of reports. See *foot-note* to *Turpin v. Thomas*, 2 Hen. & M. 189; *foot-note* to *Mason v. Peter*, 1 Munf. 445; *foot-note* to *Donally v. Ginnatt*, 5 Leigh 356; *foot-note* to *Terrell v. Dick*, 1 Call 549; monographic *note* on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425; monographic *note* on "Injunctions" ap-

and proved, or some material adventitious circumstance had arisen, which could not have been foreseen, or guarded against.

The only question decided in this case was, whether the appellees, who were originally defendants in an action of covenant, had full remedy, or had it in their power to defend themselves effectually, at common law.

The articles of agreement, on which the action was founded, were, in substance, as follows:

"Articles of agreement this day entered into between Charles James M'Murdo and George Fisher, trustees of

245 *James Wardrop, deceased, of the one part, and William Fenwick, of the other part, witness, that, for the considerations hereafter expressed, the said M'Murdo and Fisher, as trustees aforesaid, do hereby grant unto the said Fenwick full and free liberty and authority to take into his possession the mills, situate on Falling Creek in the county of Chesterfield, commonly called and known by the name of the Ampthill Mills, &c. to put the same, and every part thereof, in perfect and complete repair, and to make such alterations in the construction of the said mills as shall, in the opinion of said Fenwick, be best calculated to give them their full power and effect; to erect (should he choose to do so) a saw-mill, cooper's shop and store-house, in such situations as he shall think proper; as, also, a bridge across the creek, &c.; for the said purchases, and for the hire or salary of the different workmen, &c. except such as may attend the erection of the before-mentioned bridge, the said M'Murdo and Fisher hereby acknowledge themselves to be responsible, and engage that, at all times, they will be willing and prepared to pay the same, on the production of proper vouchers. And it is further agreed upon, and understood, that the said Fenwick shall retain quiet and peaceable possession of the before-mentioned property, for and during the full term of ten years, from the first day of October next, during which it shall be subject to his exclusive management and control, and shall be worked or used by him, his heirs or assigns, during that period, for his or their exclusive interest or emolument: Provided, (and the proviso is introduced by the trustees, in perfect confidence of its full and proper influence on the said Fenwick,) that, in all the repairs and improvements thus left to his discretion, the said Fenwick will not consider his own temporary accommodation only, but the real and permanent advantage of the property also, and proportion the expenditures accordingly. And the said

Fenwick doth hereby engage, bind 246 and oblige himself to obtain "the necessary workmen and labourers as speedily as possible, and on the most advantageous terms he can, and to complete the work before particularized with all the despatch which shall appear to him to consist with the durability thereof; that the completion of the mills shall be the first object, and shall not be impeded by any other; that

when the mills shall be completed the year shall commence; at the termination whereof, he will pay to the said M'Murdo and Fisher, or to whoever else shall be duly authorized to receive the same, the sum of six hundred dollars; at the end of each of the next succeeding two years the like sum; at the end of each of the next succeeding three years, the sum of one thousand dollars; and (should he, his heirs or assigns, choose so long to retain said property) at the end of each of the next succeeding three years, the sum of twelve hundred dollars: at that time (which will include a term of nine years from the completion of the mills) this lease shall terminate. It is also understood, and agreed to by the said Fenwick, that, should the said mills not be completed by the first day of October, which shall be in the year eighteen hundred and two, the rent, as above, shall, notwithstanding, commence on that day, and be payable on the same day in the year next succeeding; provided, however, that the works shall not have been retarded or destroyed by fire, freshes, or other inevitable accidents. The said Fenwick hereby further engages, for himself, his heirs and assigns, that, at the termination of the lease as before mentioned, the said mills and appendages, as before particularized, shall be delivered up to the said M'Murdo and Fisher, or to whoever else shall be authorized to receive the same, in good working and tenantable condition, such accidents by fire, water, or otherwise, as with due care and skill might have been prevented, and common wear and tear excepted: and should the said Fenwick, at any time previous to the termination of the lease as aforesaid,

247 resolve to release the "said mills and appendages, he hereby engages to the said trustees a preference to any other tenant on equal terms. In testimony, and for the due performance of these their respective engagements, the parties hereto do hereby bind themselves, their heirs and executors, each unto the other, their heirs, executors and assigns, in the penalty of twenty thousand dollars, to be paid by the party defaulting to the party performing; and have hereunto set their hands and fixed their seals, this eleventh day of August, eighteen hundred and one."

The declaration set forth the articles of agreement very fully; averred that every thing was done on the part of the plaintiff that he was bound to perform; and charged the breach in the refusal of the defendants, on the 30th day of August, 1803, to pay to the plaintiff the sum of 1,996l. 19s. 9d. for which they were responsible according to the contract, and for which he produced proper vouchers; stating that, on the first day of January, 1802, 422l. 15s. 6d. (part of the sum above mentioned) was, and part thereof had, long before, been due. Plea, "covenants performed," and issue. The jury found a general verdict for the plaintiff, for 2,341l. 11s. 11d. damages; and judgment was entered accordingly.

To this judgment M'Murdo and Fisher obtained an injunction from the superior court of chancery for the Richmond district, chiefly on the grounds that Fenwick's expenditures on the mills were extravagant and excessive, and not for the real and permanent

pendent to *Clayton v. Anthony*, 15 Gratt. 518: monographic note on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457.

The principal case was cited on the subject in *West v. Logwood*, 6 Munf. 498, 501, 503, 504; *Oswald v. Tyler*, 4 Rand. 37; *Slack v. Wood*, 9 Gratt. 48.

advantage of the estate; that, availing himself of that clause of the contract which authorized him to make such alterations in the construction of the mills as should, in his opinion, be best calculated to give them their full power and effect, he proceeded, not only to repair the old machinery, but to construct new machinery throughout, and on a new plan; which was not the intention of the contract; that, at the trial at law, it having been admitted by M'Murdo and Fisher

that the money charged in the account 248 "had been paid," the denial that it was properly chargeable to the defendants at law seemed to have but little influence on the jury," and they sanctioned every charge made by Fenwick; that the jury had not time for a full and deliberate investigation of an account so lengthy and important, and taking the words of the contract as their guide, and (not considering (perhaps correctly avoiding to consider) the trust reposed in the plaintiff at law) they thought he had a right to make any alterations he might deem expedient.

The answer fully and particularly denied the equity of the bill; averring that all the improvements were bona fide made, being such as were indispensably necessary to embrace the objects and provisions of the contract, and to promote the permanent advantage of the property; and that this was shown to the satisfaction of the jury, and of the plaintiffs themselves, by the testimony of the millwright summoned by them.

A great number of depositions were taken on both sides; among which were those of five of the jurors who rendered the verdict at common law; one of whom swore that the jury did not inquire whether any particular article in the account was too high or too low, or if there was more than was necessary; as they considered Fenwick not limited by the contract as to the repairs or improvements which he might think calculated to give the mills their full power and effect; but that juror heard no testimony tending to show any money was used improperly, or that more was expended than was necessary. Three of them deposed that the trial was full; that the jury gave their verdict upon complete proof of the plaintiff's demand, after every objection "which the counsel for the defendants made" had been considered; being of opinion that the money was properly expended in erecting necessary works, completed upon the most economical terms, and according to the spirit of the contract

between the parties. The fifth was in 249 general of the same "opinion, but said there was some unnecessary expense which appeared to proceed from error in judgment, for which Fenwick was not thought responsible by the jury.

The depositions contained a variety of testimony concerning the comparative expediency of repairing the old works, or of resorting to the new plan adopted by Fenwick; taking into view the quantity of water in the stream, and value of custom to the mill, compared with the expense incurred.

It appeared in evidence, that the machinery in the mills, when he took possession, was of little or no value; but that the expense of repairing the old machinery would have been much less than that of

erecting the new; which, however, was better calculated to make the most of the wheat, and more advantageous to the lessee. A witness was of opinion that the mills could have been repaired upon the old plan for 1,710l. 3s. 11 3-4d.; but as to this, the testimony was doubtful. The money paid by M'Murdo and Fisher, and credited by Fenwick in his account, rendered before the district court, amounted to 1,825l. 4s. 6d.; adding to which, 2,086l. 19s. 9d. (the sum he recovered, exclusive of interest,) the cost of the new works appeared to be, at least, 3,912l. 4s. 3d.

The late chancellor, on the 28th of March, 1806, made the injunction perpetual; from which decree Fenwick appealed.

The case was very elaborately argued upon the merits, as well as the question of jurisdiction; by

Williams and Warden, for the appellant, and

Call and Hay, for the appellees.

Upon the last point, the counsel for the appellees contended that effectual de- 250 fence could not have been made "at law, under the plea that was filed, or any other plea that could have been filed.

1. The plea was "covenants performed," which covers only the ground occupied by the declaration, and amounts, in substance, to the plea of payment. Under this plea no matter of defence could be introduced by the defendants, but such as tended to support their plea. They could not avail themselves of a precedent covenant to be performed by the plaintiff, and could not have held him to prove performance on his part of such precedent covenant. All the plaintiff was bound to prove was the amount of the sums expended, and that proper vouchers were produced.

But, in this case, the proviso was not even a precedent, but a collateral and independent covenant. The general averment of "performance, on the part of the plaintiff, according to the true intent and meaning of the contract," does not, in this case, refer to the proviso, but to the preceding part of the declaration, in which the plaintiff, after reciting the words of the contract, has introduced the novelty of undertaking to set forth the intent and meaning of those words. In this declaration there is no averment relating to the proviso. The question concerning it, therefore, could not have been tried by the jury. The plaintiff is not bound to aver performance on his part, except where, by his own showing, there is a covenant to be performed by him before performance can be exacted of the defendant. (a) Where he makes an unnecessary averment performance, he is not required to prove it, but it is rejected as surplusage. (b) Even then, if the plaintiff had averred that he made the repairs in conformity with the proviso, he would not have been bound to prove it; for it would have been surplusage; since the proviso was not a preliminary covenant.

2. It was not possible at law to put in such a plea as would have given the defendants the benefit of the proviso.

(a) 1 Saund. 235, note (5); 1 Chitty, 232.

(b) Bristow v. Wright, Doug. 605; 5 Com. Dig. 331; 1 Chitty, 316.

251 *The only way in which a special plea could have been drawn was, "that the plaintiff was not entitled to his action, because, in the repairs made by him, he had not consulted the permanent interest of the estate." But this plea might have been demurred to, because the covenant on which it relied was not a precedent, but an independent covenant; and the demurrer would have been rightly sustained.

The only question is, whether the proviso was a precedent or independent covenant? And this depends on no general rule, but the nature of the contract, and real intention of the parties. (a) According to the contract, Fenwick was to begin immediately; M'Murdo & Fisher were to be immediately responsible for the expenditures, and to pay the money on the production of vouchers. The cotemporaneous exposition of the contract by the parties was such; as their conduct proved. Surely, then, the proviso could not have been a precedent condition. They could not have withheld the first payments on the ground of their being not certain that he was consulting the permanent interest of the estate. This could not have been ascertained, until very great progress had been made in the work. Even if the proviso had been an express preliminary covenant, Fenwick's part performance would have prevented the defendants from availing themselves of the defence; because their maintaining such plea would have occasioned a loss to the plaintiff of the money actually paid by him, and properly paid. Suppose he had advanced all the money out of his own pocket, before calling on them; they had refused payment; suit had been brought, and they had thereupon filed a special plea, relying on the proviso; if the plaintiff, instead of demurring, had joined issue, justice could not have been done to either party; because Fenwick, if defeated by such plea in bar, would not have recovered even as much of the money as he had rightfully paid. There was, therefore, no adequate remedy at law.

252 *In support of this point, the counsel cited also, 6 T. R. 573; Lord Mansfield's opinion in the case of *Boone v. Eyre*, reported in 1 H. Bl. 273, note (a); 1 Saund. 319, *Portage v. Cole*; Ib. 320, note (4), and the cases there referred to; 1 Esp. N. P. 281; Gilb. Law of Evidence, 194, &c. and 1 Chitty, 313.

In opposition to an allegation on the other side, that the subject was fully before the jury, they contended that the only light in which the court should regard the case, should be to look at the record and pleadings, and consider no point as investigated but what the pleadings warranted. The inconvenience would be very great of adopting a practice of proving, by witnesses, what was said by counsel before the jury. Even in a case clearly proper for a court of equity, it might be contended that a question, which ought not to have been presented to the jury, was, in fact, argued before them. For example, where a bond has been given for payment of purchase-money, and a title not made, a witness might be called to prove that, in debt on the bond, the defendant's

counsel, in argument, objected to the action on the ground of the defect of title; and, though the objection was overruled, or (very properly) disregarded, it might be said that, because the point was before the jury, the defendant should have no remedy in equity.

On the other side, it was said that Fenwick could not have recovered at law, without showing that the expenditures incurred were in conformity with the contract, of which the proviso was an essential part, but not an independent covenant; for a proviso does not make a covenant. (b) The contract was, that they would pay the money, provided that, in all the repairs and improvements, he would not consider his own temporary accommodation only, but the real and permanent advantage of the property also, and proportion the expenditures accordingly. They were to pay, pro-

253 vided he did this; *but if otherwise, they were not to pay. This inquiry, then, was proper for the jury; and they have decided that he has done so.

The plaintiff, in support of the averment in his declaration that he had performed on his part all that was incumbent upon him to perform, was bound to prove that he made the repairs and improvements agreeably to the proviso. In like manner, in a case where a party purchases an estate, and agrees to pay a certain sum, provided particular counsel shall approve the title, the vendor must prove that his title was approved by that counsel, before he can recover of the purchaser. (c) Under the plea of covenants performed, to this declaration and agreement, the whole subject was, therefore, properly before the jury.

A court of equity can, upon no principle, make contracts for parties. It can relieve from a hard or unconscionable bargain, only by making the plaintiff accept compensation; and that must be his actual advances of money, with lawful interest; which is all the court of law has given in this case.

Thursday, May 2d, 1811. The president pronounced the opinion of the court in the following terms:

"This appears an important case, rather from the amount of the subject in controversy, than from any difficulty respecting the principles that govern the decision; which have been well settled by this court in a variety of cases; and, among others, those of *Terrell v. Dick*; *Turpin, Adm'r of James, v. Thomas's Representatives*; *Morris and Overton v. Ross*; *Syme and others v. Montague*, and *De Lima v. Glassel's Adm'r*. The principle settled, on solemn argument and due consideration of those cases ought not now to be disturbed; which is, that where a cause has been once fully heard and decided in a court of common law, having competent jurisdiction of the case, a court of equity ought not to interfere, unless

254 *fraud or surprise be suggested and proved, or some material adventitious circumstance had arisen, which could not have been foreseen, or guarded against.

"The case before us was most properly cognisable in a court of common law, where it seems to have been thoroughly investigated,

□ (a) *Hotham v. The East India Company*, 1 T. R. 645; *Campbell v. Jones*, 6 T. R. 571.

(b) *Suffeld v. Baskerville*, 2 Mod. 36; *Briscoe v. King*, Cro. Jac. 281.

(c) *Appleton v. Binks*, 5 East. 148.

and underwent an able and lengthy discussion in all its parts; and a verdict and judgment was rendered in favor of the plaintiff; to which there was no exception taken, nor was there a motion for a new trial. This court, without deciding on its merits, is unanimously of opinion that the court of chancery had no jurisdiction of the case. The decree is therefore reversed, and the bill dismissed with costs."

Beattie v. Tabb's Administrators.

Tuesday, April 30th, 1811.

1. **Bills of Exception—Facts Imperfectly Stated—Effect.**—Judgment reversed, because the bill of exceptions stated the facts imperfectly. See, to the same effect, *Barrett & Co. v. Tazewell*, 1 Call, 115.

2. **British Subjects—Statute of Limitations—Operation.**—The circumstance that a plaintiff is a British subject, and was entitled to his claim before the year 1776, is not, in itself, sufficient to protect him against the operation of the act of limitations.

This was an action of debt, instituted December 28th, 1803, in the Petersburg district court, upon a promissory note executed by John Tabb to Robert Armistead, April 12th, 1775, and assigned to William Beattie.

The defendants pleaded "nil debet," and, at the trial, gave in evidence to the jury the statute of limitations. Whereupon, the plaintiff proved that he was a British subject, and held, and was entitled, by assignment, to the note in question, before the year 1776; and moved the court to instruct the jury that he was protected from the operation of the said statute, under the second section of the treaty, (1) which is in these words: "Whereas it is agreed by the fourth article of the definitive treaty of peace, concluded at Paris on the third day of September, one thousand seven hundred and eighty-three, between his

***Bills of Exceptions—Facts Imperfectly Stated—Effect.**—Where a bill of exceptions states the facts so imperfectly that the court cannot discover how the case ought to be decided, the judgment should be reversed and the cause remanded for a new trial. To sustain this proposition, the principal case is cited with approval in *Brooke v. Young*, 8 Rand. 117; *Lynch v. Thomas*, 3 Leigh 690; *McDowell v. Crawford*, 11 Gratt. 398; *Strader v. Goff*, 6 W. Va. 264; *foot-note* to *Barrett v. Tazewell*, 1 Call 215; *foot-note* to *Raines v. Phillips*, 1 Leigh 488; *foot-note* to *Thompson v. Cumming*, 2 Leigh 321. But see *contra*, *foot-note* to *Thompson v. Cumming*, 2 Leigh 321; *foot-note* to *Bowyer v. Chesnut*, 4 Leigh 1; *foot-note* to *Harman v. Lynchburg*, 23 Gratt. 37; monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 26 Gratt. 887, where it is shown that the later decisions sustain the rule that a bill of exceptions must clearly and distinctly point out the error complained of, otherwise the exception is unavailing; in other words, where the bill of exceptions is so uncertain that the appellate court cannot discover whether or not there has been error, the judgment of the lower court ought to be affirmed. Otherwise a premium would be put upon carelessness, and the exceptor would be encouraged to draw his exceptions in as confused a way as possible.

***Statute of Limitations—Pleading.**—In *Draper v. Glasson*, Salk. 278, Lord Holt expressed the opinion that the statute of limitations was proper evidence under a plea of *nil debet*: that the action of debt formed an exception to the rule that the statute of limitations, to be relied on, must be specially pleaded; and cannot be given in evidence under the general issue. As strongly countenancing this opinion of Lord Holt, the principal case is cited in *Butcher v. Hixton*, 4 Leigh 528.

See further, on this subject, monographic note on "Limitations of Actions" appended to *Herrington v. Harkins*, 1 Rob. 591.

(1) Note. Meaning the Convention between Great Britain and the United States, concluded at London, January 8th, 1802.—Note in Original Edition.

Britannic Majesty and the United States, that creditors *on either side should meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts theretofore contracted; it is hereby declared, that the said fourth article, so far as respects its future operation, is hereby recognised, confirmed, and declared to be binding and obligatory on his Britannic Majesty and the said United States; and the same shall be accordingly observed with punctuality and good faith, and so as that the said creditors shall hereafter meet with no lawful impediment to the recovery of the full value, in sterling money, of their bona fide debts." But the court, being of a different opinion, refused to give such instruction. To which opinion of the court the plaintiff filed a bill of exceptions setting forth the above circumstances only.

Verdict and judgment for the defendants, and appeal.

George K. Taylor, for the appellant, quoted 5 Burr. 2630, *Quantock v. England*, as showing that the act of limitations is not an absolute bar, but only a legal impediment to the recovery of a debt. He then relied on the cases of *Georgia v. Brailsford* and others, 3 Dallas, 1, *Ware v. Hylton*, ib. 399, and *Page v. Pendleton*, Wythe's Rep. 127, as establishing the position that the restoration of peace, as well as the very terms of the treaty of 1783, revived the creditors' right of action to recover British debts. In *Hopkirk v. Bell*, 3 Cranch, 454, and 4 Cranch, 164, it was decided that the act of limitations was no bar to those debts. It is now understood, in the federal courts, as settled, that the act runs only from the time of the plaintiff's coming into this country since the date of the convention of 1802, and this court, on questions relating to the construction of treaties, abides by the opinions of the supreme court of the United States; in like manner as that court is governed by the decisions of the state courts, on the subject of state laws.

256 **Hay*, for the appellees, was not disposed to controvert the authority of the case of *Hopkirk v. Bell*; though it was an ex parte decision. The only question is, whether this case is so stated as to come within the scope of that decision; the ground of which was, that *Hopkirk*, the surviving partner of *Spiers, Bowman & Co.* had always been resident in the kingdom of Great Britain; and though it was afterwards certified (4 Cranch, 164,) that *Andrew Johnston*, one of the partners, came into this country in 1784, and died here in 1785, the court said, this additional circumstance was not sufficient to vary the former decision. If the company had had a factor resident here, the decision would have been different.

But in this case, it is only stated that the plaintiff is a "British subject." Where he resided does not appear. It is true that it does not appear that he was always resident in this country; but it was incumbent on him to make out a case to entitle him to recover in opposition to the plea of the act of limitations.

George K. Taylor, in reply. Admit that the plaintiff always resided here, (though such was not the fact,) yet *Hopkirk v. Bell*

is clear authority in his favour; and if it were not, the convention of 1802, in itself, is sufficient. The British authorities are conclusive that, if the act of limitations runs against one of the partners of a firm, it runs against all. The true meaning of the decision is, that though the act once did run, it was set aside by the convention; by which it was intended to revive claims already barred by the act, which is merely a lawful impediment, as decided in 5 Burr. 2630.

Thursday, May 9th. The president delivered the opinion of the court, that the statement of facts in the bill of exceptions was too imperfect to enable this court to form a correct decision.

Judgment reversed, and new trial directed.

257 *Norvell v. Camm and Wife and Others.

Wednesday, May 1st, 1811.

1. Land—Nonpayment of Quitrents—Judgment—Effect.—Under the 30th sect. of the act of 1748, c. 1, a judgment in favour of a petitioner, for land forfeited by non-payment of quitrents, gave him a preferable right to a grant of the land, which right he could not lose by failing to apply for the grant; but only by a judgment against him in favour of another petitioner.
2. Treasury Land-Warrant—Waste and Unappropriated Land.—A treasury land-warrant cannot be laid upon land, as "waste and unappropriated," which is in the possession of a person holding under a patent and settlement.

In ejectment, on behalf of John Camm and Betsey his wife, and John Warwick and Mary his wife, children of Thomas Powell, deceased, late of the county of Amherst, against Reuben Norvell, a special verdict was found as follows:

"We of the jury find that a patent for 3,926 acres of land, comprising that claimed in the plaintiff's declaration, issued to James Christian, John Christian, and William Brown, on the 10th day of September, 1755, in these words, to wit, &c.; that before the year 1765, two of the aforesaid patentees, John and James Christian, departed this life; no division of the land contained in their aforesaid patent having been made; that, after the death of the aforesaid John and James, two of the sons of the said John, to wit, John Christian and Charles Christian, presented a petition to the governor of the colony of Virginia, claiming the said patented land, as forfeited for non-payment of quitrents; and that, on the 29th day of April, 1774, a judgment of the general court was rendered on said petition, in favour of the petitioners, and ordered to be certified to the governor; which judgment and order is in these words, to wit, &c.; that, on the 30th day of October, 1777, the said petitioners John and Charles Christian conveyed to James Gresham, and put him in possession of 933 acres of land, (part of the original patent above mentioned,) by deed of bargain and sale, in these words, to wit, &c.; that, on the 21st day of August, 1787, the

said James Gresham conveyed to Thomas Powell, and put him in possession of 433 acres of land, (part of the 933 last above mentioned,) by deed of bargain and sale, in these words, to wit, &c.; that the land mentioned in the declaration in this cause is the same 433 acres, conveyed from Gresham to Powell, as "above said; that the wives of the lessors of the plaintiff are the daughters, and the only lineal descendants, of the said Thomas Powell, who departed this life intestate, on the day of , 1788; that the said lessors, and those under whom they claim, have been in the undisturbed possession of the lands claimed in the declaration, from the year 1774 until November, in the year 1800, when the present defendant, Norvell, entered upon the possession of the wives of the said lessors, and ousted them therefrom; and that the said lessors, and those under whom they claim, have regularly, until the present day, paid the taxes to the commonwealth upon these lands."

"We also find that the defendant, Norvell, hath obtained a patent, including about 330 acres of the land in controversy, founded upon a land-office treasury warrant, entered with the surveyor of Amherst county, on the 4th day of September, 1794; which entry is in these words, to wit, &c.; and surveyed by the said surveyor, on the 27th day of November, 1795, which survey is in these words, to wit, &c.; and which patent is in these words, to wit, &c. dated the 23d of November, 1797."

"We further find that the original patentees, or their survivor or survivors, remain in the undisturbed possession of the aforesaid patented lands from the day of , 1761, until the aforesaid petitioners obtained possession thereof. We find that the defendant Norvell has remained in possession of the lands mentioned in the declaration from the time of his ouster above mentioned, until the present day. And if, &c. we find," &c.

Upon this special verdict, the district court was of opinion that the law was for the plaintiff. Judgment accordingly, and appeal.

Call, for the appellant. John and Charles Christian, under whom the appellees claim, never obtained a grant after the judgment of the general court in their favour.

259 *The judgment was not sufficient to give them a title; its only effects were a revestiture of the land in the crown, and a preferable right in them to make application for the grant. (a)

If the petitioner in such case did get the grant, he had no right to enter upon the land, but was as much an intruder as anybody else.

In contemplation of law, the commonwealth's possession is never devested by an intrusion. At least, such was the case previous to the act of January 24th, 1798; (b) though since that time, thirty years' possession is good against the commonwealth. The maxim "nullum tempus occurrit regi" (c) applies to all cases arising before that act.

*For sequel to the principal case, see Warwick v. Norvell, 1 Leigh 96, 97, 98, 99, 100.

†Treasury Land-Warrant—Waste and Unappropriated Land.—Where the title to lands has been revested in the commonwealth for nonpayment of quitrents, such lands cannot be taken up as waste and unappropriated under a land-office treasury warrant, but they can only be acquired by petition. Whittington v. Christian, 2 Rand. 388, citing the principal case at pp. 378, 382, 383, as deciding the question.

(a) Acts of 1748, c. 1, s. 30. Edit. of 1760, p. 149.

(b) Rev. Code, vol. 1, c. 228, p. 378.

(c) Runn. on Eject. 14, 15; 5 Com. Dig. 64; 2 Leon. 147; Berry & Goodman's Case, Cro. Eliz. 381; Allynne, p. 11, Johnson v. Barrett and others.

An intruder cannot maintain ejectment, because he cannot make a lease to try the title. And here there was an entry within twenty years upon the intruders.

Wirt, for the appellees. The special verdict finds in us undisturbed possession for twenty-six years. Mr. Call relies merely on an entry with the surveyor, not an actual entry upon the land. Under the act of 1748, the petitioner for lapsed land, when the decision was in his favour, was "entitled" to the land itself "in the same manner, and subject to the same conditions and provisos as lands not before patented are subject." The land, therefore, was no longer "waste and unappropriated," and could not be granted by the king or commonwealth to any other person,^(a) without destroying the petitioner's lien upon it.

Even if the question were between the king and us, we do not answer to the description of intruders; for an intruder is one who enters by strong hand, without colour of title.

Wickham, on the same side. I might admit every position of Mr. Call, and safely rely on our length of possession; for, in ejectment, nothing farther need be
260 proved. *The plaintiff is entitled to recover on twenty years' possession, without showing any title from the commonwealth.

The doctrine laid down in *Runnington*, p. 14, 15, is only that the king's lessee has the benefit of the maxim of *nullum tempus*; presupposing that the title has all along remained in the king: but when he has parted with it by a grant to one person, he cannot afterwards grant it to another. The second grantee is merely a wrongdoer, and cannot take advantage of the maxim. The case in 2 Leon. 147, is badly reported, and scarcely intelligible. That in *Alleyne*, p. 11, as far as I can understand it, is authority in our favour.

Call, in reply. Every plaintiff in ejectment is bound to prove that the land has been granted by the commonwealth; for, unless the commonwealth has granted, her right cannot be devested. If the king's lessee for years has the benefit of the maxim of *nullum tempus*; surely, a fortiori, a patentee of the fee-simple (as *Norvell* is) has the same benefit.

In *Jones v. Williams*, 1 Wash. 230, David Rodgers, in favour of whose right the court decided, had made a prior settlement, which gave him the right of pre-emption to obtain the patent: but in this special verdict nothing is said of seating and planting. In *Miller v. Page*, (MS. May, 1806.) Col. Carey and his heirs had paid the quitrents for many years; yet the court determined that Page's title was good, not from his being representative of Carey, but only on the ground of the entry made by himself. The payment of quitrents was considered as no foundation of title.

Wickham. Whenever there have been two grants from the commonwealth of the same land, as "waste and unappropriated," the second grant is void.^(b) Showing a prior grant to any person is enough for the de-
261 fendant; *that being sufficient to defeat the subsequent grant.

Call. Mr. Wickham's client cannot maintain his title without showing a grant to himself, or those under whom he claims. The judgment of the general court annulled the former patent, and revested the land in the commonwealth. She has never since granted it to any body but to *Norvell*.

Thursday, May 9th. The Judges, BROOKE, ROANE, and FLEMING pronounced their opinions; CABELL, not sitting in the cause.

JUDGE BROOKE. The judgment of the general court, which is set forth in the special verdict in this case, conforms to the 30th section of the act, entitled "An act for settling the titles and bounds of lands, and for preventing unlawful hunting and ranging," passed in the year 1748. Under the operation of that section, the judgment in effect revested the legal title to the land in question in the crown, and, at the same time, entitled the petitioners, John and Charles Christian, under whom the lessors of the plaintiff claim, to a grant, upon the same conditions and provisions as if the land had not before been patented. There is nothing in the act which limits the right of the petitioners in point of time; and, unless the land had again been petitioned for as lapsed land, and adjudged forfeited, the lessors of the plaintiff, who have deduced and unquestionable title from the petitioners John and Charles Christian, are still entitled to a patent from the commonwealth, on which the title of the crown has devolved. Having a title to a grant, and it being found in the special verdict that the lessors of the plaintiff, and those under whom they claim, have been in the undisturbed possession of the land in the declaration mentioned, from the year 1774 until the year 1800,
262 *I am of opinion they have made out a good title in this action against the defendant; and that the judgment of the district court must be affirmed.

JUDGE ROANE. If it were necessary for the appellees in this case to show a complete title to enable them to recover, they would probably not succeed; but they have shown a possession of 26 years; and we are told "that 20 years' possession tolls the entry of the person having the right; and that, consequently, although the very right be in the defendant, yet he cannot justify ejecting the plaintiff."^(c)

To obviate the force of this position, it is said that the appellees, and those under whom they claim, were intruders upon the crown, and consequently gained no right whatsoever by the length of possession. Without questioning the correctness of this doctrine, as applying to the naked case of intrusions upon the demesne lands of the crown, without any colour of title whatsoever; it may be doubted whether it is applicable to the case before us, in which there is a judgment, or certificate, which (although it does not vest an absolute and indefeasible estate in the person who obtains it)^(d) gives him "a right to purchase the particular tract of land in preference to others." The English doctrines on this subject, which have been cited, do not, therefore, seem to apply to this case, in which, on the payment of a moderate

(a) 1 Wash. 232, *Jones v. Williams*.

(b) *Alexander v. Greenup*, 1 Munf. 184.

(c) *Buller's N. P.* 108.

(d) 1 Wash. 40, *Willcox v. Calloway*.

composition within a reasonable time, the party might have taken out his patent. On the ground of the 26 years' possession, therefore, the appellees were entitled to recover; and the judgment of the district court in their favour is correct, and ought to be affirmed.

JUDGE FLEMING. It has been decided by this court, in a variety of cases, that a treasury land-warrant cannot be laid on land, as waste and unappropriated, that has been patented and settled; and, more especially, where ²⁶³*(as in the case before us) the land had been in quiet possession of others, lawfully acquired, for near thirty years. I therefore concur in opinion that the judgment be affirmed.

Judgment unanimously affirmed.

Sydnor v. Sydnors.

Monday, April 20th, 1811.

Wills — Construction — Estates Tail — Conversion.*—A testator, in February, 1779, devised to his four sons certain lands "to them and their heirs for ever;" desiring that, "if any of them should die without heirs of their bodies, then the parts of them so dying should be equally divided among the survivors and their heirs." This was a devise of an estate in tail, which, by the act of October, 1779, was converted into a fee-simple.

Anthony Sydnor, by his last will and testament, dated the 4th of February, 1779, devised to his son Joseph Sydnor, 258 acres, part of a tract of land in the county of Dinwiddie, "to him and his heirs for ever;" to his son William Sydnor, 258 acres, part of the same tract, "to him and his heirs for ever;" and to his sons John and Anthony, all the remainder of the said tract, as divided, (specifying their respective parts, "to them and their heirs for ever;" adding the following clause: "and it is my desire that, if any of my above four sons, John, Joseph, William, and Anthony, should die without heirs of their bodies, that then the parts of them, so dying, shall be equally divided among the survivors and their heirs.")

The four sons above mentioned survived the testator, and, after his death, entered upon the lands to them respectively devised. John Sydnor departed this life in the year 1788, without lawful heir of his body; having devised his share of the land to his nephew John Sydnor, jun. in fee-simple. Joseph Sydnor also departed this life in the year 1787, leaving lawful heirs of his body.

William Sydnor and Anthony Sydnor, the surviving sons of the testator, on the 15th of April, 1804, brought their action of ejectment in the district court of Petersburg, against John Sydnor, jun. to recover the land devised to him as aforesaid; and, ²⁶⁴at the trial, the jury *found a special verdict, setting forth the circumstances above mentioned.

The district court determined the law to be for the plaintiffs, and the defendant appealed.

George K. Taylor, for the appellant. The

***Wills — Construction — Estates Tail — Conversion.**—The principal case was cited with approval on this subject in *Coleman v. Holladay*, 6 Munf. 60; *Tidball v. Lupton*, 1 Rand. 204; *Goodrich v. Harding*, 3 Rand. 284, 285, 286; *Bells v. Gillespie*, 5 Rand. 283, 286; *Broaddes v. Turner*, 5 Rand. 310; *Graham v. Graham*, 4 W. Va. 323; *foot-note* to *Callis v. Kemp*, 11 Gratt. 78.

limitation in the will in this case was too remote, depending upon indefinite failure of issue. Each of the brothers, therefore, took an estate in fee-simple, disencumbered of the limitation, or an estate-tail, (a) which, by virtue of the act of October, 1776, was converted into a fee-simple.

The case of *Porter v. Bradley*, 3 Term Rep. 143, may be cited against me; but that case is mentioned and disapproved, 2 Fearne, 206, and was not countenanced by this court in *Hill v. Burrow*, 3 Call, 349. In *Roe v. Jeffery*, 7 Term Rep. 589, an executory devise, somewhat similar to this, was allowed to be good, because the limitation over was not to the survivors and their heirs, (as in this case), but to the survivors, who must have taken during their lives, or not at all. *Roe v. Scott and Smart*, 2 Fearne, 203, is a case in point, being as near to that now in question as ever a case cited was to the case in controversy.

Hay, contra. This is a case upon the construction of a will; yet nothing has been said about the intention of the testator. But an attempt is made to bewilder the court with authorities.

In Anthony Sydnor's will, a fee-simple is expressly devised to each of the sons; but, if either of them should die without heirs of his body, there is then a limitation over to the survivors and their heirs. This is manifestly a limitation to take effect in the compass of a life in being, because it is made to a survivor. Such is the construction of common sense.

None of Mr. Taylor's cases have any application. The case of *Pells v. Brown*, Cro. Jac. 590, is a great *leading case, the authority of which has never been shaken, and is conclusive in my favour. It appears from that, and all the other British cases, that an express estate in fee-simple will not be contracted into a smaller estate, except for the purpose of effectuating the intention of the testator. In case of a limitation upon indefinite failure of issue; as in a devise to A. and his heirs, and if he die without heirs of his body, then to B. and his heirs; the devise to A. has been decided to be an estate-tail, in order to effectuate the testator's intention; because, otherwise, the devise to B. would be defeated. But where the limitation is to take effect within the compass of a life in being, there is no such necessity for narrowing down the fee-simple devised in the commencement of the clause; for the limitation over may well take effect by way of executory devise. Instead of which, a construction making it a fee-tail, would, in this country, defeat the intention by preventing the limitation over from taking effect at all.

In *Porter v. Bradley*, 3 Term Rep. 146, the case of *Pells v. Brown* is called the magna charta upon the subject of executory devises. If any case were wanting, *Porter v. Bradley* is decisive in our favour. There is indeed a dictum of Lord Kenyon in that case, which has been reprobated, and has since been unsaid by him, as far as he was able; but the principle decided by the court in that

(a) *Walter v. Drew*, Com. Rep. 372, cited by Fearne on Rem. p. 3; *Denn. Lessee of Geering v. Shenton*, Cowp. 410; *Hill v. Burrow*, 3 Call, 349; *Tate v. Tally*, 1b. 354.

case has never been shaken. Mr. Taylor has endeavored to distinguish *Roe v. Jeffery*, 7 Term Rep. 589, from the case at bar; but it is the same in substance. The question is, did the testator mean a definite or indefinite failure of issue? He certainly meant a definite failure; because the devise over was to take in character of survivor. The case in 2 Fearn, 203, was only partly read by Mr. Taylor. The concluding part of the devise was, that "if all the testator's sons should die without issue, then the estate was to go to his daughters, and their heirs and assigns for ever."

266 This last limitation was upon an indefinite failure of issue; for it was not to the daughters as survivors of the sons.

Taylor, in reply. I admit the authorities I have cited have established a doctrine contrary to common sense, and the hardship of which the courts deplore; but still it is law.

Cur. adv. vult.

Tuesday, Nov. 12th. The president pronounced the opinion of the court, (consisting of JUDGES ROANE, CABELL, BROOKE and FLEMING,) that the devise to each of the four brothers conveyed an estate-tail, which, by the act of assembly, became a fee-simple.

Judgment reversed and entered for the defendant.

A motion for a rehearing was afterwards made, and unanimously overruled.

Bronaugh v. Freeman's Executor.

Thursday, May 2d, 1811.

1. **Forthcoming Bonds—Description of Property—Sufficiency.**—A forthcoming bond, mentioning the persons against whom the execution issued, and that "they were desirous of keeping in their possession, until the day of sale, the property taken by the sheriff," sufficiently describes it as their property.
2. **Same—Variance between Bond and Execution—Effect in Appellate Court.**—Where a judgment upon a forthcoming bond is obtained against a

***Forthcoming Bonds—Judgment on—Appeal—Record.**—Although the judgment on a forthcoming bond, should be rendered for a larger sum than that due by the execution, yet if the execution is not made part of the record by bill of exceptions, nor any objection made in the court below, such objection cannot be sustained in the court of appeals. *Burke v. Levy*, 1 Rand. 1, 2, citing the principal case as authority.

In *Couch v. Miller*, 2 Leigh 545, a motion was made to quash a forthcoming bond for defects apparent on the face of the execution upon which it was taken. On appeal, it was objected in the court of appeals that the execution not having been made a part of the record, by any express order of the lower court, or by a bill of exceptions filed for that purpose, it was not competent for the appellate court to look into it, and compare it with the bond. In support of the objection, the principal case and *Burke v. Levy*, 1 Rand. 1, were cited. But JUDGE CABELL, who delivered the opinion of the court, in regard to these cases, said (p. 548): "It is true that in those cases, the court did refuse to look into the executions. But, in all of them, the defendants, though they appeared in the court below, had made no objection to the bonds, on the ground of their being unauthorized by or variant from the executions. This court said, their failure to make such objections in the court below, furnished ground to presume that the bonds had been rightly taken, so far as related to the executions, and therefore it would not look into the executions, to see whether that was in fact the case or not. The principle on which those cases were decided, does not apply to that which is now before us; for here, it is expressly stated, that the bond was objected to by the defendant, and quashed by the court, on account of defects apparent on the face of the execution. This necessarily made the execution a part of the record, and imposes on the appellate court the duty to look into it, as the only means of testing the cor-

rectness of the judgment appealed from. The propriety of this course, in such a case, is much stronger than if the judgment had been by default, for want of the appearance of the defendant. Yet, it is clear, that even if the judgment had been by default, the court would look into the execution, and compare it with the bond, as was done in *Glascok v. Dawson*, 1 Munf. 606." In this case (*Couch v. Miller*), it was held that upon a motion to quash a forthcoming bond for defects apparent on the face of the execution on which it was taken, an appellate court will regard the execution as part of the record, though not made so by an express order to that effect.

See *Downman v. Chinn*, Ex'r of *Downman*, 2 Wash. 189, and *Jones, &c. v. Hull*, 1 H. & M. 311.

3. **Same—Sheriff's Fees.**—The sheriff's fee for taking the forthcoming bond may be included in it.

In the condition of a forthcoming bond given by John Bronaugh and Thomas Bronaugh, with Benjamin Bronaugh surety, to Freeman's executor, the writ of fieri facias was described as "against the goods and chattels of John Bronaugh and Thomas Bronaugh, and levied on two negroes, which they were desirous of keeping in their possession, until the day of sale," &c. The sum mentioned in the bond to have

267 been that for which the execution issued, was 633 dollars and 35 cents; to which the sheriff's commissions and fee for taking the bond were added.

A judgment was entered by the county court of Fauquier, and affirmed by the Haymarket district court, upon this bond; the defendants having had legal notice of the motion, and appearing by their attorney, without moving to quash the bond, or filing any bill of exceptions. A copy of a writ of fieri facias, apparently differing, as to the sum due, from that recited in the forthcoming bond, was inserted by the clerk in the transcript, but does not appear to have been regularly made a part of the record.

A writ of supersedeas to the judgment was awarded by a judge of this court; the petition assigning the following errors, viz.

1st. That it does not appear, by the forthcoming bond to whom the property taken belonged; (a) and

2d. That the condition does not recite the execution truly.

Botts, for the plaintiffs in error, (in the absence of Love, their counsel,) made another objection; that the sheriff's fee of 62 cents was improperly included in the bond. (b)

Williams, contra, relied on the case of *Lewis v. Thompson* and others, 2 Hen. & Munf. 100, as decisively repelling the first objection. He passed over the second without comment; and, as to that mentioned by Mr. Botts, observed, that the point was not

rectness of the judgment appealed from. The propriety of this course, in such a case, is much stronger than if the judgment had been by default, for want of the appearance of the defendant. Yet, it is clear, that even if the judgment had been by default, the court would look into the execution, and compare it with the bond, as was done in *Glascok v. Dawson*, 1 Munf. 606." In this case (*Couch v. Miller*), it was held that upon a motion to quash a forthcoming bond for defects apparent on the face of the execution on which it was taken, an appellate court will regard the execution as part of the record, though not made so by an express order to that effect.

See principal case also cited on this subject in *Central Land Co. v. Calhoun*, 16 W. Va. 372; *foot-note* to *Couch v. Miller*, 2 Leigh 545, quoting from *Central Land Co. v. Calhoun*, 16 W. Va. 372. The principal case is also cited in *Ayres v. Lewellin*, 3 Leigh 614.

See further, monographic note on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107; monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 263.

†**Same—Sheriff's Fees.**—The principal case was cited with approval in *Bernard v. Scott*, 3 Rand. 527.

(a) *Hubbard v. Taylor*, 1 Wash. 259.

(b) *Glascok's Adm'x v. Dawson*, 1 Munf. 606.

settled in *Glascok's Adm'x v. Dawson*. It depends on the construction of the act of assembly; and, as the sheriff is allowed the fee, it seems reasonable that it should be paid by the party giving the bond.

268 *Wednesday, October 9th. The president pronounced the opinion of the court, that there is no error in the judgment, which is therefore affirmed.

Ashley v. Cornwell.

Tuesday, April 30th, 1811.

Duties — Act of Congress — Construction.—Construction of the act of congress "laying duties on stamped vellum, parchment and paper," with respect to charter-parties. Under that act, a writing altering or explaining a charter-party, was not to be considered a charter-party, and as such, subject to the duty.

In the year 1801, John Cornwell instituted an action of assumpsit in the county court of Norfolk, against Warren Ashley, who pleaded the general issue; and (the cause coming on to be tried at the June session, 1804) offered in evidence a writing executed by the plaintiff and himself, altering and explaining a former agreement for the affreightment of a vessel. The plaintiff objected to the reception of that writing; because (as he alleged) it was not stamped according to the act of congress, entitled "An act laying duties on stamped vellum, parchment and paper," passed the 6th of July, 1797. The court sustained the objection, and the defendant filed a bill of exceptions.

Verdict and judgment for the plaintiff, which, upon appeal, was affirmed by the district court of Suffolk; whereupon the defendant obtained a writ of supersedeas from a judge of this court; stating, in his petition, that the act of congress did not require such a writing as that offered in evidence to be stamped; and "the act being no longer in force, the provisions thereof ceased."

The cause was argued on both points, by Wickham, for the plaintiff in error, and George K. Taylor, for the defendant, but decided by the court here, upon the first point only, which is fully discussed in the following opinions, delivered on Friday, the 3d of May.

JUDGE CABELL. The act of congress having laid a tax, by way of stamp, of one dollar on every charter-party,

269 *proceeds afterwards to declare "that every deed, instrument, note, memorandum, letters, or other writing between the captain or master, or owner of any ship or vessel, and any merchant, trader, or other person, in respect to the hire or freight of such ship or vessel, for conveyance of any money, goods, wares, merchandise or effects, laden, or to be laden, on board of such ship or vessel, shall be deemed and adjudged to be a charter-party."

It is essential to the nature of a charter-party that it should embrace the whole hire or freight of a vessel, and, of course, there cannot be two subsisting charter-parties, at the same time, for the same voyage. Any construction of the act of congress, therefore, that should multiply taxes on the same contract for the affreightment of a vessel, must be contrary to the true intent and meaning of that act, which imposes but one

tax on any one entire contract, however various may be its modifications. It was not intended to change the substantial nature of a charter-party, but (for the purpose of preventing all doubts or evasions) to declare that every contract for the affreightment of a vessel shall be deemed and taken to be a charter-party, and, of course, subject to the tax; whether that contract assumed the form of a deed, note, memorandum, letter, or other writing. The application of these principles will afford a ready solution of the first question made in this case, whether the writing excluded by the county court from going to the jury as evidence, was such a writing as, under the act of congress, was required to be stamped. Is it a charter-party? Most certainly it is not, of itself, a new, distinct substantive contract for the affreightment of a vessel. It is silent as to the port of departure, and of destination, and as to the time of commencing or completing the voyage. But it refers to a former agreement, of which it is expressly a mere modification, both together

forming one entire contract; and, of course, no new tax was necessary.

*I think, therefore, that the county court erred in excluding it from the jury; and (without giving any opinion on the other point) I am, on this ground, for reversing both judgments, and remanding the cause to the county court, with instructions to admit the evidence.

JUDGE BROOKE. I concur in the opinion delivered. I think the 5th section of the act to congress alluded to, comprehends only entire contracts in writing, in its definition of a charter-party, and does not include the writing stated in the bill of exceptions in this case: I think it unnecessary to say any thing on the other point. Both the judgments must be reversed, and the cause sent back for further proceedings.

JUDGE ROANE. A charter-party is defined to be an agreement by indenture whereby the owners, &c. of a ship, and the freighters covenant with each other that such a ship shall take in such a lading, and carry the same to such a place, &c. in consideration of which the freighter is to pay so much. (a) The act of congress imposing a tax, in general terms, upon "any charter-party," must be taken to refer to the law-merchant to ascertain what a charter-party is. No difficulty could, therefore, occur in this case, but from the fifth section of the said act, the expressions of which have been stated, and are very broad. As, however, the clause imposing the tax refers to the common law to ascertain what a charter-party is, so this provision is only to be taken to dispense with form in relation to the instrument; it cannot be taken to dispense with the fundamental criterion as to charter-parties, namely, the cargo, the price, and the place to and from which the cargo is to be transported. The object of the law was to prevent evasions of the tax by varying the forms of charter-parties, but not to extend to all alterations whatever, which might be made in charter-parties after they have been

271 executed: and, if the paper *in ques-

(a) 4 Bac. Abr. (Gwill. edit.) 626.

tion be deemed to come within the act, it would be difficult to exclude from its operation any memorandum or agreement, however trivial or unimportant, by which any of the provisions of a charter-party should be subsequently varied.

On this ground, then, I think the district court erred in its opinion. It is unnecessary to decide the other point; but my present impressions are, that under the repealing act of 1801, c. 19, (a) the original act was continued, quoad the present subject. I infer this, both from the provision in the third section of the act, and from the general principles of construction in relation to this subject. These principles were much canvassed in the special court of appeals in June, 1793, in a case between Martin and Payne, which is quoted and relied on by myself in the case of Elliott v. Lyell, 3 Call, 280. While I refer to that case as containing my sentiments on the general topic, I must repeat, however, that I have not deemed it necessary to apply them to the case before us.

I am of opinion that the judgment be reversed, and the cause remanded, with directions that the superior court, on the next trial, admit the paper, mentioned in the bill of exceptions, to be given in evidence to the jury.

JUDGE FLEMING concurred; and the following was entered as the unanimous opinion of the court:

Both judgments reversed, verdict set aside, and cause remanded to the county court for a new trial to be had therein, "on which the court is to admit the paper mentioned in the bill of exceptions, and rejected by the courts below because not written on stamped paper, to be given in evidence."

272

*Isom v. Johns.

Tuesday, May 2d, 1811.

Assumpsit*—Money Levied by Sheriff.—Money levied by the sheriff upon a judgment which is afterwards reversed, cannot be recovered back by general indebitatus assumpsit for money had and received, without proof that the money was actually received by the plaintiff, or applied to his use.

In a general action of indebitatus assumpsit, in the Sweet Springs district court, on behalf of Robert Johns against Jonathan Isom, (the declaration containing only two counts, viz. for "money had and received," and "laid out and expended,") the defendant pleaded non assumpsit, and at the trial demurred to the plaintiff's evidence, which was, in substance, that the defendant (who was plaintiff in a former action, in the county court of Montgomery, between the same parties) had obtained a judgment and sued out a writ of fieri facias, and, subsequently, a venditioni exponas, against the present plaintiff, in part satisfaction whereof certain negroes of his were sold by the sheriff; that afterwards the said judgment was reversed, upon a writ of supersedeas, and new proceedings directed.

The jury found a conditional verdict; and the court, upon argument of the demurrer,

(a) Laws U. S. vol. 6, p. 58.

*Assumpsit.—See monographic note on "Assumpsit" appended to Kennaird v. Jones, 9 Gratt. 188.

was of opinion that the evidence demurred to was sufficient to support the plaintiff's declaration. Judgment was entered accordingly, to which a supersedeas was awarded by a judge of this court.

Wickham, for the plaintiff in error, made three points: 1. That money paid on a judgment of a court of competent jurisdiction, afterwards reversed, cannot be recovered in assumpsit, the proper remedy being by writ of restitution, or by motion to the court. (b) Assumpsit lies, indeed, for money paid under the sentence of a court which has no jurisdiction. (c) But the case is otherwise where the authority is not void ab initio, though it may be afterwards vacated. (d) And even if a special action *of assumpsit could be supported, a general indebitatus could not. (e)

2. The evidence demurred to was defective in this, that a full copy of the record of the original judgment and proceedings was not exhibited.

3. It did not appear from the evidence, that the sheriff had ever paid the sum levied by him to the plaintiff. There was evidence enough to sue the sheriff, but not the plaintiff.

Wirt, on the other side, contended that the decision in Overton and Wife v. Hudson, does not touch the present case. The reason given by the court (f) proves this.

In support of the action, he cited 1 Esp. N. P. 6, and Feltham v. Tyrrel, Loft, 207, there referred to, as well as in Bull. N. P. 131, in Cowp. 419, and in 1 T. R. 387, Moses v. M'Ferlan, 2 Burr. 1005, is the leading case establishing the principle that wherever the defendant has money in his hands, which, ex æquo et bono, he ought to refund, the general action for money had and received properly lies. The principle of that case exactly applies to this. The objection of surprise, the court will find, would equally apply to every case (founded on the same principle) that has occurred since. (g) The action for money had and received is an equitable action, and the defendant may avail himself of every equitable defence.

The writ of restitution lies, in England, after final judgment, on a writ of error; and sometimes, during the pendency of a supersedeas, the court will, on motion, order the sheriff, where the money is still in his hands, to pay it into court. But, in the case at bar, though it is not expressly proved that the sheriff had paid the plaintiff the money before this action was brought, there is reason to presume it. (1) The remedy by motion could not, then, have succeeded.

274 *Our act of assembly says the appellate court shall, on a supersedeas, enter such judgment as the court below should have given. This does not empower

(b) 2 Bac. Abr. (Gwill. edit.) 505, 2 Sell. Prac. 519, 729, and 2 Salk. 588.

(c) 1 Lord Raym. 742, Newdigate v. Davy.

(d) Ib. Mead v. Death and Pollard, 1 Bac. 261.

(e) Overton and Wife v. Hudson, 2 Wash. 172.

(f) 2 Wash. 180.

(g) 3 T. R. 370, Stratton v. Rastal.

(1) Note. The return of the sheriff on the venditioni exponas, bore date the 18th of February, 1802; stating the sales of the negroes, and showing his responsibility to the plaintiff. The date of reversal of the original judgment was the 28th of October following. This action was brought in 1804.—Note in Original Edition.

it to award a writ of restitution; and there is no decision of the courts in this country authorizing such writ. But, at any rate, the defendant has no cause to complain that we relinquished a more summary remedy, and resorted to one which gave him a better opportunity of exhibiting any equitable defence which he might have.

As to the 2d point made by Mr. Wickham, I can see no necessity for producing the full record of the judgment. If the evidence was not proper, the objection goes to its competency, and not to its sufficiency. The defendant should, therefore, have excepted, instead of demurring. The demurrant has admitted the fact of the reversal of the judgment; by doing which, he admits every thing that was necessary to make it appear.

3. The action for money had and received will lie without proof of actual receipt of money. The case of *Israel v. Douglas*, 1 H. Bl. 239, proves that it will lie on an accepted order. *Longchamp v. Kenny*, Doug. 137, and *Leery v. Goodson*, 4 T. R. 687, also show that, under circumstances, the receipt of the money may be presumed.

But I contend that payment to the sheriff is equivalent to payment to the plaintiff, (a) the sheriff being, in effect, his agent, upon the writ of fieri facias.

Wickham, in reply. The dictum in *Esp. 6*, "that if money has been recovered in consequence of any judgment," &c. is not supported by authority. The case of *Moses v. M'Ferlan* was of a judgment of an inferior court having no jurisdiction, and comes within the rule I have laid down. (1) *Espinasse* has clearly mistaken the law, or has used an inaccurate expression.

275 *The doctrine of "ex æquo et bono," in the latitude contended for, would lead to this; that in every case, by a side wind, the merits of a former cause might be tried over again. The defendant in the second action, who was plaintiff in the first, would have a right to say, "it is true that my judgment was reversed for error in form; but, ex æquo et bono, I ought to keep the money levied on the execution, because it is a just debt."

(a) 2 Lev. 203, *Taylor v. Kennon*; 2 Show. 140, *Morton's Case*; Skin. 605, 5 Mod. 296.

(1) Note. JUDGE BROOKE observed that the word "or," in the 3d line, pl. 6, p. 6, of *Esp.* should have been "as," to make the doctrine correct; so as to make the sentence read, "If money has been recovered in consequence of any judgment or adjudication, if such was erroneous, and is reversed: as, if money has been paid in consequence of the judgment of an inferior court, &c. it shall, in this action, be recovered back."

As to the general form of the declaration in this case, JUDGE ROANE observed, that LORD MANSFIELD, in *Moses v. M'Ferlan* had carried his doctrine too far; and referred to JUDGE PENDLETON's observations in 1 Call. 289, *Wood v. Luttrell*, contrasted with those of LORD MANSFIELD by JUDGE TUCKER, in 3 Tuck. Bl. 183, n. (19). See also Cowp. 414; *Lindon v. Hooper*; and 2 W. Bl. 1269, *Fenner v. Mears*, and *Longchamp v. Kenney*, Doug. 138, as to the necessity of notice to the defendant.

JUDGE BROOKE mentioned a district court case, (*Hunter v. Bedinger*.) in which a bill of particulars was rendered by the plaintiff, to prevent the inconvenience of the defendant's being surprised by the general count for money had and received.

Upon this Writ observed: "The practice in England is for the defendant to call at the trial for information of what the plaintiff means to prove; and the suit may be continued until such information be given. This practice admits the regularity of the general count in the declaration, and shows that the proper course in this case was not a demurrer to evidence.—Note in Original Edition.

As to the writ of restitution, I admit there is no decision of the courts of this country upon the subject; but neither has there been any decision that the action of assumpsit lies in such a case as this. We must, therefore, resort to principles and to British authorities. (2)

2. The evidence is defective in not showing the whole record of the reversing judgment as well as of that which was reversed. And this objection may well be taken by demurrer; for insufficiency is necessarily included in incompetency.

276 *3. There are no circumstances in this case to induce a presumption that the money was paid to the plaintiff. The contrary should rather be presumed, because it might have been stayed in the sheriff's hands by the very supersedeas upon which the judgment was reversed.

The sheriff is not the plaintiff's agent, but an officer of the court; and by its order he might have been compelled to return the money. In England, upon a ca. sa. the sheriff has no right to receive the money, unless with the assent of the plaintiff; (though the law is otherwise under our act of assembly;) because the writ commands him to take the body of the defendant; not to make the money. If he receives it with the assent of the plaintiff, he is then his agent for that purpose. But this does not prove the sheriff to be the plaintiff's agent in the case of a fi. fa. Where an attorney regularly receives money for his client, the remedy of a third person, claiming the money, is against the client only, not the attorney; but the sheriff acts in a very different capacity.

Cur. adv. vult.

Monday, Sept. 30th. The president pronounced the following opinion of the court: "The court (without considering the other points in the cause) is of opinion that a general action of indebitatus assumpsit cannot be sustained against the plaintiff in this case, there being no evidence of the money having ever been actually received by him, or applied to his use."

Judgment reversed, and entered in favour of the plaintiff in error.

277

*Garnett v. Childers.

Tuesday, May 7th, 1811.

Appeals.—Who May Appeal.—After the term at which a decree is rendered, an appeal ought not to be granted to a defendant who has been ordered to pay costs, but appears, from his answer, to have no right to the subject in controversy.

A suit at law having been brought, and judgment obtained, in the names of James Webb and Thomas C. Martin, executors of Jesse Carter, deceased, against John Childers, upon a bond which a certain Reuben Garnett, as agent for Carter, in his lifetime, took of Childers for the price of a negro sold him; he filed a bill of injunction in the late high court of chancery, on the ground that the transaction was usurious;

(2) Note. On the subject of the writ of restitution, see Tidd's Practice, 936, 937, and 1187, and his Practical Forms, 336, 337.—Note in Original Edition.

*Appeals.—An appeal cannot be taken from a chancery court on the ground that the appellant has been improperly decreed to pay costs. *Ashby v. Kiger*, 3 Rand. 165, citing principal case. See also, monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 263.

making the executors of Carter and Reuben Garnett both defendants in equity.

The defendant Garnett, in his answer, after denying the charge of usury, said, that "he had no farther purchased the debt than that he lent money to the said Carter, and there were other things unsettled between them, and this money, now demanded of the complainant, would be applied, when received, to the credit of the said Carter, pound for pound, after deducting the commission and expenses of collection."

James Webb, one of Carter's executors, by his answer, claimed the debt as belonging to the estate of his testator.

The complainant replied generally to both the answers; and, after depositions were taken, the cause was set for hearing, as to the defendant Garnett, upon his motion by counsel; but does not appear to have been set for hearing as to the other defendants.

Upon the evidence, the late chancellor made the injunction perpetual, to stay execution of so much of the judgment as exceeded the principal sum of money stated in the bill, and decreed that the defendants pay the complainant his costs in this court; from which decree the defendant Garnett was allowed an appeal, in the next vacation after the term when it was rendered.

278 *Williams, for the appellant, contended that the complainant must have considered Garnett interested in the controversy; otherwise he would not have made him a party. He is bound to Carter's representatives, and responsible if they lose the debt. This court, in *Armistead v. Marks*, 1 Wash. 325, decided that an appeal by one party brings up the whole record, and the reversal may be as to all.

Wickham. We made Garnett a defendant to obtain a discovery of the usury; and though his answer denies it, we had a right to go on to establish it by proof; for we sued for relief as well as discovery. (a)

The case of *Armistead v. Marks* applies only to a joint judgment. Here Webb does not complain of the decree. The decree against him perpetuates the injunction to stay proceedings on his judgment; but that against Garnett is for costs only. He therefore had no right to appeal, having no interest in the debt in controversy. In *Craddock v. Ellzey*, (b) the court would not touch the case as it respected the other parties, Craddock only having appealed: Judge Roane was inclined to reverse the decree in toto, considering it as an entire decree; but Fleming and Tucker were of a different opinion. It was therefore reversed as to Craddock only.

Friday, May 10th. The president pronounced the opinion of the court, that the appeal be dismissed, having been improvidently granted.

279 *Addison and Wife v. Core's Administrator.

Wednesday, May 8th, 1811.

Statute of Descents—Construction.*—The true con-

(a) *Chichester's Executrix v. Vass's Administrator*, 1 Munf. 98.

(b) May, 1810, not reported.

*Statute of Descents—Construction.—See foot-notes

struction of the 7th sect. of the act "reducing into one the several acts directing the course of descents," as to the case of an infant, is, that if there be no mother, &c., and the estate was derived from the father or mother, the inheritance shall not be divided into moieties, but the whole shall go to the kindred of that parent from whom the estate was derived. And the law was the same as to the distribution of unbequeathed personal estate belonging to infants, who died between the 1st of October, 1798, and the 22d of January, 1802.

James Core, of the county of Northampton, departed this life, on the 28th day of May, 1795, an infant, intestate, and without issue, (having neither father nor mother living, nor sister, nor brother, nor their descendants,) possessed of sundry slaves and other personal estate in his own right, the whole of which came to him from his father.

Kendall Addison and Palmer his wife, who was the only sister of the mother of the said infant, brought their suit in chancery, in the county court, against John Core, the administrator, for an account and distribution of the said slaves and other personal property; contending that the same ought to be divided into two moieties, one of which should be allotted to the paternal, and the other to the maternal kindred.

The defendant filed his answer, insisting that the whole of the said property belonged to the kindred on the part of the father, by virtue of the acts of assembly relative to distributions and descents.

Upon argument, the county court dismissed the bill with costs; and their decree was affirmed by the late high court of chancery.

In April, 1806, a motion was made by the complainants to the superior court of chancery for the Williamsburg district, for leave to file a bill of review for error apparent on the face of the decree; which motion being overruled, they appealed to this court.

Wickham, for the appellants, admitted that the case presented the same point as that decided in *Tomlinson v. Dilliard*, 3 Call, 105, and *Dilliard v. Tomlinson*, 1 Munf. 183.

280 *Nicholas, for the appellee.

Thursday, May 9th. The president pronounced the opinion of the court, that this case was settled by the cases above mentioned, and that of *Templeman v. Steptoe*, 1 Munf. 339.

The decree was therefore affirmed.

Royster and Others v. Leake.

Wednesday, May 8th, 1811.

1. Deputy Sheriff—Official Bond—How Long Binding.† —A bond from the deputy to the high sheriff, conditioned for the faithful performance of his duty.

to *Dilliard v. Tomlinson*, 1 Munf. 183; *Templeman v. Steptoe*, 1 Munf. 339.

†Deputy Sheriff—Official Bond—How Long Binding. —In *Munford v. Rice*, 6 Munf. 81, it was held that a bond from the deputy to the high sheriff conditioned for the faithful performance of his duty as deputy "during his continuance in office," without specifying the length of time, is binding on him and his sureties for the transactions from the case at bar, and in a note (p. 81) it is said: "It appears that the marginal Epitome, pt. 1, to the case of *Royster v. Leake*, 2 Munf. 280, is not correctly expressed. It should be as follows:—A bond from the deputy to the high sheriff, dated November 15th, 1803, and conditioned for the faithful performance of his duty as deputy, "during his continuance in office, until November court 1804,"

during his continuance in the office of deputy sheriff, is binding upon him and his sureties, for the second year as well as the first, and until the winding up of the business lawfully committed to him as deputy.

2. *Same—Judgment against Motion on.*—Under the 51st section of the execution law, (Rev. Code, vol. 1, c. 151,) the remedy by motion is given against the sureties of a deputy-sheriff, after a judgment against him for the same cause; such judgment not appearing to be satisfied. The motion also may be made against the sureties, separately from their principal.

In this case, Leake, for the benefit of M'Coull, by motion in a summary way, under the 51st section of the execution law, (1) obtained a judgment in the Richmond district court against Royster and others, sureties for James Vaughan, deputy for Joseph Payne, late sheriff of Goochland county.

In support of his motion, (the notice being proved,) the plaintiff gave in evidence a judgment obtained in his name against Gideon Hatcher and others; a writ of fieri facias thereupon, dated September 14th, 1804, which came to the hands of James Vaughan, deputy sheriff as aforesaid, and was returned by him, "1804, November 17th, executed, on 7 negroes, &c. remaining unsold for want of bidders;" a writ of venditioni exponas, bearing date the 3d of July, 1805, returnable to the first day of the district court to be held in September following; which was returned, "1805, October 1st, satisfied by a discount of the revenue tax for the year 1804. James Vaughan, D. S. for Joseph Payne, late sheriff of Goochland."

281 *The plaintiff also produced the bond executed by the said Vaughan and his sureties to Joseph Payne, his principal. It bore date the 15th day of November, 1802. The condition stated that he was to act as deputy, "until Goochland November Court, 1804," but concluded with "if, therefore, the said James Vaughan shall truly and faithfully, &c. &c. during the time of his continuance in office of deputy-sheriff, then the above obligation to be void, or else to remain in force."

The defendants gave in evidence a judgment obtained by the plaintiff against the said Vaughan, for nonpayment of the same money, received by him and now demanded of his sureties; but there was no proof of satisfaction of that judgment.

The court gave judgment for the plaintiff, for the sum received by Vaughan, with interest at the rate of 15 per centum per annum, from the second day of September, 1805; whereupon the defendants appealed.

Wickham, for the appellants, said that the bond given by the deputy sheriff, in this case, was taken under the common error that the sheriff's office lasted two years. This is precisely the case of *The Commonwealth v. Fairfax*, 4 Hen. & Munf. 208. The sureties

was adjudged binding upon him and his sureties, for the second year as well as the first, and until the winding up of the business lawfully committed to him as deputy."

The principal case was also cited in *Cecil v. Early*, 10 Gratt. 205; *Tyler v. Nelson*, 14 Gratt. 222.

See further, monographic note on "Official Bonds" appended to *Sangster v. Com.*, 17 Gratt. 124; monographic note on "Sheriffs and Constables" appended to *Goode v. Galt*, Gilm. 152.

+*Same—Motion against.*—See principal case cited in *Jacobs v. Hill*, 3 Leigh 400.

(1) Rev. Code, vol. 1, c. 151, p. 305, 306.

were not answerable for the second year.

He contended, moreover, that, under the 51st section of the execution law, the remedy by motion being given against the deputy sheriff, or his sureties, the plaintiff had not a right to obtain one judgment against the deputy, and another against the sureties. Besides, the law allows either a joint or a several motion; but this is neither one nor the other. (a)

No counsel appeared for the appellee; but, after inspecting the record, and considering the case, the court unanimously affirmed the judgment.

282 *Braxton's Administratrix v. Lipscomb.

Wednesday, May 8th, 1811.

Assigned Bond—Debt—Declaration—Necessary Allegations.—In debt upon an assigned bond, the declaration ought to charge a failure to pay the money to the obligee, and to each of the assignees, as well as to the plaintiff; and if it only charge a failure to pay to the plaintiff, it is too defective to maintain the action; and the defect is not cured by verdict.

The declaration in this action, (which was debt upon an assigned bond, on behalf of Thomas Lipscomb, assignee of Robert Blackwell, who was assignee of Thomas Littlepage, against Mary Braxton, administratrix with the will annexed of George Braxton, deceased,) after setting forth the several assignments, and that action had thereby accrued to the plaintiff, concluded as follows: "Yet the said George in his lifetime, or the said defendant since his death, although often required, the said sum of money to the said plaintiff have not paid," &c. without stating that they had also failed to pay the same to the said Thomas Littlepage, the obligee, and to Blackwell, the intermediate assignee.

On the plea of "payment by the testator," a verdict was found and judgment entered for the plaintiff in the county court; from which the defendant appealed to the district court, where the judgment was affirmed, and a second appeal taken to this court.

No counsel appeared for the appellant.

(a) *Leftwich v. Berkeley*, 1 Hen. & Munf. 61.

**Assigned Bond—Debt—Declaration—Necessary Allegations.*—In debt on a bond in behalf of the survivor of two joint assignees, a declaration, charging that the defendant has not paid the debt to the obligee or to the plaintiff, without averring, also, that he did not pay it to the other assignee in his lifetime, is bad on general demurrer. *Nicholson v. Dixon*, 5 Munf. 198, citing the principal case. To the same effect, the principal case was cited in *Mitchell v. Thompson*, 3 Pat. & H. 429. In this case (*Mitchell v. Thompson*) it was held, that in debt on a bond by the administrator of the assignee of the obligee against the administrator of the obligor, the declaration was essentially defective on general demurrer, because it did not aver nonpayment by the defendant to the assignor, before notice of the assignment, nor to the plaintiff's intestate in his lifetime afterwards.

To the point that in a suit on an assigned bond, it must be alleged that the debt has not been paid to the obligee nor his assignee, the principal case is also cited in *Douglass v. Central Land Co.*, 12 W. Va. 511; *Fisher v. City of Charleston*, 17 W. Va. 615; *Reynolds v. Hurst*, 18 W. Va. 651; *foot-note* to *Strange v. Floyd*, 9 Gratt. 474, quoting from *Reynolds v. Hurst*, 18 W. Va. 651. The principal case was distinguished in *Dykes v. Woodhouse*, 3 Rand. 314.

See also, monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409; monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; monographic note on "Debt, The Action of" appended to *Davis v. Mead*, 13 Gratt. 118.

The Attorney-General, for the appellee, argued the cause upon another point presented by a bill of exceptions filed in the county court, but concerning which no opinion was given here.

Saturday, May 11th. The following decision of this court was pronounced:

"The court is of opinion that the judgment of the district court is erroneous: therefore, it is considered that the same be reversed, &c. and this court, proceeding to give such judgment as the said district court ought to have given, is of opinion that the declaration is too defective to maintain the action, in this, that it is not averred, that neither the defendant, nor her testator, in his lifetime, paid the debt to the obligee, or to either of the assignees of the said bond, but only that neither of them paid the same to the said plaintiff; and that the judgment of the said county court is also erroneous; therefore, it is further considered that the said judgment be reversed, &c. and that the appellee take nothing," &c.

Tunnell and Wife v. Watson and Wife.

Friday, May 10th, 1811.

Special Verdict—Intendment.—No material fact, not found expressly, or by very evident implication, in a special verdict, can be supplied by intendment.

See also, *Robinson's Adm'r v. Brock*, 1 Hen. & Munf. 313; *Henderson v. Allens*, 1b. 236; *Pegram v. Isabel*, 1b. 387; *Hite's Heirs v. Wilson and Dunlap*, 2 Hen. & Munf. 268; *Clay v. White*, 1 Munf. 162; and *Clay v. Ransome*, 1b. 454.

The last will of Selby Simpson, of Accomack county, contained the following clauses: "I lend unto my loving wife, after payment of my just debts, all my estate, real and personal, until my daughter Betsy shall arrive to lawful age, or marries; and, after my said daughter Betsy arrives to lawful age or marries, my will and desire is, that an equal division shall be made of the aforesaid estate between my wife, my daughter Betsy, and the child that my wife is now pregnant with. Item; my will and desire is, that if my daughter Betsy Selby, and the child that my wife is now pregnant with, should both die under the age of twenty-one years, and without heirs of their body, that my loving wife shall hold and enjoy all my aforesaid estate for ever."

The child of which the testator's wife was pregnant was born about five or six months after his death, and departed this life, in July, 1796, under the age of twenty-one years, intestate, unmarried and without issue; at which time Betsy Selby, the daughter and devisee of the testator, was also under age, unmarried, and without issue. She afterwards intermarried with John W. Watson, who, in right of his wife, brought, an action of ejectment
284 *against Tunnell and wife, to recover one half of the deceased child's undivided third part of a tract of land in the county of Accomack, of which the testator died seised in fee-simple.

The jury found a special verdict setting forth the facts above mentioned, and some others, which need not here be noticed: but they did not state whether the deceased child had any other heirs besides his mother and sister. (1)

(1) Note. The will did not mention any children

Upon this verdict the county court entered judgment for the defendants, which, upon an appeal, was reversed by the superior court, and judgment entered for the plaintiff. The defendants thereupon appealed to this court.

Attorney-General, for the appellants. The special verdict was too imperfect to found a judgment upon.

Wickham, contra. There is enough in the verdict for the court to infer that the female lessor of the plaintiff was entitled, as co-heir of the deceased posthumous child, to one half of its share of the land. It was not necessary for the jury to use negative as well as affirmative words, and (after finding that Betsy Selby and the posthumous infant were legitimate children of the testator) to say there were no other children. A person's being heir is an inference of law, which the court may draw from the facts found; not a distinct fact, necessary to be found by the jury. In many cases, verdicts equally defective with this have been sustained. (a)

Attorney-General. Mr. Wickham is carrying the doctrine of presumption, as to special verdicts, farther than I suppose it allowable. No material fact, not expressly found, can be intended by the court. In the case of the alias capias, in Viner, the defect
285 in the finding was very slight. In *Birch v. Alexander*, the court only took the evident meaning of the jury; no intendment was necessary at all. Who is heir is an inference of law; but facts sufficient to warrant the inference must be found. The court, in this case, cannot infer that there were no other children.

Wednesday, May 15th. The following was entered as the opinion of the court:

"A majority of the court is of opinion that the special verdict in this cause is too imperfect to render judgment upon, for the whole land in the declaration mentioned, in this, that it is not shown, by the facts found therein, that the female lessor of the appellee was the exclusive heir of the posthumous child of Selby Simpson."

Judgment therefore reversed, and venire facias de novo awarded.

White's Executors v. Johnson and Others.

Saturday, May 11th, 1811.

1. Commissioner's Report—When No Exception Necessary.—A commissioner's report, if erroneous upon its face, may be objected to at the hearing of the cause, tho' no exception be previously filed; and, also, in the appellate court, though no exception appear to have been taken in the court below: but, without such exception, it cannot be

of the testator besides Betsy and the infant with which his wife was pregnant.—Note in Original Edition.

(a) *Birch v. Alexandria*, 1 Wash. 34, 31 Vin. 402, pl. 4, and 404, pl. 11.

***Commissioner's Report—When No Exception Necessary.**—A commissioner's report, if erroneous upon its face, may be objected to at the hearing of the cause, though no exception be previously filed, and also in the appellate court, though no exception appears to have been taken in the court below, but without such exception it cannot be impeached on grounds and in relation to subjects, which may be affected by extraneous testimony. To sustain this proposition, the principal case was cited in *Mosby v. Mosby*, 9 Gratt. 608; *Evans v. Shroyer*, 23 W. Va. 583; *Sandy v. Randall*, 20 W. Va. 251; *Hyman, Moses*

- impeached on grounds, and in relation to subjects, which may be affected by extraneous testimony.
2. **Administration Account—Interest—Extraneous Testimony.**—Whether interest ought to be charged in an administration account, is a question, the decision of which may depend upon extraneous testimony.
3. **Commissioner's Report—Failure to State Notice Given—Effect.**—A failure to set forth in a commissioner's report that notice was given to the parties, is not an error sufficient to reverse a decree, if no exception to the report appear in the record.

Several points, on which no opinion was given by the court, were made in the argument of this case. So much, therefore, only need be reported as comes within the decision.

The suit was brought in the county court of Pittsylvania, by Johnson and others, legatees of Jeremiah White, against William Clarke and William White, his executors, *for a settlement of their administration account, and to recover a balance alleged to be due to the plaintiffs. The county court referred the account to commissioners, who made a report, in which, after charging no interest, either for or against William Clarke, the acting executor, they stated a balance to be due him of seventeen shillings and seven pence.

Whether notice was given to the plaintiffs did not appear; but the cause was regularly set for hearing, and no exception to the report appeared in the record.

The county court dismissed the bill with costs. Upon an appeal to the superior court of chancery for the Richmond district, the present chancellor, by an order in vacation, directed Master Commissioner Greenhow to state the account anew, upon the exhibits contained in the record; which being accordingly done, and interest charged upon each item of debit and credit, from the date of such item, a balance appeared due, from the executor, of 116l. 3s. 8d.

Exceptions were filed to this report, but overruled by the chancellor, who reversed the decree of the county court, and decreed to the plaintiffs the last-mentioned sum with costs. (1) The defendants thereupon appealed.

Wickham for the appellants, contended that the county court decree was correct, since no exception was taken to the report of the commissioners; the rule being, that whenever a report is not necessarily wrong upon its face, an exception must be taken.

* Co. v. Smith, 10 W. Va. 317; Estill v. McClintic, 11 W. Va. 413; foot-note to Cole v. Cole, 28 Gratt. 306; foot-note to Cooks v. Peyton, 1 Gratt. 433; foot-note to Simmons v. Simmons, 33 Gratt. 451.

For further information on this subject, see monographic note on "Commissioners in Chancery" appended to Whitehead v. Whitehead, 28 Gratt. 376.

† **Administration Account—Interest—Extraneous Testimony.**—Thus, if a commissioner's account fails to charge an administrator with interest, it cannot be impeached on that account in the appellate court, if no exception has been filed in the court below, for whether interest ought to be charged might have been affected by extraneous testimony. Estill v. McClintic, 11 W. Va. 413, citing the principal case. To the same effect, the principal case was cited in Peters v. Neville, 26 Gratt. 559.

On the question as to when officers of the court are liable for interest on money in their hands, see cases collected in foot-note to Hunter v. Spotswood, 1 Wash. 146.

(1) Note. It is proper to mention that before the decision of this case by the court of appeals, the chancellor discovered his error, and altered the practice of his court in relation to reports of commissioners not excepted to.—Note in Original Edition.

In support of this position, he relied upon the cases of Brewer v. Hastie, 3 Call, 22, and Perkins v. Saunders and Wade, 2 Hen. & Munf. 420.

The refusal to allow interest might have been proper *upon the circumstances of the case, which, it is to be presumed, appeared in evidence to the commissioners.

Munford, contra. The not allowing interest was an error upon the face of the report; for, generally, interest ought to be charged both for and against the executor; according to Jones v. Williams, 2 Call, 106, and Granberry's Ex'r v. Granberrys, 1 Wash. 246. If any special circumstances existed to vary this rule, they should have been stated, and cannot be presumed: for, in suits in chancery, the whole evidence being always spread upon the record, the court can presume nothing that is not proved: neither can the appellate court presume anything in favor of the decree; in which respect it is not like a general verdict. (a)

Another error appears on the face of the report. Notice of the meeting of the commissioners should have been given to the plaintiffs, (b) and this ought to have been stated by the commissioners in their report. It is always the practice of the superior courts of chancery (to which the county courts are bound to conform) for the commissioners to set forth in their reports the notice, and proof of its service. The commissioners in the county court not having done so, their report was radically defective, and no decree should have been made upon it, though no written exception was filed.

Wickham, in reply. The objections for want of notice should have been made in the county court. Can there be a different rule as to reports of commissioners from that which prevails with respect to deposition? If the exception to a deposition, for want of notice, be not taken before the hearing, it may be read. (1)

288 *It is not necessary, neither is it the practice, (2) for the commissioners to set forth the notice in their reports.

The vouchers before the commissioners are never part of the record. Is not a document proving the propriety of an exemption from interest as much a voucher as any other? I admit the onus probandi lay upon us; but the duty was to be performed before the commissioners. The sole place to produce evidence of circumstances was there.

Wednesday, June 12th. The following opinion of the court was delivered by Judge Roane:

"This court, while it is not disposed to deny that reports, which are erroneous upon the face of them, may be objected to at the hearing, or excepted to in the appellate court, although the same were not specially excepted to by the parties prior to the decree made in the cause, is, on the other hand, of opinion, that without such exception, reports

(a) See Ford v. Gardner, 1 Hen. & Munf. 72.

(b) Campbell and Wife v. Winston and others, 2 Hen. & Munf. 10.

(1) Note. See the 11th and 13th Rules of Practice, 1 Hen. & Munf. vi.—Note in Original Edition.

(2) This position is contradicted by the 16th Rule of Practice, (established November 18th, 1788,) 1 Hen. & Munf. vi.—Note in Original Edition.

shall not be impeached on grounds, or in relation to subjects, which may be affected by extraneous testimony; of which nature is the report in this cause, so far as it relates to the interest claimed against the appellant; and that the report, on which the decree of the county court is founded, not being objected to, is conclusive between the parties."

Decree of the superior court of chancery reversed, and that of the county court affirmed.

289

***Ross v. Gordon.**

Monday, May 15th, 1811.

1. **Injunction—Costs.**—Where an injunction is perpetuated in part, the complainant ought, in general, not to be decreed to pay costs. (1)

2. **Same—Same—Appeal.**—In such case, the error of awarding costs against the complainant is sufficient, upon his appeal, to reverse the decree, though right in every other respect.

In this case the present chancellor for the Richmond district, on the 22d day of September, 1806, decreed that the injunction awarded "the plaintiff, (Ross,) the 12th day of October, 1805, to stay execution of a judgment recovered against him by the defendant, (Gordon,) in the district court of Richmond, be dissolved as to 72l. 17s. 1 1-2d with interest thereupon, at the rate of five per cent. per annum, from the first day of November, 1791, and the costs expended by the defendant at common law, and be perpetual as to the residue; and that the plaintiff pay to the defendant the costs by him in his defence expended."

The plaintiff appealed; and, after argument by the Attorney-General, for the appellant, and Copland, for the appellee, the following was entered as the decree of this court.

"The court is of opinion that there is error in so much of the said decree as awards costs against the appellant, inasmuch as he, by his injunction, obtained relief against the execution issued upon the judgment of the district court, to the amount of the sum for which the same was perpetually enjoined, and was so far the party prevailing in the cause; but that there is no error in the residue of the said decree; therefore, it is decreed and ordered, that so much of the said decree as is men-

tioned above to be erroneous, be reversed and annulled; that the residue thereof be affirmed; and that the appellee pay to 290 the appellant *his costs by him expended, as well in prosecuting his suit in the said superior court of chancery, as in the prosecution of his appeal aforesaid here."

Duvals v. Ross.

Wednesday, May 15th, 1811.

1. **Equity Jurisdiction—Discovery.**—To give a court of equity jurisdiction on the ground of discovery, it is not sufficient to charge that certain facts are known to the defendants and ought to be disclosed by them; but it should be averred that the plaintiffs are unable to prove such facts by other testimony.

See, in *Bass v. Bass*, 4 H. & M. 478, a decision of CHANCELLOR TAYLOR to the same effect.

2. **Sale of Land—Deficiency—Compensation.**—Whenever it appears that the vendor's own title deeds must have disclosed to him the true quantity of land, he is bound to make compensation for a deficiency, tho' his deed to the vendee express a quantity, "more or less."

See the same point in *Nelson v. Matthews*, 3 H. & M. 184.

Upon an appeal from a decree of the superior court of chancery for the Richmond district, pronounced the 5th of May, 1807.

The case is sufficiently stated in the following opinions of the judges of this court, delivered, seriatim, on Friday, June 7th, after argument by Williams, for the appellants, and the Attorney-General, for the appellee.

JUDGE CABELL. On the 6th of January, 1787, articles of agreement were entered into between David Ross and William Duval, by which Ross contracted to sell to Duval several tracts of land, of which one is described as a tract of "one thousand acres, more or less," which he had purchased of Duguid and Patterson, in the county of Buckingham. In these articles of agreement nothing is said of the price of the individual tracts of land; but the sale of the whole, on the part of Ross, is said to be in consideration of certain lands sold by Duval to Ross, and estimated at 4000l. William Duval, afterwards, sold to his brother Philip the said tract described as containing 1,000 acres, more or less, and gave him an order on Ross to make a title therefor. Ross, not having received a conveyance from Duguid and Patterson, delivered to Philip Duval a copy of the articles of agreement between himself and Duguid and Patterson for the purchase of this land, with an order directing them to

***Injunction—Costs.**—If a party plaintiff in injunction succeeds in obtaining a perpetuation as to part, he is entitled to costs. *Donally v. Ginnatt*, 5 Leigh 363, citing the principal case. But if there was no necessity of coming into equity, he ought not to have his costs. *Donally v. Ginnatt*, 5 Leigh 363. The principal case was also cited in *Tracy v. Tracy*, 14 W. Va. 252, on the subject of costs.

See generally, monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518; monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

(1) Note. To this rule there may, perhaps, be some exceptions; as where the bill appears to have been wantonly and unnecessarily filed; the plaintiff at law having directed the credits in question to be given on the execution, within the complainant's knowledge.—Note in Original Edition.

†**Same—Same—Appeal.**—To the point that an appellate court may reverse a decree for error in decreeing costs, though in all other respects the decree be affirmed, the principal case was cited in *Donally v. Ginnatt*, 5 Leigh 363; *Asbby v. Kiger*, 3 Rand. 166; *Peers v. Barnett*, 12 Gratt. 423; *Bee v. Burdett*, 23 W. Va. 748.

See further, monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720; monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268.

***Equity Jurisdiction.**—In a discussion of this question in *West v. Logwood*, 6 Munf. 491, the principal case is cited at pp. 498, 500, 502, 504.

See further, monographic note on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457.

†**Same—Sale of Land—Deficiency—Compensation.**—The principle upon which equity gives relief in cases of deficiency or excess in the estimated quantity upon the sale of lands, is that of mistake, whether the mutual mistake of the parties, or the mistake of one of them, occasioned by the fraud or culpable negligence of the other; for, if there be no mistake, either in the contract itself or the execution of the contract, the parties must stand upon their legal rights, to be adjudicated and enforced in a legal forum, unless the question should arise incidentally in a court of chancery in the exercise of some other branch of its jurisdiction. *Blessing v. Beatty*, 1 Rob. 299, 301, citing principal case in support of the proposition. See also, principal case cited in *Crislip v. Cain*, 19 W. Va. 535, 538, 540. See further, foot-note to *Hull v. Cunningham*, 1 Munf. 530.

make a deed for the land therein mentioned to William Duval, or his order.

291 Philip Duval (as appears by his answer) was struck with the circumstance that the land was described in these articles as "containing, by estimation, 796 acres," but made no objections; thinking, as is commonly the case, that, being an old survey, it might so far exceed the nominal quantity as actually to contain 1,000 acres. He, however, particularly informed Ross that he would have the land actually surveyed before a deed should be made; to which he assented, and promised to repay any reasonable expenses. On making the survey, the tract, so far from containing 1,000 acres, fell short of the 796, by twenty-odd acres. An action was afterwards instituted in the court of Henrico county, against Ross, in the name of William Duval, claiming compensation for the deficiency, at the rate of 20s. per acre, alleging that, although the land had been described in their articles of agreement as a tract containing 1,000 acres, more or less, yet the contract as to the price was a contract by the acre, and that the land had been actually estimated at 1,000 acres, at 20s. per acre. Duval obtained a judgment for 408l. damages, besides costs, which was afterwards enjoined by Ross, who made Philip Duval a party also; and the chancellor having perpetuated the injunction, the Duvals appealed to this court.

I cannot perceive, in this case, any ground on which Ross can found his claim to the interference of a court of equity. The controversy between the parties, a mere contest about the terms of a contract, was properly cognisable before a court of law. It was regularly submitted to a jury, who fully investigated and fairly decided it. Ross himself complains neither of surprise, of the absence of witnesses, nor of any other circumstance to impeach the fairness of the trial. He does not state the subsequent discovery of testimony unknown to him at the trial; and although he calls on the Duvals to answer as to certain facts which he alleges were known

to them, yet he no where intimates

292 that these facts were *known to them only, so as to be incapable of other proof, and thus to authorize a resort to a court of equity for the purpose of extorting a disclosure. In fact, the only ground on which he himself rests the subject, is, that the judgment is oppressive and unjust. What is this, but, under the specious pretext of equity and justice, to give to the court of chancery the enormous power of revising and controlling verdicts and judgments in all cases whatsoever? A power dangerous in itself, incompatible with the genius of our government, and utterly denied by our laws.

But, admitting that Ross was properly before the chancellor, how stands the case on its merits? Take his own statement, and it is evident that he sold, for a thousand pounds, a tract of land which he represented to the buyer, at the time of the contract, as containing, by estimation, 1,000 acres, more or less; whereas, in truth, the tract had been always estimated to contain only 796 acres, more or less, as appears

by his own title-papers. I will not say that this was an intentional fraud, practised by Ross on Duval; but to apply to it the mildest term, it was at least a mistake, of which he ought not now to avail himself, to the injury of Duval. If, therefore, I were to confine myself to the bill only, I should be of opinion that Duval ought to be compensated for the deficiency. But when the answers are considered, they leave no possibility to doubt. They expressly, flatly, and unequivocally contradict all the material allegations in the bill in relation to the contract; declaring it to have been a contract, not of 1,000l. for the tract in gross, but of 1,000l. for 1,000 acres, at 20s. per acre. As for the exhibits in the cause, relating to some transactions between the parties of a date subsequent to that of the contract, and which were introduced to strengthen the construction put upon it by Ross, they are either explained away by the answers, or are

293 not of such a character *as to counterveil the positive denials of the answers. It is somewhat remarkable that this cause was set for hearing without any replication to the answers; which circumstance precluded all depositions, although there were two subscribing witnesses to the contract, who could have given correct as well as disinterested testimony. That testimony, however, was not necessary to the appellants. If it would have availed the appellee, it is his own fault that he has lost its benefit. Deciding the cause upon the evidence in the record, I have no hesitation in pronouncing my opinion that the decree of the chancellor ought to be reversed, and the injunction dissolved.

JUDGE BROOKE. One of the appellants in this case obtained a judgment at law upon a covenant entered into by the appellee to convey and make a good title to 1,000 acres of land, more or less. The appellee, without even suggesting, in his bill, any good or sufficient cause of his having failed to defend himself at law, obtained an injunction. The appellants, by their answers, deny the whole of the supposed equity in his bill, and rely on the judgment at law: no depositions were taken in the case, and the only exhibits in the record are the copies of the covenant on which the action at law was founded, and of some accounts and receipts, &c. filed in another suit, and referred to by the complainant's bill in this. At the rules, the cause was set for hearing, and the chancellor perpetrated the injunction, and, in effect, reversed the judgment of the court of law; whether upon a more correct construction of the covenant or not than it received, in the court of law it is not important to decide. If the court of law permitted the jury to give an improper construction to it, the objection ought to have been made at law: if the verdict of the jury was contrary to

the evidence, a new trial ought to

294 have been *asked for. Upon the evidence, which was before the court of chancery, (and which may be presumed to have been before the jury, because the contrary is nowhere alleged,) I am inclined to think the verdict was correct. In the case of Bedford v. Hickman, in this court,

it appearing that the title-deeds of the vendor must have disclosed to him the true quantity of land, he was compelled to "account for a deficiency to the vendee, though the deed to the latter expressed a quantity more or less, as in the present case. But, however that may be, to permit a court of equity to reverse the decision of a court of law on the sole ground that it was erroneous, would be to confound the jurisdictions of the two courts, and contradict the many decisions of this court, which have denied to a court of equity that power. The case of *The Commonwealth v. Nicholas*, decided this term, and the cases there referred to, are express authorities on this point. I am therefore of opinion, the decree of the chancellor must be reversed.

JUDGE ROANE. On the merits of this case, I am inclined to think that the case of *Bedford v. Hickman*, in this court, (Fall of 1804,) is an authority for the appellant.

That was a bill by Hickman, to be relieved against a judgment in Bedford's favour, for the price of the land purchased. The bill stated that it was purchased for 900 acres, "more or less;" and that, since the purchase, it was discovered that a fraud had been practised on him; for that, by the original deed under which Bedford held the land, only 709 acres are conveyed; that, by a survey, there were only 765; and that the seller, Bedford, knew of the deficiency, as he had the said original deeds in his possession, and was reminded of the quantity by one Taylor. The answer of

the defendant denied fraud; averred 295 he had no knowledge of the "quantity of acres, but by the tax-roll; that he sold for "more or less," and would have preferred a survey, which, however, was declined by Hickman, who elected to take the land for 900 acres, after seeing one of the deeds; that he himself bought the land for 900 acres; and admits he had seen two old deeds, but had no recollection of their contents. It was argued, as Bedford did not disclose all the facts at the time, and only showed the particular deed conveying to him 900 acres, and some receipts for taxes, but said nothing concerning the two elder deeds, which made the quantity of land less as aforesaid, that this was such a concealment of material facts and circumstances as would vacate a bargain of hazard. The county court granted a perpetual injunction for the excess of the price of the land, which decree was, in succession, affirmed by the court of chancery and this court.

This case goes the full length of defeating the appellee on the merits. In the case at bar, there was no equivocal knowledge respecting the number of acres held by him. His agreement and deed from Duguid and Patterson called for only 796 acres, and yet he undertook to represent the tract as containing 1,000 acres, "more or less;" which last words are, in general, only construed to extend to small errors, arising from variations in instruments, &c. Here was a concealment of a most important fact, and a representation on the part of Ross, which binds him to warrant the quantity represented.

It is not denied that the subsequent conduct of the adverse party, after a full discovery of the deficiency, may waive the original right to compensation: but the facts stated in this case, as on the part of William Duval, are not so clear and explicit as to exclude any other construction; and, as to the knowledge of Philip 296 Duval, "it was acquired after his right accrued under the covenant; and he did not then waive his right to compensation by any act of his. He concluded, notwithstanding the call of the agreement of Duguid and Patterson, that Ross relied, as to making out his quantity, on its being an old survey; which, in event, would either enable Ross to fulfil his engagement, or subject him to damages under the covenant.

This is the view I have taken of the subject, in exclusion of the question whether Ross is not concluded as to this subject by the verdict and judgment at law. I am therefore for reversing the decree.

JUDGE FLEMING. I have some doubts on the merits of this case, which I have not maturely considered; as it appears to me that all the facts and circumstances stated in the bill were, or might have been, given in evidence, on the trial at law, in Henrico court, and were proper subjects for the consideration of a jury, which was fully competent to decide upon them. I am therefore of opinion, according to a variety of decisions of this court, that the interference of a court of equity was improper; and upon that ground concur in opinion that the decree be reversed, the injunction dissolved, and the bill dismissed with costs.

Decree unanimously reversed, and bill dismissed.

297 *Payne and Fairfax v. Grim.

Wednesday, May 15th, 1811.

1. **Record—Writ—Amendment.**—The writ is part of the record, for the purpose of amendment only, where issue has been joined upon a plea to the action.

See 2 H. & M. 467.

2. **Writ—Defect—Plea in Abatement.**—After issue joined on a plea to the action, it is too late to move the court to dismiss the suit on the ground of a defect in the writ, or for leave to file a plea in abatement.

See *Bradley v. Welch*, 1 Munf. 284.

This was an action of debt in the Morgan Town district court. Issue being joined on the plea of payment, the defendants, on the trial of the cause, moved the court to dismiss the suit, "because the writ and summons, (1) in this action, were both issued and served on the defendants on the 15th of September, 1806, which was the first day of the term;" but the court overruled the motion. The defendants then asked leave to withdraw the plea of pay-

***Plea in Abatement—Plea in Bar.**—By pleading in bar, all matter in abatement is waived. *James River & Kanawha Co. v. Robinson*, 16 Gratt. 440, citing principal case.

See further, monographic note on "Abatement. Pleas in" appended to *Warren v. Saunders*, 37 Gratt. 259.

The principal case is also cited in notes to *Page v. Taylor*, 2 Munf. 499; *Hill v. Harvey*, 2 Munf. 535.

(1) The defendant, Fairfax, being sheriff at the time, a summons was issued against him instead of a capias. See Rev. Code, vol. 1, c. 65, sect. 23, p. 77. —Note in Original Edition.

ment, and put in pleas in abatement, which leave the court refused, whereupon exceptions were taken. A verdict being found for the plaintiff, the defendants filed errors in arrest of judgment on the same ground, and also on the ground of an alleged variance between the declaration and the writ and summons. The court, nevertheless, entered judgment for the plaintiff, from which the defendants appealed.

The Attorney-General, for the appellants. A writ cannot be issued, after the commencement of a court, returnable to the same term. This was a defect which vitiated the proceedings in toto; and therefore advantage might be taken at any time, even after judgment signed. (a)

Wickham, contra. The writ is part of the record for the purpose of amendment only, where issue has been joined upon a plea to the action; for by pleading to the action, all matter of abatement is waived. The passage in Sellon's 298 *Practice is misconceived; relating only to judgments by default.

Thursday, May 16th. The court affirmed the judgment.

Page's Executor v. Winston's Administrator.

Thursday, May 16th, 1811.

1. **Chancery Practice—Contract of Sale—When Not Binding.**—A contract of sale is not considered, in equity, as binding on the parties by the execution of a bond for the purchase money, if it appear that the seller failed to perform what was to be done on his part in order to consummate the contract.
2. **Same—Same—Same—Case at Bar.**—G. having agreed to sell W. certain escape-warrants upon W.'s giving bond and good security for the purchase money; W. executes a bond, with a blank for the name of the surety, to be filled up at a certain time and place, when and where the escape-warrants are to be assigned and delivered by G.; if W. fail to give the surety, a court of equity will not permit G. to take advantage of the bond, without proof of his assigning and delivering, or tendering the escape-warrants, within a reasonable time, and before commencing suit upon it; as to which, the onus probandi, in equity, lies on him.
3. **Same—Answer—Failure to Respond to Allegation of Bill—Effect.**—If a bill of injunction to stay proceedings on a judgment charge the plaintiff at law with having failed to do an act on which the equity of his claim depends, and, in his answer, he take no notice of that allegation, the court, on the hearing, will consider this an admission that he

(a) Sellon's Pr. 109.

***Chancery Practice—Answer—Failure to Respond to Allegation of Bill—Effect.**—In *Coleman v. Lyne*, 4 Rand. 464, it was held that where the answer of the defendant in chancery omits to notice some of the allegations of the bill, and replies to others, the allegations not noticed are not considered as admitted; but the plaintiff must except to the answer as insufficient. It was insisted by counsel that all the allegations of the bill, not expressly denied by the answer, must be considered as admitted by the defendant to be true, and the principal case was cited to sustain the contention of counsel. But JUDGE CARR, who delivered the opinion of the court, distinguished the principal case on the ground that, in it the allegation in the bill was that something was not done—a negative which could not be proved. To the same effect, the principal case is cited in *Cropper v. Burtons*, 5 Leigh 432; *Richardson v. Donehoo*, 16 W. Va. 704.

Again, in *Dangerfield v. Claiborne*, 2 Hen. & M. 17, it was held that, where the answer is not responsive to a material allegation of the bill, the plaintiff may except to it as insufficient, or may move to have that part of the bill taken for confessed, and an order of court to that effect served on the defendant; but if he does neither he shall not, on the trial avail himself of an implied admission by the defendant. And, in *Clinch River Mineral Co. v. Harrison*, 91 Va. 181, 182, 21 S. E. Rep. 660, it is said

has not done the act in question, and will decree against him without any exception to the answer, or any interlocutory order taking the bill for confessed in part. (i)

Edward Winston, in his lifetime, obtained an injunction from the late Chancellor Wythe to stay proceedings upon a judgment in favor of William Fleming Gaines, surviving executor of Robert Page, deceased, against him.

The bill set forth an offer by the complainant to buy sundry claims, under escape-warrants, against John C. Littlepage, and an agreement by the defendant to sell them, at par, upon a credit of twelve months, with interest thereon from the date; the complainant executing a bond therefor, together with Macon Green (who was then not present) as his surety; that, it being unknown to the complainant whether he could procure that person as a surety, it was stipulated that he should then sign a bond, with a blank therein for the said surety and that, if the same was not given, the contract was to be void; *but if the said security was given on or before the then ensuing Hanover court, (at which time and place the said bond was to be produced for that purpose,) then the defendant was to assign and deliver to the complainant the said escape-warrants, and thereby the said contract to take effect; that Macon Green refused to be the surety, whereby the contract became void; that the complainant endeavoured to get such other security as he supposed might be unexceptionable, but could not; that, hearing no more from the defendant until after the bond had become due, and considering the contract as absolutely void, he proceeded to supply himself with other claims against Littlepage to the amount he wanted; that nevertheless, when he afterwards saw the defendant, (for the first time since the contract,) the latter, to his astonishment, affected to consider it as absolute and obligatory, although more than twelve months had then elapsed since it was made, and no application had been made to the complainant concerning it, other than through an agent (as he believed,) at the Hanover court, when the surety was to have been given as aforesaid, and at which time the said agent was informed of Macon Green's refusal to become bound in the bond. Against this unreasonable conduct the complainant remonstrated, because it was well known to the said Gaines "that he had not vested any, the least, shadow of a right in the complainant to the said escapes, and that no value whatsoever had been

that this rule has been followed in all the reported cases in Virginia where the question has arisen.

To the point that the answer is evidence for the defendant, so far only as it is responsive to some allegation in the bill, the principal case is cited in *Robinson v. Cathcart*, 20 Fed. Cas. 990: *foot-note* to *Maupin v. Whiting*, 1 Call 224, quoting from *Robinson v. Cathcart*, 20 Fed. Cas. 990.

See further, monographic note on "Answers in Equity Pleading" appended to *Tate v. Vance*, 37 Gratt. 571.

(1) Note. This appears to be a proper modification of the rule laid down by the chancellor, in *Dangerfield v. Claiborne*, 2 H. & M. 17, it being reasonable that in a case where the onus probandi lies on the defendant, he should not delay the plaintiff by an omission in his answer.—Note in Original Edition.

received by the complainant for the said bond; and, moreover, that he had been obliged to supply himself elsewhere;" but the defendant persisted in urging his claim to the money, and threatened a suit, "upon which the complainant replied, that, if such was the determination of the said defendant, (which he conceived to be unjust,) he demanded a delivery and assignment of the said escape-warrants;" which the defendant positively refused, and thereupon commenced his action at law, and obtained judgment on the bond; "atill with-
300 holding from the *complainant the said escape-warrants, with an assignment of the same, which alone could enable him to take measures for his indemnification."

The defendant, by his answer, admitted the agreement stated in the bill, but denied its being conditional, or that he ever restricted the complainant to Macon Green, or refused to receive any other good and sufficient man as security; alleging that "he merely observed that, as he was not very well acquainted with the generality of the people in Hanover, he would take the said Macon Green, whom they both knew; but never had an idea of making the validity of the bargain to depend on the willingness of the said Green to sign the bond, or not." He proceeded to pray that Humphrey Brooke's affidavit, corroborating the above statement, might be received as part of this answer, stating that he had acted by his advice, as attorney at law, "and as one interested in the estate of Robert Page, deceased;" "that he put the bond into his hands for the purpose of getting the blanks filled, either by the said Green, or by some other person whom he might approve of as security, but that his said attorney had always informed him that his applications to the complainant had ever been evaded by some excuse or other." The respondent "conceiving that he had fully answered the most material allegations contained in the complainant's bill, and denying all fraud, &c., prayed to be hence dismissed," &c.

No depositions were taken on either side, but that of H. Brooke.

The present chancellor perpetuated the injunction on the hearing, without any order, taking the bill for confessed in part; whereupon the defendant appealed.

Warden, for the appellant, admitted the escape-warrants never came into Winston's hands, but said that Gaines was always ready to assign them, upon his giving good security, or paying the money.

301 *The Attorney-General, contra.

Gaines ought to have gone on, and executed the contract on his part, as he chose to avail himself of the bond, without security. He says not a word in his answer about readiness or willingness to assign the escape-warrants. It was either a bargain or no bargain. If it was no bargain, Gaines had no right to sue on the bond; if it was a bargain, he was bound to assign the warrants.

Saturday, June 1st. The president delivered the following as his opinion, and that of the court:

The only evidence in the cause, except the answer, is the deposition of Humphrey Brooke, who, the appellant acknowledges, is an interested witness.

The appellee, however, had no cause to complain that the appellant would consummate the contract, upon his simple bond, without security; and had the latter tendered, within a reasonable time, and before the commencement of the suit, the escape-warrants against Littlepage, with proper endorsements thereon, the contract, I conceive, would have been binding on the parties: but Winston expressly charges in his bill that "the defendant had not vested any, the least, shadow of right in the complainant, to the said escapes; and no value whatever had been received by him for the said bond;" and, further, "that when the appellant threatened him with a suit on his bond, he demanded a delivery of the said escape-warrants; but which he positively refused; and still withholds from him the said escape-warrants, with an assignment of the same." To this very important charge in the bill, the defendant made no answer, but contented himself with saying "that he has fully answered the most material allegations contained in the complainant's bill." But, in my conception, "that he refused to deliver the escape-warrants, properly endorsed, when demanded," was the most material allegation in the bill; and the main hinge on which the merits of the cause
302 *principally turned. And the defendant's having failed to answer it, was, in my apprehension, a tacit acknowledgment that the charge was true.

Mr. Brooke, in his deposition, says, "with respect to the escape-warrants, the deponent is of opinion that the said Winston might have procured them, and that he still may, upon making proper application." What were the grounds of Brooke's opinion, respecting those warrants, or what he might think would be making "proper application," seems immaterial to be considered at this day. I am, upon the whole, clearly of opinion that the decree is correct, and ought to be affirmed.

The decree is affirmed by the unanimous opinion of the court.

Wilson v. Crowdhill.

Wednesday, May 29th, 1811.

Debt—Acceptor of Bill of Exchange.—An action of debt will not lie against the acceptor of a bill of exchange.

See the same point in *Smith v. Segar*, 3 H. & M. 394.

This was an action of debt against the acceptor of a bill of exchange. Plea nil

*Debt Acceptor of Bill of Exchange.—An action of debt will not lie against the acceptor of a bill of exchange. *Smith v. Segar*, 3 Hen. & M. 394. See foot-note to this case, citing the principal case, and showing that in *Regnault v. Hunter*, 4 W. Va. 269, the principal case and *Smith v. Segar*, 3 Hen. & M. 394, were disapproved.

The principal case is also cited in *Farmers' Bank v. Clarke*, 4 Leigh 600; *Catlett v. Russell*, 6 Leigh 374. In *Hollingsworth v. Milton*, 8 Leigh 50, it was held that, under the statute of Virginia, 1 Rev. Code, ch. 125, § 4 (equivalent to Va. Code 1860, ch. 144, § 10), an action of debt will lie for the payee against the acceptor of an order. In delivering the opinion of the court in this case (*Hollingsworth v.*

debet, and issue. After a verdict for the plaintiff, the defendant filed errors in arrest of judgment, the most material of which was, that the action of debt would not lie in this case. The county court gave judgment for the plaintiff, which the district court affirmed. The defendant obtained a supersedeas from a judge of this court.

Botts, for reversing the judgment, quoted 4 Bac. (Gwill. edit.) 732, and the cases there cited, as conclusive.

Monday, June 3d. The president pronounced the opinion of the court, that an action of debt will not lie against the acceptor of a bill of exchange.

Judgment reversed, and entered for the defendant.

303 *Stovall's Executor v. Woodson and Wife.

Friday, May 31st, 1811.

Executors—Payment of Legacies—Refunding Bond.*

It seems that an executor cannot be compelled to pay a legacy, until bond and security be given by the legatee to refund his due proportion of such debts and demands as may thereafter appear against the estate of the testator.

The appellees, legatees of Bartholomew Stovall, deceased, brought their suit in chancery, against the executor, in the county court of Powhatan, for a settlement of the administration account, and to recover their share of the balance due the estate.

The acting executor by his answer expressed willingness to have a fair settlement by commissioners, "and to deliver to the complainants whatever they might be entitled to of his testator's estate, on their executing to him a bond of indemnity, such as the law authorizes him as executor to demand, to refund a proper proportion of said property to answer any demand which might afterwards appear against the estate of his testator."

After a reference to, and report by, a commissioner, the county court decreed that the plaintiffs recover against the defendant the sum of 911. 6s. 10d. 1-2. with 6 per centum per annum interest thereon from the 17th of Sept. 1804, and costs. Upon an appeal to the superior court of chancery for the Richmond district, the chancellor, in vacation, referred the accounts, contained in the record, to Master Commissioner Greenhow for examination,

Milton) JUDGE TUCKER said (p. 52): "In the cases of *Smith v. Segar*, 3 Hen. & M. 304, and *Wilson v. Crowdhill*, 2 Munf. 302 (which however were acceptances on bills of exchange), the influence of this statute (the one referred to above) does not seem to have been considered." See further, on this subject, *foot-note* to *Hollingsworth v. Milton*, 8 Leigh 50; *monographic note* on "Debt. The Action of" appended to *Davis v. Mead*, 13 Gratt. 118; *monographic note* on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622.

***Executors—Payment of Legacies—Refunding Bond.**—It is error, though the bill be taken for confessed, to decree against an administrator *de bonis non*, that he shall pay a legacy, without requiring the legatee to give bond and security for refunding his "due proportion of any debts or demands which may afterwards appear against the estate of the testator, and the costs attending the recovery thereof." *Rootes v. Webb*, 4 Munf. 77. To the same effect the principal case is cited in *Macbir v. Machir*, 6 Munf. 267.

See generally, *monographic note* on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6; *monographic note* on "Legacies and Devises" appended to *Early v. Early*, Gilm. 124.

and upon his report, correcting certain errors apparent on the face of those accounts, (to which exceptions had been taken in the county court,) reversed the decree, and rendered another for the sum of 2201. with interest on 1801. 6s. 6d. part thereof, from the 30th of August, 1806; and the costs in both courts. From that decree the defendant appealed to this court.

Wickham, for the appellant.

Call, for the appellees.

304 *Friday, Nov. 1st. The president pronounced the following opinion of the court:

"The court being of opinion that there is no error in so much of the decree of the superior court of chancery as reverses that of the county court, and as decrees the sum therein mentioned to the appellees with costs, is yet of opinion that the said decree is erroneous in this, that the appellees are not directed to give bond and security, according to the provisions of the act of assembly, in such case provided, (1) to refund their due proportion of such debts and demands as might thereafter appear against the estate of the testator of the appellant, as a condition precedent to the payment of the sum decreed as aforesaid: therefore it is decreed and ordered that the same be reversed, &c. and that the cause be remanded to the said court of chancery, that the decree may be reformed so as to require bond and security to be given prior to the payment of the sum so decreed."

Johnson v. Johnson's Administrator.

Tuesday, June 4th, 1811.

Appeals—Place on Docket.*—Where an appeal is admitted to be docketed (for good cause shown) after the time within which the record ought to have been sent up, and the appellant has been guilty of no neglect, the court will direct it not to lose its place on the docket.

On motion of Mr. Botts, for satisfactory reasons, the court directed this appeal (in which the record had not been sent up in due time) to be docketed. A question was then suggested, whether it should be entered at the end of the docket, or in the place which it would have occupied if the record had been regularly sent up. The court, being of opinion that the appellant was guilty of no neglect, after inquiry concerning the practice, directed the latter course to be adopted; the same thing having been done in the case of *Kerr v. Dixon*, Nov. 1st, 1799.

305 *Winston v. Johnson's Executors.

Wednesday, June 5th, 1811.

1. **Real Estate—Sale of Land Subject to Judgment Lien—Liability of Purchasers.**—It seems that voluntary purchasers of lands subject to the lien of a judgment are personally responsible, in equity, to the creditor, (the goods and chattels of the debtor being exhausted,) for half the profits (or so much of half as may be sufficient to satisfy the judgment) jointly and not pro rata, notwithstanding they hold tracts of unequal values, and by distinct conveyances.

2. **Bills of Review—Want of Notice of Taking as**

(1) Note. The words of the assembly apply only to an administrator.—Note in Original Edition.

*See *monographic note* on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 265.

†**Bills of Review.**—See *monographic note* on "Bills of Review" appended to *Campbell v. Campbell*, 23 Gratt. 640.

Account.—Want of notice of the time and place of a commissioner's taking an account, or the court's acting upon the report too soon, (1) are not sufficient reasons for a bill of review, such objections not having been taken (as they ought to have been) before the rendition of the decree.

3. **Same—New Matter.**—New matter is no ground for a bill of review, unless it was discovered since the decree was pronounced.

This was originally a suit, in the late high court of chancery, by Noel Johnson, a judgment creditor of Geddes Winston, who was alleged and proved to be insolvent, against him, his two sons, Samuel Jordan Winston and William Winston, and William Radford, one of his sons-in-law, to obtain satisfaction of the judgment out of certain lands and slaves conveyed by him after its date. From the joint answer of Samuel Jordan Winston, and William Winston, it appeared that Geddes Winston had given each of them three hundred acres of land lying in Hanover, but not any negroes; and that Samuel Jordan Winston had bought of his father sundry slaves, for which he owed him a balance of 100l. secured by bond. The answer of William Radford stated a title, in himself, (by purchase for a fair price confirmed by a well authenticated bill of sale,) to fourteen out of sixteen slaves, a mortgage of whom had originally been executed to him by Geddes Winston, which purchase satisfied the said mortgage.

The cause came on to be heard on the 16th May, 1795, (after abating as to the defendant Geddes Winston, by his death,) when the chancellor was of opinion "that one half of the rents and profits of the lands confessed by the defendants, Samuel Jordan Winston and William Winston, to have been given to them by their father, which gifts were fraudulent as to creditors, are subject to payment of the money recovered against him by the plaintiff's judgment, because an execution by elegit might have been served upon those lands in the lifetime of the said Geddes Winston; and also that the money confessed by the defendant, Samuel Jordan Winston,

306 *to remain due from him to his said father, and to have been secured by bond, and two of the sixteen slaves acknowledged by the defendant, William Radford, to have been mortgaged to him, are moreover subject to payment of the plaintiff's said demand." The decree therefore was, "that the said Samuel Jordan Winston do pay so much of the money remaining due by his bond aforesaid to the

plaintiff as will satisfy the judgment aforesaid, if the said bond hath not been transferred to some other creditor of the said Geddes Winston; but, in case of such transfer, that the defendants, Samuel Jordan Winston, and William Winston, do account, before one of the commissioners of this court, for the rents and profits of the lands aforesaid perceived by those defendants during the lifetime of their father, and pay to the plaintiff one half of the said rents and profits, or so much thereof as shall be sufficient to satisfy his said judgment; and, in case of a deficiency, that the defendant William Radford do assign his right and title to the before mentioned two slaves to the plaintiff; and that the defendants, Samuel Jordan Winston, and William Winston, do pay unto the plaintiff the costs expended by him in the prosecution of this suit."

This decree was affirmed by the court of appeals, in April, 1797. The account of rents and profits, thereby directed, was taken May 30th, 1799, by Master Commissioner Dunscomb, who stated in his report, that he "appointed that day for the defendants to render the account," and, they "failing to attend," he proceeded to form an estimate of the annual value of the lands by means of the affidavit of a certain Samuel Perrin, charging Samuel J. Winston with 75l. as one half of the amount thereof, from July, 1789, (the date of the deed of gift to him,) to July, 1795, when Geddes Winston died; and William Winston with 86l. 5s. calculating in like manner from March, 1790. When this report (to which there was no exception) was returned, does not appear in the record.

On the 5th of October, 1799, the 307 chancellor decreed, "that the defendants, Samuel Jordan Winston, and William Winston, do pay unto the plaintiff 67l. 15s. 11d. (the amount of his judgment,) with interest on 28l. 7s. 3d. 1-2 from the 8th day of October, 1788, until paid, and the costs; and that the bill be dismissed as to the other defendant William Radford."

To this decree Samuel Jordan Winston filed a bill of review, on the following grounds: 1st. That Commissioner Dunscomb's report was made ex parte, and, "to the best of his knowledge and belief, without any notice to him;" 2dly. "That the said report was confirmed the session after it came in, contrary to the practice of the court, and without the knowledge of his counsel;" and, 3dly. "That the decree ought not to have been against the defendants jointly; since it appeared by the report that the profits received by William Winston were greater than those charged to Samuel J. Winston; and the effect of this joint decree is that the latter, instead of being charged with half the debt, is made liable for the whole."

The bill of review also set forth sundry new matters; viz. "that, during the lifetime of the said Geddes, the complainant did not receive any rents or profits from the said lands, they being held by the said Geddes; that the profits stated by the commissioner greatly exceed the actual value of the land; that part of the said land is held by the widow of the said Geddes as tenant in dower; that

Same—Want of Notice of Taking an Account.—Want of notice of the time and place of a commissioner taking an account is not sufficient reason for a bill of review or petition for rehearing: such objection not having been taken, as it ought to have been, before the decree was rendered. *Bank v. Shirley*, 26 W. Va. 569.

(1) Note. See the 17th Rule of Practice, 1 H. & M. vi.—Note in Original Edition.

Same—New Matter.—After the affirmance of a decree by the court of appeals, a bill of review should not be received, but for new matter which could not be produced or used by the party claiming the benefit of it at the time when the decree was pronounced, and proved to have been discovered since. *Campbell v. Price*, 3 Munf. 223, citing principal case.

To the point that new matter is no ground for a bill of review, unless it was discovered since the decree was pronounced, the principal case is also cited in *Dingess v. Marcum*, 41 W. Va. 763, 24 S. E. Rep. 636.

the complainant has paid large sums of money on account of the said Geddes's debts, and is moreover charged by a decree, in a suit, Dandridge and others against him, for a considerable sum; that what he has paid, and is chargeable for, (exclusive of Johnson's claim,) is, he verily believes, fully equal to his interest in the said land; and that the bond given by him to his father having been transferred, a suit has been brought thereon, and he has discharged it." No reason was assigned for not bringing forward all these circumstances (except the last) in the answer to the original bill.

308 *Noel Johnson having removed to Kentucky before the bill of review was exhibited, an answer by William Duval, his attorney and agent, was received on his behalf, denying generally the allegations in it. Sundry depositions and exhibits were taken and filed in support of the new matter set forth in the bill. The cause came on to be heard, the 5th of October, 1805, when the chancellor affirmed the decree reviewed, "wherein error was not perceived," and dismissed the bill of review with costs; whereupon Winston appealed to this court.

Munford and Wickham, for the appellant. The proceedings subsequent to the decree, which this court affirmed, have not conformed to that decree, which was, that the defendants should account for the profits of the lands held by them respectively, that is, they should separately account, as they held separately. There is a great difference between a joint contract and such a case as this. Each was answerable only for the estate in his hands. Yet the decree was joint, and not pro rata. This was a direct departure from the decree of this court.

2. There are great objections to the commissioner's report on its face. In the first place, the order was not that he should make up an account; but that the defendant should render one. He had, therefore, no right to proceed ex parte, but should have reported to the court their default, and the court might have directed an attachment against them. Again, the commissioner was to report the rents and profits received by them; instead of which, he has stated the annual value by conjectural estimate.

3. The want of notice is an extrinsic objection, but sufficiently established by Winston's affidavit to the truth of the bill of review. In this case there being no proof, nor explicit statement by the commissioner that notice was given, the mere presumption was rebutted by Winston's

309 *affidavit, and actual notice should have been proved by the other party. (1) This objection was not taken in the original suit, because the report was not suffered to lie long enough in court. It was dated the 30th of May, and acted upon by the chancellor the 5th of October following; and it does not appear that the parties were heard; for the decree has this remarkable peculiarity, that it is not said to have been rendered "after hearing arguments of counsel," (as

is customary,) but only "on consideration of the commissioner's report."

Warden, contra. The decree against Samuel J. Winston and William Winston jointly was correct; for they answered jointly, and there was no reason for making a distinction between them, since they were both voluntary purchasers of lands, every part of which was equally liable to the plaintiff's demand. If the whole debt be taken out of the lands conveyed to the one, he may have his remedy out of those conveyed to the other. (2)

As to the want of notice; the phrases used by Dunscomb in his report, "that he appointed a day," and that the defendants "failed" to attend, sufficiently imply that they must have had notice. And, if they had not, they should have made the objection before the decree was rendered; for, from the date of the commissioner's report, 310 *it must be supposed to have been returned within the term of the then high court of chancery, which commenced on the 12th of May, and not to the September term, as is pretended in the bill of review.

Cur. adv. vult.

Wednesday, September 25th. Judge Roane reported the following opinion of the court:

"The court is of opinion, that there is neither any error apparent upon the face of the decree sought to be reviewed, nor any new matter shown in the case before us, which is competent to authorize the bill of review allowed in this case; and is further of opinion that neither the allegation of the appellant that the report of the commissioner was made without due notice to him of the time and place of taking the same, nor that the said report did not lie long enough in court, prior to the rendition of the decree, (objections on neither ground having been taken in the court below,) are of a character to justify a bill of review. On these grounds, this court affirms the decree of the chancellor dismissing the bill of review, with costs."

Gibson v. Randolph.*

Friday, June 7th, 1811.

1. *Court of Appeals—Jurisdiction—Interlocutory Decree.*—The court of appeals has no jurisdiction to grant appeals from interlocutory decrees.
2. *Deeds—Recording.*—If, before the time limited by law for recording a deed has expired, a bill

(2) Note. The case of *Mason's Devisees v. Peters' Administrators*, 1 Munford, 487, in which it was decided that where devisees are made responsible to simple contract creditors, upon the principle of marshalling assets, they shall be subjected, not jointly, but pro rata, does not appear to contradict this doctrine, as it respects the claim of a judgment creditor; because the marshalling assets being the mere creature of a court of equity, the court will manage it so as to do complete justice, and make an end of litigation; but the judgment creditor has a right in equity to as extensive a remedy as he had at law, by elegit.—Note in Original Edition.

*For monographic note on Receivers, see end of case.

†*Court of Appeals—Jurisdiction.*—See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., Turnpike Co., 1 Rob. 268.

‡*Interlocutory Decrees.*—See monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

§*Deeds.*—See monographic note on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564.

¶*Fraud—Onus Probandi.*—A plaintiff who alleges fraud must clearly and distinctly prove the fraud

(1) Note. In his answer to the bill of review, Duval insisted that Samuel J. Winston had notice to attend the commissioner, "as would expressly appear by the papers filed in the original suit." But no paper proving such notice appears in the record.—Note in Original Edition.

be filed to impugn it as fraudulent, the court cannot afterwards declare it void, as against the complainant, on the ground of its not having been duly recorded.

The chancellor for the Richmond district having pronounced in this case an interlocutory decree, on the 28th of February, 1811, a petition for the allowance of an appeal was presented here, but overruled on the ground of want of jurisdiction in this court to grant appeals from any but final decrees. Application was afterwards made to the chancellor, and the appeal allowed by him.

311 *The object of the suit (which was originally instituted by William Randolph, a creditor of Thomas Gibson, against Thomas and Robert Gibsons, in the county court of Cumberland, and removed by certiorari to the superior court of chancery) was to set aside as fraudulent, two deeds from Thomas to Robert Gibson, both dated October 26th, 1803; by one of which a tract of land, and by the other certain personal property, was conveyed. The bill was filed in February, 1804.

The answer of Robert Gibson (sworn to in open court, June, 1804) denied all fraud; averring the deeds to be founded on full and valuable considerations, bona fide paid; and mentioning that the deed for the land was then lodged in the clerk's office of Prince Edward district court. That of Thomas Gibson (sworn to, before a justice of peace, in October, 1809) plainly and positively admitted the fraud, as well as the debt charged in the bill.

Copies of the deeds are inserted in the transcript of the record, without any certificate of their being recorded.

Several depositions were also filed and copied, but do not appear to have been considered by the chancellor; the transcript stating that "the cause was heard on the bill, answers and exhibits, and was argued by counsel; on consideration whereof," the court, without deciding, at this time, upon the validity of the deed for the personal estate, and being of opinion that the other deed is void as to creditors, "as it was not recorded in the time prescribed by the act of assembly," adjudged and decreed the deed, last mentioned, to be null and void; that the defendant Thomas pay to the plaintiff the amount of his claim, and that the other defendant, Robert Gibson, render an account, before a commissioner, of the sums of money paid to or for the defendant Thomas, on account of the property contained in the said deeds, or on any other account.

312 *The record in this appeal being brought up, the cause was heard by this court on Thursday, the 27th of June, in pursuance of the act, "to amend the several laws concerning the court of appeals," passed February 13th, 1811. (a)

alleged in his bill. The *onus probandi* is on him, and if the fraud is not strictly and clearly proved as it is alleged, relief cannot be granted, although the party against whom relief is sought may not have been perfectly clear in his dealings. Fraud will not be carried by way of relief beyond the manner in which it is proved to the satisfaction of the court. *Harden v. Wagner*, 22 W. Va. 306, citing principal case.

(a) Acts of 1810, c. 5, s. 2.

Botts, for the appellant. The decree invalidating the deed on the supposition that it had not been recorded, went out of the facts put in issue; the only point in controversy being whether the deeds were fraudulent. It did not appear whether, in fact, the deed for the land was recorded in due time, or not. And as the bill was filed within eight months after it was executed, the law of recording deeds could not be brought any way to act upon the case.

Samuel Taylor, for the appellee, relied on the decision in *Moore's Executor v. The Auditor*, 3 H. & M. 232, as being in point to show that the court may take notice of a deed's not being recorded, although the fact be not put in issue. If Robert Gibson has a recorded deed, his interest will not be affected by the decree now in question.

Botts, in reply. A case determining a deed void upon an objection not put in issue, could hardly have passed the ordeal of this court, but through inadvertence; and, if it did, it is not law. The chancellor having declared the deed not to have been recorded; if this court affirm his decree, it will be binding, however plain the fact may be to the contrary.

It being represented that a speedy decision of this case was very important; both parties claiming to be in possession of the land, which was taken in execution by an elegit; (there being no appeal from so much of the decree as was against Thomas Gibson;) the judges (Roane, Cabell and Coalter)

313 immediately retired to consult; *and, after some time, returning into court, Judge Roane reported the following opinion:

"The court is of opinion that the said decree is erroneous in declaring that the deed of the 26th day of October, 1803, is void in consequence of its not being duly recorded according to the provision of the act in such case made and provided; both because the appellee appears, by his bill, to have had that notice of the existence of the deed aforesaid which it was the object of the act to afford, and because the construction upon this subject must have reference to the time of the exhibition of the bill, at which time, in the present case, the limitation provided by the said act had not expired. On this ground, the court is of opinion to reverse the said decree, and remand the cause for further proceedings, both as to the validity of the deed of the personal estate, and as to that of the said deed of the 26th day of October, 1803, on grounds other than that on which the said decree was founded, neither of which last-mentioned grounds were within the contemplation of the decree in the present case, nor, as to them, was the testimony taken in the cause read or considered; and although, if that testimony were now fully matured, this court might probably enter such decree thereupon as the said court of chancery ought to have rendered, yet it would be improper so to do, as the said decree was made in anticipation of the final trial upon the merits, and confined to the single point before mentioned."

Decree reversed, and cause remanded, to be finally proceeded in, pursuant to the principles above stated.

RECEIVERS.

- I. Definition.
- II. Nature and Object of Receiverships.
 - I. Jurisdiction to Appoint.
 1. In Vacation.
 2. On Appeal.
- IV. Application and Notice.
- V. Who May Be Receiver.
- VI. Appointment of Receiver.
 1. Requisite Showing to Obtain.
 2. A Matter of Discretion.
 3. Grounds for Appointment.
 - a. Title to Property in Dispute.
 - b. Fraud.
 - c. To Preserve Rents and Profits of Real Estate.
 - d. To Preserve Trust Property.
 - e. To Preserve Partnership Property.
 - f. To Preserve Property of Railroads and Other Corporations.
 - g. To Preserve Decedent's Estates.
- VII. Effect of Appointment.
- VIII. Powers, Duties, and Liabilities of Receivers.
- IX. Bond and Security.
- X. Compensation and Expenses.
- XI. Bond in Lieu of Receiver.
- XII. Receiver's Certificates.
- XIII. Removal of Receiver.
- XIV. Actions by and against Receivers.
- XV. Appeal and Review.

I. DEFINITION.

A receiver is an officer of the court through whom the court, by virtue of its jurisdiction, equitable or statutory, takes possession of property which is the subject of a suit, preserves it from waste or destruction, secures and collects the proceeds, and ultimately disposes of them according to the rights of those entitled thereto, whether they are regular parties in the cause or only come before the court in a seasonable time and in the due course of proceeding to assert and establish their pretensions. 23 Am. & Eng. Enc. Law (2d Ed.) 1001; *Beverley v. Brooke*, 4 Gratt. 187.

II. NATURE AND OBJECT OF RECEIVERSHIPS.

By means of the appointment of a receiver, a court of equity takes possession of the property which is the subject of the suit, preserves it from waste or destruction, secures and collects the proceeds or profits, and ultimately disposes of them according to the rights and priorities of those entitled, whether regular parties in the cause, or only parties in interest coming before the court in a seasonable time, and due course of proceeding, to assert and establish their pretensions. The receiver appointed is the officer and representative of the court, subject to its orders, accountable in such manner and to such persons as the court may direct, and having in his character of receiver no personal interest, but that arising out of his responsibility for the correct and faithful discharge of his duties. It is no consequence to him how, or when, or to whom, the court may dispose of the funds in his hands, provided the order, or decree, of the court furnishes to him sufficient protection. The order of appointment is in the nature, not of an attachment, but a sequestration; it gives, in itself, no advantage to the party applying for it over other claimants; and operates prospectively upon rents and profits which may come to the hands of the receiver, as a lien in favor of those interested, according to their rights and priorities in or to the principal subject, out of which

those rents and profits issue. In the exercise of this summary jurisdiction, a court of equity reserves, in a great measure, its ordinary course of administering justice; beginning at the end, and levying upon the property a kind of equitable execution, by which it makes a general, instead of a specific, appropriation of the issues and profits, and afterwards determining who is entitled to the benefit of its *quasi* process. But acting, as it often must of necessity, before the merits of the cause have been fully developed, and not infrequently when the proper parties in interest are not all before the court, it proceeds with much caution and circumspection, in order to avoid disturbing unnecessarily or injuriously, legal rights and equitable priorities. *Beverley v. Brooke*, 4 Gratt. 187.

The authority of the court over the property sequestrated may at all times be enforced and its surrender compelled by process of attachment or writ of possession, though as a general rule the court will not so readily interfere as against the possession of a stranger to the action claiming by paramount title, but will leave the question of title to be tried in a proper action instituted for that purpose. *Thornton v. Washington Sav. Bk.*, 76 Va. 432.

III. JURISDICTION TO APPOINT.

1. IN VACATION.

May Generally Be Appointed in Vacation.—The power to appoint a receiver, when one is necessary for the collection, preservation or sale of property pending an injunction suit, is incident to the power to grant an injunction, and the latter power being expressly conferred by law on a judge in vacation, the former is conferred on him by implication. *Penn v. Whiteheads*, 12 Gratt. 74; *Smith v. Butcher*, 28 Gratt. 144.

In a suit in equity, brought for the purpose of having a receiver appointed, the court, or the judge in vacation, may, upon a proper representation of the facts, appoint a receiver. But while the case is still at rules, and not matured for hearing, the court cannot proceed to enter a decree settling the principles of the cause and distributing the money. *Krohn v. Weinberger*, 47 W. Va. 127, 34 S. E. Rep. 746.

West Virginia Statute in Respect to Rents, Issues and Profits of Real Estate.—Section 28, ch. 133, West Virginia Code, provides that, "No receiver shall be appointed of any real estate, or of the rents, issues or profits thereof until reasonable notice of the application therefor has been given to the owner or tenant thereof. A judge of such court in vacation, may appoint such receiver of any such property, except real estate and the rents, issues and profits thereof." Under this section it has been held error for the court to appoint a receiver of real estate, or of the rents, issues and profits thereof, in vacation. But it was further held in the same case that the error could be corrected by making an order when the court is in session requiring such improperly appointed receiver to pay or pass over to the general receiver or to a special receiver appointed during the session of the court, all money or property in his hands. *Kerr v. Hill*, 27 W. Va. 576.

2. ON APPEAL.—Where an injunction is awarded by the lower court, and is subsequently dissolved upon the merits, neither the appellate court nor any judge thereof can award an injunction or appoint a receiver in the case, though the action of the lower court, in dissolving the injunction, is, of course, reviewable. *Fredenheim v. Rohr*, 87 Va. 764, 18 S. E. Rep. 193.

In *Virginia, etc., Steel & Iron Co. v. Wilder*, 88 Va. 943, 14 S. E. Rep. 806, it was held, that even conceding that an appellate judge has the right, as auxil-

tary to the power to grant an injunction given him by § 2438 of the Code, to appoint a receiver, yet where the claims are unascertained, and are small in comparison with the property sought to be sequestrated, and no notice of the application has been given to the defendants, and an offer has been made to secure these claims should they be established by giving any bond that may be required, it was error to appoint a receiver.

IV. APPLICATION AND NOTICE.

General Rule Requiring Notice.—It is of the very essence of a motion for the appointment of a receiver, even by the court below, that notice shall be given to the defendants of the time and place of the application; and it is only in an extreme case, such that the exigency of the danger would be fatal, that a receiver can be justly appointed, even in and by the court in which the cause is pending, without reasonable notice to the defendants. *Fredenheim v. Rohr*, 87 Va. 764, 18 S. E. Rep. 193-206; *Ruffner v. Maira*, 33 W. Va. 655, 11 S. E. Rep. 6.

When Notice is Not Necessary.—Where a motion for the appointment of a receiver, is made in term time in a pending suit, no notice to the debtor is necessary. *Ogden v. Chalfant*, 33 W. Va. 559, 9 S. E. Rep. 879.

Although notice should be given to the adverse party of an application for an injunction and the appointment of receiver, except in cases of obvious necessity, to prevent a failure of justice, yet, if upon a motion to dissolve the injunction and discharge the receiver, the court sustains its original order, this is equivalent to holding that, upon full notice and argument, the injunction ought to have been granted, and, on appeal, the decree awarding such injunction and appointing a receiver will not be reversed for the want of such notice in the first instance. *Bristow v. Home Building Co.*, 91 Va. 18, 20 S. E. Rep. 946.

In interpleader, ordinarily, a special receiver should not be appointed to take possession of the property without notice, still there are exceptions to the rule, as where immediate action is necessary to prevent great loss or inquiry, and especially where it is not sought to dispossess a party of his own property. *Oil Run Petroleum Co. v. Gale*, 6 W. Va. 525.

In Case of Rents and Profits of Real Estate.—No receiver of real estate or of the rents and profits thereof can be appointed until reasonable notice of the application therefor has been given to the owner or tenants of the land. *Hutton v. Lockridge*, 27 W. Va. 428.

When the equities of the bill are fully and fairly denied by answer, unless the plaintiff overcome such denial by other testimony, the question should no longer be regarded as one addressed to the discretion of the court; but it is error to appoint a receiver when the charges of the bill are so denied. *Wilson v. Maddox*, 46 W. Va. 641, 33 S. E. Rep. 775.

On Interlocutory Applications.—Interlocutory applications for a receiver before answer are usually supported by affidavits of the grounds relied on. It would ordinarily seem to be sufficient that the facts upon which the application is based are verified by the affidavit of the plaintiff alone. *Krohn v. Weinberger*, 47 W. Va. 127, 34 S. E. Rep. 746.

Receiver May Be Appointed on Rule to Show Cause.—Where a rule is made against an insurance company in a chancery suit to which it is a party to show cause why a receiver shall not be appointed to collect its policy, which is the subject of the suit, and the company appears by counsel and declines to answer the rule, and makes no objection to the appointment of a receiver, it will not be thereafter

heard to object to the appointment of such receiver. *New York Life Ins. Co. v. Davis*, 94 Va. 427, 26 S. E. Rep. 941.

V. WHO MAY BE RECEIVER.

The general rule is that the receiver ought to be an indifferent person between the parties. But the selection of a proper person is very much a matter within the discretion of the court and hence will very rarely be interfered with on appeal. It has been held that this discretion is not abused in simply appointing as receiver the attorneys of respective parties to the suit. *Shannon v. Hanks*, 88 Va. 388, 13 S. E. Rep. 437.

VI. APPOINTMENT OF RECEIVER.

1. REQUISITE SHOWING TO OBTAIN.—In order to obtain the appointment of a receiver, the plaintiff must show—First, either that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund, to which he has a right to resort for the satisfaction of his claim; and, secondly, that the possession of the property by the defendant was obtained by fraud, or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant. *Kanawha Coal Co. v. Ballard*, etc., *Coal Co.*, 43 W. Va. 721, 30 S. E. Rep. 514.

2. A MATTER OF DISCRETION.—The appointment of a receiver is not a matter of right, but of discretion, to be governed by the circumstances of the case, one of which circumstances is the probability of the plaintiff's being ultimately entitled to a decree. It is, moreover, a power always to be exercised with caution, and never except in a strong case. The general rule is to refuse an interlocutory application for a receiver, unless the plaintiff presents at least a *prima facie* case, and the court is satisfied that there is imminent danger of loss. *Norris v. Lake*, 89 Va. 513, 16 S. E. Rep. 663; *Wagner v. Coen*, 41 W. Va. 351, 23 S. E. Rep. 735; *Lyle v. Commercial Nat. Bk.*, 93 Va. 487, 25 S. E. Rep. 547; *Grantham v. Lucas*, 15 W. Va. 425.

In West Virginia courts are possessed of discretionary power, with certain statutory restrictions, of appointing receivers or refusing application for such appointment; the exercise of this discretion will not be interfered with on appeal, except in cases where it has been manifestly abused. *Smith v. Brown*, 44 W. Va. 342, 30 S. E. Rep. 160.

3. GROUNDS FOR APPOINTMENT.

a. DISPUTED TITLE TO PROPERTY.—Where there are adverse claimants to real estate, and those out of possession file a bill, supported by affidavits, showing that those in possession are cultivating the land in a wasteful and destructive manner, the court should appoint a special receiver to take charge of the land, to rent and preserve the same until the conflicting claims are adjusted. *Dunlap v. Hedges*, 35 W. Va. 287, 13 S. E. Rep. 656.

b. FRAUD.—Where a husband was conducting a mercantile business as the agent of his wife, and property had accumulated from the profits of the business, and a creditor of the husband, who had received a judgment, and issued an execution which had been returned "No effects unencumbered," filed a bill to subject the property, charging that the agency was a fraud, and that the property was the husband's, or at least that he had an interest in it on account of his services, and asking for an injunction to restrain the collection of the debts, it was held proper to grant the injunction, and, on a motion to dissolve it, to appoint a receiver to sell the property and collect the debts. *Penn v. Whiteheads*, 12 Gratt. 74.

C. TO PRESERVE RENTS AND PROFITS OF REAL ESTATE.

In General.—A creditor having a lien on real estate of an insolvent debtor has the right, after his debt has become due, to have a receiver appointed to hold the rents of such real estate to supply any deficiency which may exist after sale is made, and thus obtain a specific lien on the rents to pay the deficiency. *Bristow v. Home Building Co.*, 91 Va. 18, 20 S. E. Rep. 946; *Ogden v. Chalfant*, 33 W. Va. 559, 9 S. E. Rep. 579; *Moran v. Johnston*, 26 Gratt. 108; *Pulliam v. Winston*, 5 Leigh 324; *Adkins v. Edwards*, 83 Va. 300, 2 S. E. Rep. 435.

In a suit by a judgment creditor to subject the real estate of his debtor to pay his debt, where there are deeds of trust on the property and numerous judgments against the debtor, which are to be ascertained and their priorities fixed, and the real estate is not sufficient to pay all the debts, the court may appoint a receiver to take possession of the property and rent it out. *Smith v. Butcher*, 28 Gratt. 144.

Where Personal Property Is Insufficient to Pay Debt.

—Where a bill to subject property of a debtor alleges that the debtor has no personal property, and that fact is not controverted by the answer, and the cause has been referred to a commissioner to report the liens upon the real estate of the debtor and their priorities, and to ascertain what real estate the debtor owns, and the value thereof, and a report is made in the cause showing the value of the real estate and the amount of liens thereon, and no exception is made to the report as to the value of the real estate as therein ascertained, and the report is excepted to, because further credits are claimed by the debtor, not allowed by the commissioner, and it appears from the report that, if the credits were allowed, the liens would still exceed the value of the property, and it appears that the debtor has no sufficient personal property to cover the deficiency, although the report is not confirmed, the court may properly appoint a receiver to take charge of the estate, to receive the rents and profits, and if the debtor is in possession of any part of the land, to rent the same and receive the rents and profits thereof. *Grantham v. Lucas*, 15 W. Va. 425.

Where Land Is Worth More Than Liens against It Receiver Should Not Be Appointed.—But in a suit by judgment creditors to subject lands of the judgment debtor to the payment of their claims, it is error to appoint a receiver to rent out the lands pending the rendition of a decree in a separate suit to determine the interest of the judgment debtor in the land, where it does not appear that the judgment debtor is insolvent, and it appears that the land is worth more than the amount of the liens proven against it. *Banner v. Dingus*, 2 Va. Dec. 648.

Where Case Is in Appellate Court.—In a suit to subject real estate to the lien of the judgment, where a decree for the sale of land is rendered, and an appeal and supersedeas to such decree granted, the court may appoint a receiver to preserve the rents and profits, notwithstanding the pendency of the case in the appellate court on the supersedeas. *Hutton v. Lockridge*, 27 W. Va. 428; *Beard v. Arbuckle*, 19 W. Va. 145.

Receiver May Be Appointed to Collect Accrued Rents.—A receiver may be directed to collect from tenants of the real estate rents due, as well as such as may become due. *Smith v. Butcher*, 28 Gratt. 144.

d. TO PRESERVE TRUST PROPERTY.

Where There Is Danger of Misapplication of Trust Funds.—When an assignment or conveyance is made

by an insolvent firm to a trustee of the assets of the firm for the payment of the claims of creditors, and it is made to appear in a proper suit in equity that there is danger of the loss or misappropriation of the same, or of a material part thereof, the court may appoint a special receiver of the property to administer the assets under its directions. *Wagner v. Coen*, 41 W. Va. 351, 23 S. E. Rep. 735.

But where the whole scheme of a bill is to set aside trust deeds executed by a corporation on ground not recognized in law, and to distribute the proceeds of the property among the creditors *pro rata*, and there is also a charge in the bill that the trustees have unreasonably delayed executing the trusts, and the property is waiting, and no charge that plaintiff ever demanded a sale of the property, and the bill alleging the property will not pay the several creditors under the trust, this charge, under the circumstances, is not sufficient to justify taking the property out of the hands of the trustees, and putting it into the hands of a receiver. *Pyles v. Riverside Furniture Co.*, 30 W. Va. 123, 2 S. E. Rep. 909.

Where Trusts Denied and Proved on Bill to Have Trust Declared.—After a party has denied the express trust, in a suit to have the trust declared, and after the trust and the terms thereof are proved in writing to the satisfaction of the court, it is proper to put the property in the hands of a receiver. *McCandless v. Warner*, 25 W. Va. 754.

e. TO PRESERVE PARTNERSHIP PROPERTY.**Receiver Is Appointed to Wind Up Partnership.**

—The principle upon which a court of equity interferes between partners by appointing a receiver is merely with a view to relief by winding up and disposing of the concern and dividing the profits, and not for the purpose of carrying on the partnership; and, therefore, a receiver will not generally be appointed unless it appears that the plaintiff will be entitled to a dissolution at the hearing. *Satterlee v. Cameron*, 1 Va. Dec. 517; *McMahon v. McClernan*, 10 W. Va. 419.

When Appointed—Loss on Misappropriation of Property.—In a suit to dissolve a partnership and settle its accounts, where the defendant in possession denies the partnership, a receiver should not be appointed unless the fact of partnership is clearly proven in the cause and there is danger of the loss or misappropriation of the property of the firm, or a material part thereof. *Wood v. Wood*, 50 W. Va. 570, 40 S. E. Rep. 416.

After Account Has Been Taken.—Where an account has been taken showing the different debts of a partnership, the amount of each and to whom they are due, and showing how much each partner is to pay, the court may appoint a receiver with authority to collect from each partner the amount he is to pay and apply the fund to pay the creditors. *Jordan v. Miller*, 75 Va. 442.

Question as to Existence of Partnership or Share of Profits—Issue.—In cases of partnership, where there is an application for a receiver, and upon the evidence there is doubt whether there was a partnership between the parties, or as to the share of the profits to which the plaintiff is entitled, or as to the dissolution of the partnership by mutual consent at a particular time, the court should direct an issue to determine these questions. *Satterlee v. Cameron*, 1 Va. Dec. 517.

Same—Business Successful.—In a suit between partners for the purpose of establishing a partnership, and having the same dissolved and the accounts settled, an amended and supplemental bill praying for a receiver having been filed, where the defendant is in possession, and conducting a suc-

cessful and prosperous business, who denies the partnership, and is solvent, and able to respond in damages, the court will not appoint a receiver. *Wood v. Wood*, 50 W. Va. 570, 40 S. E. Rep. 416.

f. TO PRESERVE PROPERTY OF RAILROAD AND OTHER CORPORATIONS.

Receiver to Manage Railroad.—Though a court of chancery will be reluctant to appoint a receiver to take charge of and manage a railroad, it is competent to do so when such a course is indispensable to secure the rights of legitimate stockholders and to prevent a failure of justice. *Stevens v. Davison*, 18 Gratt. 819.

Distribution of Funds of Railroad by Receiver.—The funds in the hands of a receiver of a railroad, appointed in a suit to foreclose a mortgage executed by the company, must be applied to the satisfaction of the lien of the mortgage creditors and not to the payment of debts due to the general creditors. But this rule is subject to the modification that the net earning while the road is in the hands of a receiver, may be applied to the payment of such claims for outstanding debts for labor, supplies, equipments, or permanent improvements of the mortgaged property, as may, under the circumstances of the particular case seem just and reasonable. Such claims are regarded as having superior equities to those of the bondholders. *Addison v. Lewis*, 75 Va. 701.

When the current earnings of a railroad, which ought, in equity, to have been employed to pay current debts, contracted before the receiver's appointment, for labor, supplies, and the like, have been applied by the company to the payment of interest due mortgage creditors, to pay for additional equipments for the road, or for valuable and lasting improvements, it is competent for the court to restore what has been thus improperly diverted, and to direct such current debts to be paid out of the income in the receiver's hands before anything derived from that source goes to the mortgage creditors. *Addison v. Lewis*, 75 Va. 701.

Where Title to Equipments Is Reserved.—When there is a mortgage on a railway, and the corporation makes a conditional purchase of locomotives and cars, and the vendor reserves the title as security for the payment of the purchase price, he has a right, if the railway goes into the hands of a receiver, to the possession of such engines and cars, and compensation for their use, but the balance of the purchase price due him is not such a debt as in equity and good conscience ought to be accorded priority over the mortgage creditors. *Fidelity Ins., etc., Co. v. Railroad Co.*, 86 Va. 1, 9 S. E. Rep. 759, 19 Am. St. Rep. 858.

Equity May Do Anything Reasonable to Preserve Property.—A court of equity having in charge the mortgaged property of a railroad company, is authorized to do all acts that may be necessary—within its corporate power—to preserve the property and give it additional value, not only for the benefit of the lien creditors, but also for the benefit of the company, whose possession the court has displaced by the appointment of a receiver, and by taking into its own hands the property, rights, works and franchises of the company. Any act, it would seem, necessary for the protection and preservation of the property, is a legitimate and proper act, and whatever is manifestly appropriate to such preservation, or to the enhancement of the value of the property, not in excess of the powers of the corporation, will always be upheld and enforced by the courts. In such a case the court may authorize the receiver to take a lease of another railroad where it is manifestly for the interest of the cred-

itors and the company. And so on like conditions the court may authorize its receiver to contribute out of the accrued revenues in his hands, to the building of another railroad. *Gibert v. Washington, etc., R. Co.*, 33 Gratt. 586.

Receivers of a Mining Corporation.—Where a corporation is insolvent, and is the lessee of a coal mine, and the said insolvent lessee is largely indebted to its lessor for royalty reserved in the lease, which is secured by a lien on the lease and personal property and appliances in use about the mine by the lessee, and several of the creditors of such lessee have proceeded by way of attachment, and are proceeding, to seize and scatter the personal property belonging to said lessee, and to remove the rails from the tracks and wire ropes from the drums, a court of equity, on proper application made by such lessor, will appoint a receiver to take charge of said property. *Kanawha Coal Co. v. Ballard, etc., Coal Co.*, 43 W. Va. 721, 39 S. E. Rep. 514.

g. TO PRESERVE DECEDENT'S ESTATES.

Generally.—A court of equity has authority to call in the assets of an estate from the personal representative and place them in the hands of a receiver. *Davis v. Chapman*, 83 Va. 67, 1 S. E. Rep. 473; *Farmer v. Yates*, 23 Gratt. 145.

The appointment of a receiver for a decedent's estate is the proper remedy, where it appears that the administrator has been removed, and the sheriff appointed administrator *de bonis non* that the administered assets will not pay the debts of estate; and that the remaining assets will have to be drawn upon, which, being once administered, the administrator *de bonis non* could not receive and hold. *Harman v. McMullin*, 85 Va. 187, 7 S. E. Rep. 349.

Court Cannot Appoint Receiver on Bill to Establish or Impeach Will.—Upon a bill filed under Code 1873, ch. 118, to impeach or establish a will, the court can exercise only the special and limited powers conferred upon it by the statute; it can only ascertain by a jury trial whether the paper in question is or is not the will of the decedent; it can go no further, and cannot make any order respecting his estate; and a decree appointing a receiver to take charge of the estate *pendente lite*, is *ultra vires* and void. *Coalter v. Bryan*, 1 Gratt. 18; *Hartman v. Strickler*, 83 Va. 233; *Kirby v. Kirby*, 84 Va. 627, 5 S. E. Rep. 589.

VII. EFFECT OF APPOINTMENT.

In General.—An order appointing a receiver is in the nature of an injunction or writ of sequestration, preventing any alienation of, or interference with, the property without the consent of the court. Any meddling with the control or possession of the receiver, whether forcibly or by legal proceedings, without the permission of the court, is contempt of court and punishable. *Thornton v. Washington Sav. Bk.*, 76 Va. 432.

Does Not Affect Title.—The appointment of a receiver being for the preservation of the property and the protection of the litigants pending the suit, such appointment gives no advantage to the person at whose instance it is made, nor does it change any title or create any lien. *Krohn v. Weinberger*, 47 W. Va. 127, 34 S. E. Rep. 746.

The appointment of a receiver does not affect the title to the fund; it is still regarded as *in custodia legis*. *Harman v. McMullin*, 85 Va. 187, 7 S. E. Rep. 349.

Amounts to a Sequestration of Property, and Defeats Power of Original Owner to Lease.—A lease of lands in the hands of a receiver, made to a third party by a party to a pending suit, however valid between

the parties, confers no rights upon the lessee. *Thornton v. Washington Sav. Bank*, 76 Va. 433.

Effect Where Title to Fund is in Dispute.—Where there are conflicting claimants of a trust fund who are prosecuting separate suits in the same court to subject the fund, the appointment of a receiver in one of the suits, on the motion of the plaintiff in that suit, enures to the benefit of the plaintiff in the other suit, upon the establishment of his superior right to the funds. Where the parties are substantially the same in both suits, the successful plaintiff may have an order in his suit for the settlement of the receiver's accounts, and a decree against him for the amount found to be in his hands. *Beverley v. Brooke*, 4 Gratt. 187.

In Case of Mortgages.—If a mortgagee, having the right of possession, fails to exercise such privilege, the appointment of a receiver is in the nature of an injunction which defeats the mortgagee's power of election. The court takes possession of the property by its receiver, and preserves the security for the mortgage until his right of priority is established. *Beverley v. Brooke*, 4 Gratt. 208.

Prevents Levy on Property.—Personalty in the hands of a receiver cannot be levied on, but the *fi. fa.* creates a lien thereon. *Davis v. Bonney*, 89 Va. 755, 17 S. E. Rep. 220.

Decree Appointing Not Subject to Collateral Attack.—A decree approving the action of a receiver of the court in a case where the court had jurisdiction of the subject-matter and of the parties, cannot be attacked in a collateral proceeding, but must remain in force until reversed on appeal, or by proper proceedings in that case. *Turnbull v. Mann*, 99 Va. 41, 37 S. E. Rep. 238.

Receiver to Collect Money Not a Creditor within Statute, Code 1873, ch. 143, §§ 4 and 5.—One appointed by a court of equity in a pending cause as receiver to collect the purchase money of land sold by him as commissioner under a previous decree in the cause, and for which he had a bond with surety to himself as commissioner, is not a creditor within the meaning of the statute (Code 1873, ch. 143, §§ 4 and 5), to whom a surety on the bond may give the notice to bring suit upon it. If the receiver was such a creditor he could only have authority to suit after giving the security required of him in the decree appointing him; and in the absence of clear and satisfactory proof that he had given the security required, a notice to him was not sufficient to release the surety. *Davis v. Snead*, 33 Gratt. 705.

VIII. POWERS, DUTIES AND LIABILITIES OF RECEIVERS.

Active and Passive Receivers Distinguished.—The powers of active receivers of going concerns are very much broader than those of passive receivers who are charged with the mere preservation of property. *State Bank of Virginia v. Domestic S. M. Co.*, 99 Va. 411, 39 S. E. Rep. 141.

Power to Contract.—Where a receiver has express or implied power to make contracts they cannot be annulled at the pleasure of the court. *State Bank of Virginia v. Domestic S. M. Co.*, 99 Va. 411, 39 S. E. Rep. 141.

Power to Abrogate Contract.—A receiver, under the direction of the court, may adopt an executory contract, and require compliance therewith, and if such contract is afterwards found to be unfair and burdensome, and is abandoned and abrogated by order of the court, the contracting party is not entitled to damages as for a breach of such contract, but is only entitled to a just compensation for the actual expenditure of labor and money by him in fulfillment of his contract, subject to a deduction of all sums paid him thereunder; which compensation

is entitled to a preference of payment out of the corporate assets in the hands of the receiver in equal priority with the other obligations of the receivership. *Griffith v. Blackwater B. & L. Co.*, 46 W. Va. 56, 33 S. E. Rep. 125.

Power of Foreign Receiver.—A foreign receiver cannot assert title to property within the state, as against the attachment of a resident creditor, especially when the sole purpose of the receivership is to enable the debtor to hinder, delay, and defraud resident creditors. *Grogan v. Egbert*, 44 W. Va. 75, 28 S. E. Rep. 714, 67 Am. St. Rep. 763.

A foreign receiver of a dissolved foreign partnership has no right to remove the funds of such firm out of the state, to the detriment of resident creditors thereof, or of separate creditors of the firm members, until he shows that the firm is insolvent and that such funds are necessary to satisfy partnership debts, regardless of any claim thereto by the debtor partner. *Grogan v. Egbert*, 44 W. Va. 75, 28 S. E. Rep. 714, 67 Am. St. Rep. 763.

Duty to Protect Estate.—It is the duty of a receiver to ascertain when a judgment owned by the estate will become barred by the statute of limitations, and if he fails in this duty, by reason of which the judgment becomes barred and is lost, he is liable. *Rush v. Steele*, 93 Va. 526, 35 S. E. Rep. 604.

Liability in Making Loans or Investments.—In *Carr v. Morris*, 85 Va. 31, 6 S. E. Rep. 613, a receiver was ordered by the court to lend a trust fund at six per cent. interest on a bond secured by a deed of trust on real estate, payable to himself, with interest, recoverable by suit upon default, the entire debt to become payable upon two successive defaults of interest. The receiver lent the money at eight per cent. interest on notes payable to another, secured by deed of trust on real estate, and neglected to enforce the debt upon default. The trust fund was subsequently lost. The receiver was held chargeable with the loss, though no bad faith was shown.

Where a receiver lent money belonging to the estate to a firm of which he was a member, and died leaving the debt still owing from the firm to the estate, it was held that he and his sureties were chargeable only with simple interest upon the sums loaned to the receiver's firm, to be computed from the time it became his duty to invest those sums respectively. *Walton v. Williams*, 1 Va. Dec. 579.

Liability for Negligence.—A receiver of a railroad may be held responsible for damage sustained by a shipper of freight through the negligence of the receiver's agents and employees, in any case in which the company could be so held. *Melendy v. Barbour*, 78 Va. 544.

IX. BOND AND SECURITY.

Bond and Security Necessary before Receiver Can Act.—A receiver appointed by a court to collect money after giving certain security, cannot sue until he has given such security. *Reynolds v. Pettyjohn*, 79 Va. 329; *Crumlish v. Shen.*, etc., R. Co., 40 W. Va. 627, 32 S. E. Rep. 92.

A special receiver to whom money is directed to be paid by a decree in a cause, should be required to give bond with approved personal security, with proper conditions, in a penalty fixed by the court, before he is authorized to receive such money or any part of it. *Carper v. Hawkins*, 8 W. Va. 291.

Effect of Failure to Give Bond.—Where receiver collects the money from a purchaser at a judicial sale before giving the required bond, and fails to account, though he may afterwards give the bond, the purchaser may be compelled to pay the money a second time. *Woods v. Ellis*, 85 Va. 471, 7 S. E. Rep. 352.

Where Sheriff or Sergeant is Receiver No Bond or Security is Required.—If the sheriff of the county or the sergeant of a city in which the property is located is appointed receiver, it is not necessary to require him to give security for the faithful performance of his duty, as it is covered by his official bond. *Grantham v. Lucas*, 15 W. Va. 425; *Moran v. Johnston*, 26 Gratt. 108.

Liability of Surety on Bond is Only for Receiver's Defaults When Acting as Receiver.—The doctrine that a surety of a public officer is bound for funds collected by his principal by color of his office has no application to the surety on the bond of a commissioner or receiver of a court appointed to collect and disburse a particular fund, and the condition of whose bond is for the faithful discharge of that duty only. *Ayers v. Hite*, 97 Va. 466, 34 S. E. Rep. 44.

X. COMPENSATION AND EXPENSES.

No Fixed Rule as to Compensation.—There is no fixed rule in this state as to the mode of allowing compensation to a special receiver, whether by way of commission or a fixed sum. Usually, when the fund is large, a lump sum is proper. The amount and mode of allowance are within the sound discretion of the court, under the circumstances of the particular case, subject to review on appeal. *Crumlish v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22 S. E. Rep. 91.

Must Be Reasonable.—In the absence of authority previously given, expenditures to be allowed a special receiver must be reasonable, and such as are proper, essential, and necessary in the due and ordinary execution of his office, and such as were contemplated in his appointment and according to the nature of his business. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance for authority to make it. *Crumlish v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22 S. E. Rep. 91.

Extra Allowances.—Extra allowances to trustees and receivers should not be made in the absence of evidence of extraordinary services rendering such allowances just and reasonable. *Weigand v. Alliance Supply Co.*, 44 W. Va. 183, 28 S. E. Rep. 803; *Crumlish v. Shenandoah, etc., R. Co.*, 40 W. Va. 627, 22 S. E. Rep. 92; *Overholt v. Old Dominion Mfg. Co.*, 98 Va. 654, 37 S. E. Rep. 301.

Counsel Fees.—A special receiver may be allowed fair and reasonable fees paid to counsel necessary in the execution of his receivership. Courts ought to authorize employment of counsel where it is intended to give such power, and they are indisposed to allow such fees without previous authority to incur them given the receiver. *Crumlish v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22 S. E. Rep. 91.

Where Master Reports Compensation Reasonable, Appellate Court Will Not Interfere.—Where the master reports a compensation for receiver as fair and reasonable, and the same is supported by competent evidence, the appellate court will not interfere. *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. Rep. 431.

XI. BOND IN LIEU OF RECEIVER.

The appointment of a receiver in a suit to subject property may be dispensed with, if the debtor gives security to account for the rents and profits in case there should be a deficiency upon a sale of the premises under the decree; but if the debtor does not ask for permission to give such bond, it is no error to decree the appointment of a receiver. *Grantham v. Lucas*, 15 W. Va. 425.

XII. RECEIVER'S CERTIFICATES.

Power to Issue.—Courts of chancery may, in a proper case, issue receiver's certificates, which

shall constitute a paramount charge upon the franchises, earnings and property of a corporation under their control, but it is a power which should be exercised with the utmost caution, prudence and reserve, and never without giving those, whose interests are to be affected, the opportunity to be heard in opposition to it. *Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 58, 30 S. E. Rep. 446; *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. Rep. 431.

"As to the receiver's certificates, we do not doubt that it was competent for the court to authorize their issue and to make them a lien paramount to the deeds of trust. It was necessary to raise money in some way to preserve the property from destruction or serious injury, and to put it in salable condition, and the only practicable mode of accomplishing that object was by issuing receiver's certificates. * * * It is now well settled that a court of equity has the power in this class of cases to authorize its receiver to issue certificates upon which to raise money when the necessities of the particular case require it, and to make them a first lien on the property in its hands, and the authority, when properly exercised, is highly beneficial to the mortgage bondholders, yet it ought to be cautiously and sparingly exercised." *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. Rep. 431.

Position of a Bona Fide Holder.—The bona fide holder of a receiver's certificate, duly issued to him under the orders of the court of chancery for debts incurred by the receiver, which certificate has been reported to the court, and, without objection, allowed, acquires a vested right for the payment of his debt in a certain order of which he cannot be deprived except by his own act, or by due process of law. The subsequent issue of other certificates of which he has no notice does not affect him. *Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 58, 30 S. E. Rep. 446.

Certificates Issued without Notice Do Not Affect Lien of Deed of Trust.—It has been held that the lien of the deed of trust cannot be displaced by the subsequent issue by a court of chancery of receiver's certificates without notice to the creditors secured. *Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 58, 30 S. E. Rep. 446.

XIII. REMOVAL OF RECEIVER.

Removal for Failure to Give Required Bond.—Where a receiver gives a bond which is insufficient and a rule is entered against him to show cause why he should not give a new bond, the court, upon the failure of the receiver to show cause, may remove him and appoint another in his stead. And it must very plainly appear that the lower court erred in such removal and substitution before the appellate court will reverse its action. *Shackelford v. Shackelford*, 32 Gratt. 481.

Extent of Power of Court on Removal.—Where a court has removed trustees appointed by will to manage an estate, for mismanagement, and, pending the appointment of their successors, placed the property in the hands of a receiver, it may remove such receiver in its discretion, and appoint proper persons to take charge of and manage the property as trustees under the terms and conditions of the will; but it cannot declare void a lease of a portion of the property made by such receiver in good faith, in accordance with the provisions of the will, and in the interest of the beneficiaries therein named. *Bayly v. Gaines*, 1 Va. Dec. 618.

Where a decree appointing a special receiver is wholly reversed, without any reservation, his office ceases with the reversal. *Crumlish v. Shenandoah, etc., R. Co.*, 40 W. Va. 627, 22 S. E. Rep. 92.

XIV. ACTIONS BY AND AGAINST RECEIVERS.

Right to Sue.—Mere authority to the receiver of a court to collect bonds given for the purchase price of real estate does not authorize him to institute suits in other courts against the obligors in said bonds, and others, to set aside alleged voluntary and fraudulent conveyances of real estate made by them. *McAllister v. Harman*, 97 Va. 548, 34 S. E. Rep. 474.

One appointed receiver of chattels does not, simply by virtue of his appointment, acquire a right of property; but if he bring detinue for the chattels describing himself as receiver, and as upon his own property, and on a bailment thereof to the defendant, the count is good, the description as receiver being surplusage. *Boyle v. Townes*, 9 Leigh 158.

Where a receiver has been appointed to collect an insurance policy, with directions to institute, in his own name, such proceedings thereon as he may be advised is proper, the insurance company has a right to expect that an independent suit will be instituted thereon in the name of the receiver, and it is error to force the company into a trial on the merits against its will, in the suit in which the receiver was appointed, where the order directing suit by the receiver in his own name remains unrevoked, and it appears that such a proceeding is a surprise to the company, and will probably deprive it of making a *bona fide* defense on the merits. *New York Life Insurance Co. v. Davis*, 94 Va. 427, 26 S. E. Rep. 941.

Necessity for Leave of Court Before Suit Can Be Brought against.—There is no better settled proposition than that a receiver, as such, cannot be sued elsewhere than in the court by which he was appointed, without leave of such court first had and obtained; and whether leave to sue will be granted, rests in the discretion of the court. This rule is not altered by the constitutional right to sue in federal courts in certain cases. *Reed v. Axtell*, 84 Va. 231, 4 S. E. Rep. 587; *Melendy v. Barbour*, 78 Va. 544; *Jones v. Browne*, 32 W. Va. 444, 9 S. E. Rep. 873.

Where the court appointed a receiver in a pending cause and directed a debtor to pay his debt to the receiver, and the debtor failed to do so. It was held that, upon sufficient notice having been given the debtor and his sureties, the circuit court could enter up a judgment in the receiver's favor, under § 40, ch. 49, Code of 1860. *Goss v. Southall*, 23 Gratt. 835.

XV. APPEAL AND REVIEW.

Appealability of Order Appointing Receiver.—Under § 3454, of the Virginia Code of 1887, which enacts that an appeal may be allowed in any case in chancery wherein there is a decree or order requiring the possession of property to be changed, an appeal lies from an order appointing a receiver where such order requires the possession or the control of the property to be changed. *Shannon v. Hanks*, 88 Va. 338, 13 S. E. Rep. 437; *Hutton v. Lockridge*, 27 W. Va. 428.

Where property has never been in the possession of the appellant his appeal from an order, appointing a receiver for the property, will be dismissed, since, as to him, such order does not require the title or possession of property to be changed. *Harris v. Hauser*, 26 W. Va. 595.

One aggrieved by a decree of the court which appointed a receiver for or against whom the decree is rendered may have an appeal in a proper case, even if the receiver cannot question the decree of the court appointing him. *Melendy v. Barbour*, 78 Va. 544; *Gage v. Crockett*, 27 Gratt. 735.

From an order of the circuit court improperly appointing a receiver of lands and thus requiring a change of its possession the owner of the land so

dispossessed may appeal, though the principles of the cause are not adjudicated. *Hutton v. Lockridge*, 27 W. Va. 428.

An Order Refusing to Appoint a Receiver Is Not Appealable.—An order or decree refusing to appoint a receiver is not appealable. *Robrecht v. Robrecht*, 46 W. Va. 738, 34 S. E. Rep. 801.

Necessity of Prejudice.—On appeal from an order appointing a receiver, if it does not appear that the appellant was injured or prejudiced by the order, it will not be reversed. *Clark v. Johnston*, 15 W. Va. 804. Thus, in cases to subject real estate to a debt, where the liens far exceed the value of the property, an order appointing a receiver will not be reversed on appeal. *Shannon v. Hanks*, 88 Va. 338, 13 S. E. Rep. 437.

Where in a suit for a specific performance of an alleged contract to convey lands, the decision of the lower court that the plaintiff has no title or right that can be enforced in equity is affirmed on appeal, the appellant cannot object to the action of the lower court in placing the property in the hands of a receiver pending the appeal, since such action could not have been prejudicial to the appellant. *Henley v. Hefferron*, 2 Va. Dec. 306.

Order Appointing Receiver Is Appealable Where Principles of Cause Are Adjudicated.—Where, in a suit for the appointment of a receiver, the court, by the appointment of the receiver, adjudicates the principles of the cause, the decree is appealable, though the possession and administration of the personal property only is involved. *Wagner v. Coen*, 41 W. Va. 351, 23 S. E. Rep. 785. And it has been held that an order refusing to dissolve an injunction and discharge a receiver decides, in effect, that the property held by the receiver is, for the present at least, in proper hands, and to this extent is an adjudication of the principles of the cause, and is therefore appealable. *Bristow v. Home Building Co.*, 91 Va. 18, 20 S. E. Rep. 946.

Award of Supersedeas Does Not Remove Receiver.—If a receiver is in possession of property at the time a supersedeas is awarded, he is not thereby removed, since the supersedeas is only intended to stay further proceedings, and to leave the matters in the condition it finds them until the appellate court can hear the case and pass on the questions involved in the opinion. *Bristow v. Home Building Co.*, 91 Va. 18, 20 S. E. Rep. 946.

314

*Taylor v. Stone.

Friday, June 14th, 1811.

Caveat Emptor—Legal Rights—Equitable Rights.*—In the case of legal rights, the principle caveat emptor properly applies; but equitable rights may be lost by a sale to a bona fide purchaser without notice.

This was a suit in the late high court of chancery, on behalf of Uriah Stone against John Early, Skelton Taylor, Stephen Pate, John Pate and Anthony Pate. The object of the bill was to be allowed an equity of redemption of certain slaves, of whom the plaintiff had made an absolute conveyance to the defendants Stephen and John Pates, but which conveyance he alleged was intended as a mortgage to secure the repayment of a sum of money lent him partly by them, and partly by the defendants John Early and Anthony Pate. The defendant Taylor was a purchaser of some of those

*Equitable Rights—Effect on Purchase without Notice.—See foot-note to *Hooe v. Pierce*, 1 Wash. 312, citing the principal case.

slaves at a sheriff's sale, by virtue of an execution against Anthony Pate. The sale was forbidden on the ground that the property belonged to Stephen Pate and John Pate, instead of Anthony; but there is no evidence in the record that Taylor, the purchaser, had notice of Uriah Stone's claim at the time of his purchase. The late chancellor, on the 14th of September, 1803, upon his view of the evidence in the cause, declared the bill of sale for the slaves, though absolute in form, to have been in fact a mortgage, and "that this was known to all the defendants." He therefore decreed a restoration of the slaves in question held by each of them, an account of profits, &c. A commissioner having reported the account, and no exception being taken to his report, the present chancellor confirmed it, and entered a final decree, from which the defendant Taylor alone appealed.

After argument, by Call, for the appellant, and Wickham, for the appellee, the following opinion of the court (consisting of Judges Brooke, Cabell and Coalter) was pronounced by Judge Brooke, Saturday, June 22d.

315 *The appellant claims as a bona fide purchaser of the slave in question at a sheriff's sale under an execution against Anthony Pate, one of the defendants. It does not appear, by any testimony in the cause, that he had, at the time of the sale, any notice of the equity existing between the complainant and Anthony Pate, if any did exist. The bill of sale from the complainant to the sons of Anthony Pate was absolute. The sale was forbidden on the ground that the property belonged to the sons, and not the father; but the appellant was apprized that the father was the real purchaser, and not the sons. The slaves were in his possession; and he was willing to incur the risk of there being any latent equity between them. If any had existed, he had notice, and must have lost the property. But, with respect to the equity of the complainant, founded on the alleged ground that the bill of sale was intended to operate as a mortgage, he had no notice until after the sale. The bill of sale was evidence to the contrary. In the case of Hooe & Harrison v. Pierce's Administrator, (a) the doctrine seems to be settled that, in the case of legal rights, the principle caveat emptor properly applies; but equitable rights may be lost by a sale to a bona fide purchaser without notice. In the present case the complainant had parted with his legal right, and permitted his equitable claim to lie so long dormant, as, attended with other circumstances, to create considerable doubt whether it was not bottomed on a fraudulent combination to cheat the creditors of Anthony Pate.

The decree of the chancellor is to be reversed, and the bill dismissed as to the appellant Taylor.

316 *Holladay, Executor of Littlepage, v. Littlepage.

Wednesday, June 19th, 1811.

1. Statute of Limitations—Suspension of—Agreement of Parties.—A mutual understanding and agree-

(a) 1 Wash. 217.

*Statute of Limitations.—See monographic note on "Limitation of Actions" appended to Herington v. Harkins, 1 Rob. 591.

ment between a debtor and creditor, that suit shall not be brought upon an account until the debtor shall have gone to Europe, and returned, is a good bar to the act of limitations during his absence from this country, and may be given in evidence to prevent the court's expunging from such account items appearing to have been due five years before his death.

2. Evidence.—Proof of a parol acknowledgment of money.—Proof of a parol acknowledgment by a third person that he received a sum of money from the plaintiff for the defendant's use, may with propriety be left to the jury, as a link in the chain of circumstances; such acknowledgment having been made at or about a time when the defendant, or some person for him, must have paid the money in question; and by a person competent to charge himself by an ordinary receipt. But the death of such person is not sufficient ground for admitting the evidence.

John Carter Littlepage brought an action of assumpsit against Walter Holladay, executor of Lewis Littlepage, founded upon an account against the testator. At the trial upon the general issue, the plaintiff adduced evidence to prove sundry items bearing date prior to the year 1785. In that year, the testator made his will, and it was proved by witnesses that he acknowledged a power of attorney at the same time, authorizing the plaintiff to sell his reversionary interest in sundry slaves, which his mother held for life; and, out of the proceeds of such sale, to pay himself the amount of an unsettled account; without mentioning the sum. The mother was living at the time of the trial. After those items of debit had accrued, the testator went to Europe, and did not return until 1801. He died in 1802, and this suit was brought in the following year; no suit having been before instituted. The defendant moved the court to instruct the jury to disregard all the testimony offered by the plaintiff, in support of such items of the said account as were due five years before the testator's death, and to consider such items as expunged, according to the 56th section of the act concerning executors, &c. (b) but the court instructed the jury that that act was inapplicable to this case; to which opinion the defendant excepted.

The plaintiff moreover offered in evidence the deposition of Francis Irvine, stating, among other things, that, in a conversation with Mr. Haywood, the owner, and Captain Meridith, the master of the ship in which the testator went to Europe, they both said that the plaintiff had paid the said Lewis's passage. The defendant

317 *moved for an instruction that this part of the deposition was inadmissible testimony; but the court refused to give such instruction, "the captain being dead;" whereupon a second bill of exception was filed. A verdict was found, and judgment rendered, for the plaintiff; from which the defendant appealed.

Botts and Wickham, for the appellant. Williams and Wirt, for the appellee.

For the appellant it was insisted, 1. That the district court erred in the opinion that the 56th section of the law concerning executors was inapplicable.

2. That even the act of limitations would have been a bar; for, having begun to run, it could not stop upon the embarkation of Lewis Littlepage for Europe. The absence

†Evidence.—See monographic note on "Evidence" appended to Lee v. Tapscott, 2 Wash. 276.

(b) Rev. Code, v. 1, p. 167.

of a defendant is not within the saving of the statute, where he goes away openly, and with the knowledge of the plaintiff, but only where he absconds or conceals himself, or, by removal out of the country, &c. when the cause of action accrued. defeats or obstructs the plaintiff from bringing his action. (a) A debtor's going away publicly, after giving notice to his creditor, does not obstruct his suing him, but gives full opportunity and warning to stop him by a writ.

The power of attorney from Lewis Littlepage to the plaintiff could not operate upon the cause. If it was a reacknowledgment of the debt, it ought to have been declared upon, if under seal; and if not, the act of limitations runs against it. Neither is its existence legally proved, since it is not produced; and there is no proof of its loss, nor that it ever was delivered. But if it were properly authenticated, it would afford a presumption that the debt has been paid; as the plaintiff, by virtue of the power, had sufficient funds in his hands.

3. There was error in the instruction 318 respecting the "payment of the passage-money. The court admitted hearsay evidence of what the captain of the vessel had said; and this on the ground that the captain was dead. But the witness said he heard the owner say the same thing, and he was alive. Hearsay evidence is admissible only as to question of boundary, pedigree, and the like, but not as to substantive facts which may be proved by the oath of the person whose words are relied upon. Even a receipt of a third person to one of the parties to a suit, is not as satisfactory as the testimony of the person who signed it; because he may, in fact, have received no money. But a receipt is better evidence than a mere hearsay declaration; and that, at least, ought to have been produced.

On the other side, the case of Brooke's Administrators v. Shelly, 4 H. & M. 266, was relied upon to show that, imperative as the language of the 56th section of the law concerning executors is, there may be exceptions to it, so as to let in the circumstances of the case, and prevent the court from expunging. The circumstances here are that, when Lewis Littlepage was on the wing for Europe he executed a power of attorney, acknowledging the debt to the plaintiff. This was equivalent to a new assumpsit, and took away all the preceding years. It looked also, prospectively, to the whole time during which the plaintiff was to be his agent, that is, until the death of his mother; and, therefore, prevented the act of limitations from running during all that time. The court ought not to look merely at the letter of the expunging act, but at its intention and spirit. These apply to cases only where the plaintiff had it in his power to sue; but here, the agreement certainly was, that Lewis Littlepage was to be permitted to leave the country without molestation. The power of attorney was executed at the moment of his departure, to take effect afterwards, and while he was gone, the suit could not have been brought.

319 *As to the point that the power should have been produced; the exception was not taken on that ground. For

any thing that appears, the instrument itself may have been before the court and jury; for it is not said, in the bill of exceptions, that all the evidence is inserted.

2. The testimony relative to the declarations of the captain and owner was properly admitted, as part of the chain of proof, though not sufficient, in itself, if standing alone. The captain being dead, his receipt would have been good to prove payment of the passage-money, and his confession is equivalent to his receipt.

Argument in reply. According to the argument on the other side, the act of limitations is to be moulded according to the court's ideas of equity! Such latitude of construction is not admissible. It has repeatedly been decided in England that the courts cannot make exceptions to the act; and that, if the saving in favour of infants, femes covert, &c. had not been inserted, the courts could not have supplied it. There never was a stronger case for applying the act than this. When Lewis Littlepage was going to Europe, why did not John Carter Littlepage (his brother) get his obligation for the money? No demand is made after his return. There is every presumption, therefore, that this business was settled. A bond was given, perhaps, and afterwards taken in and destroyed.

The decision in Brooke's Administrators v. Shelly, only shows that where a new assumpsit, sufficient of itself to bear an action, is proved, the account is out of the question. But the new assumpsit must be complete, and sufficient to bear an action. Here, the power of attorney acknowledged only an unliquidated balance, and moreover does not appear to have been delivered. If it was, it ought to have been produced; for corroborative testimony is not proper until the principal voucher is exhibited. Its non-

production is plain proof that it never 320 *was delivered. The inference is, that it was only an inchoate act, and that the debt was settled in some other way.

The district court erred in another respect. It took upon itself to determine the weight of evidence, and decided on facts, without leaving it to the jury to judge of the credibility of the witnesses. Keel & Roberts v. Herbert, 1 Wash. 203, is exactly the case at bar.

Wirt. That case is not applicable to this. The act requiring the court to expunge the items, necessarily confers on the court the power of judging of fact as well as law, for the purpose of determining whether each particular case comes within its scope; and, to form this judgment, they must weigh the evidence.

April 6th. The president pronounced the following opinion of the court:

"The court is of opinion, that the testator of the appellant and the appellee having come to an understanding, and agreement, respecting the matters in controversy in this cause, in the year 1785, whereby it was plainly understood and agreed, between the said parties, that suit was not then to be brought thereupon, but that the said testator should be permitted to go to Europe, which he accordingly did, about the time aforesaid, with the privity and assent of the appellee, no suit could properly have been

(a) Act of Limitations, s. 14, Rev. Code, v. 1, p. 100.

brought at that time, nor until the said testator's return to this country, which happened in the year 1801; and the present suit having been instituted within a short time thereafter; and the absence aforesaid forming a good bar to the limitation of time relied on by the appellant, under the act in this case provided; the court is of opinion that there is no error in the instruction of the district court, contained in the first bill of exceptions.

"As to the other instruction objected to; the court below having only decided 321 that the testimony objected to *was admissible evidence; the acknowledgments in question having been made at or about the time of the said testator's sailing for Europe, and being the admissions of those who were competent to charge themselves with the receipt of the passage-money, by an ordinary receipt or acquittance; the court is of opinion that the said testimony, on these grounds, and not on that assigned by the court below, was properly received by that court; and that the judgment of the said court be affirmed."

Quarles's Executor v. Quarles and Others.

Friday, June 21st, 1811.

1. **Will—Bequest of Slaves to Legatee on Attaining Majority—Right to Intermediate Profits.**—Where slaves are specifically bequeathed to a child, when he or she shall attain the age of 21 years, or shall marry, and no provision is made expressly for maintenance in the mean time, their intermediate profits, if not otherwise disposed of, do not pass by a general residuary clause, but go to the legatee.
2. **Same—Same—Interest on Profits.**—In such case, the legatee is also entitled to interest on the profits from the time of the receipt thereof by the executor; no good reason appearing for his failure to apply the principal to the use of the legatee.
3. **Legatee—Joint Suit—Decree.**—Though specific legatees jointly sue, the decree ought to be several, conformably to their respective rights.

This was a suit in chancery in the county court of Louisa, on behalf of John Quarles, William G. Poindexter and Jane his wife, and Patsy Quarles, the three younger children of William Quarles, deceased, against his executor, to recover the profits of certain slaves specifically bequeathed by the testator to the several plaintiffs, when they should (respectively) attain the age of twenty-one years, or should marry. Annexed to each bequest was a provision that, "if either, or all, of the above negroes should die before they should come into the legatee's possession, they should be replaced by others equally valuable."

The testator also devised to the plaintiff John, and his heirs, certain lands, after his mother's death; to each of the plaintiffs a horse and saddle, and feather bed and furniture; and to the female plaintiffs 25l. each, when they should respectively attain the age of twenty-one years, or should marry. He directed, moreover, the sum of 50l. to be reserved out of his estate, and kept

in the hands of his executor for the education of the plaintiffs. *After 322 sundry devises and bequests to the widow and elder children, the will concluded with directing an equal division of the residue, not disposed of, among all the children.

The plaintiffs contended that, as the will appointed no particular fund for their maintenance

during their minorities, their father's intention was that they should be maintained from the annual profits of the slaves bequeathed to them, and the interest accruing on their shares of the residuary fund; the said profits and interest being not more than sufficient to maintain them in a decent and comfortable manner.

The defendant in his answer opposed the claim on the ground that considerable real and personal property was devised to the mother of the plaintiffs, and the respondent supposed the testator intended to make no other provision for their maintenance, as he well knew they would enjoy all the profits of that estate, of which no part would be received by the elder children, who were by a former wife. The respondent farther stated that the estate left the plaintiffs ought to have been sufficient to support them; that they had lived with their mother until the marriage of Jane; and the other two still lived with her; that they had been at no expense for maintenance, nor had it been necessary for them even to apply the profits arising from their residuary proportion which they received at an earlier age than the elder children; that at the time of the testator's making his will, the negroes devised to the plaintiffs were of as much or more value than those given to the other children, and at the time of their coming of age, or marrying, were, and will be, much more valuable than those received by the other children at their full age, or marriage.

The answer concluded with admitting the amount of hire of the negroes left to the plaintiffs, up to the 25th day of December, 1803, to be 382l. 8s. 5d. 1-2. as would appear by an account thereunto annexed.

323 *The plaintiffs replied generally; and commissions to take depositions were awarded, but none were taken on either side. The cause was heard on the bill, answer, replication, and copy of the will; whereupon the county court decreed that the defendant pay to the plaintiffs "the annual profits of the negroes respectively devised to them by the testator, amounting to 382l. 8s. 5d. 1-2." and costs.

The superior court of chancery having affirmed this decree, the defendant again appealed.

Wickham, for the appellant. The plaintiffs were not entitled to intermediate profits on the slaves, possession of which was not to be delivered them until a future day. They might have produced no profits, or might have been an expense to the estate. If such had been the case, could the executor have charged the expense against the legatee? Would he not have been obliged to deliver the slaves free of charges? If so, shall the legatee be entitled to profits, when he is not responsible for loss? No case can be found of an allowance of intermediate profits on a specific legacy of property to be delivered in futuro.

Call, for the appellees. This was a vested legacy to each of the plaintiffs; and in all cases of vested legacies, the profits go to the legatee. The word "when" does not denote a condition precedent, but only marks the period when the legatee shall enjoy the benefit of the gift. (a) In case of a devise of

(a) 3 Bro. Ch. Cas. 474.

lands, it is now settled that the words "when" and "then" do not create a contingency.

But, "in the case of a child, let a testator give a legacy how he will, either at 21, or marriage, or payable at 21 or marriage, if the child has no other provision, the court will give interest by way of maintenance." (a)

Mr. Wickham says there is no case of 324 allowance of *profits on a specific legacy. But, in this country, there is the same reason for allowing profits of slaves, as in England, interest on money.

In England there was formerly a great controversy, whether profits were not to be allowed even upon contingent legacies. A distinction has been taken that, in such case, where there is a residuary clause, the profits shall go into the residuum. Here, there is a residuary clause; and, if the profits of the slaves go that way, there is no provision for maintenance, the 50l. being intended for education only.

The decree, indeed, is defective; for interest ought to have been allowed on the sum confessed by the answer.

Wickham, in reply. The question whether this was a contingent or a vested legacy, is unimportant. If it was vested, I contend that no interest is allowed on a vested legacy, payable when the legatee attains full age, or marries. It is "debitum in præsent, solvendum in futuro." (b) I admit, where interest is necessary for the maintenance of a child, or there is nothing in the will showing a contrary intention, the court will allow it; but then, the necessity must be apparent; as where the child has no other provision. Education must be considered as part of maintenance; for, if we go to the root of words, education signifies bringing up. The testator's having partly provided, shows his intention to provide no more. Besides, the residuary estate may have been sufficient, the amount of which is not ascertained; it may be ten pounds, or it may be ten thousand.

As to interest on the profits, this is never allowed, no more than interest upon interest. (c)

325 *Thursday, October 3d. JUDGE BROOKE pronounced the opinion of the court,

"That there is no error in the decree of the court of chancery, as far as it affirms the decree of the county court giving to the appellees the profits of the slaves devised to them, from the death of the testator; but that there is error in both decrees in this, that interest is not allowed the appellees on the amount of profits admitted to have been received by the appellant; and also in this, that the said decrees are joint and not several." Therefore, both decrees are to be

(a) 3 Atk. 102, *Heath v. Perry*; and 1 P. Wms. 788, *Acherley v. Wheeler and Vernon*.

(b) *Crickett v. Dolby*, 3 Ves. Jun. 13.

(c) *Skipwith v. Clinch*, 2 Call, 253, and other cases. (1)

(1) See *Graham v. Woodson*, 2 Call, 249, where interest was allowed upon arrears of rent upon circumstances. *Coke v. Wise*, 3 H. & M. 463, and *Newton v. Wilson*, id. 470, where it was decided not to be recoverable in an action of debt for rent arrear; and as to interest on hire of slaves, see *Dillard v. Tomlinson*, 1 Munf. 183, 214, and *Whitehorn v. Hines and Wife*, id. 557, 589.—Note in Original Edition.

reversed, with costs against the appellant, the appellees being the parties substantially prevailing; and, "the appellees not complaining of the error last assigned," a decree is to be entered in their favour for the sum of 382l. 8s. 5d. 1-2. (which the appellant admits by his answer he had received as hire of the slaves,) "with legal interest thereon from the 25th day of December, 1803, the time of the receipt thereof, until the 15th day of March, 1804." (2)

Afterwards, Monday, December 2d, "the counsel for the appellees waiving his objection to the error in the decrees of the county court and superior court of chancery, in not allowing interest to the appellees on the profits of the slaves bequeathed them," the decree of reversal was set aside, and the decree of the superior court of chancery affirmed. (3)

326 *Hopkirk v. Dennis and Others.

Tuesday, May 14th, 1811.

Legatees—Liability to Creditors of Estate*—Case at Bar.—If after the qualification of an executor he die without closing his administration, and the legatees (without the intervention of an administrator de bonis non) take possession of the assets, a court of equity, on a bill for discovery, will consider such of them as are solvent responsible to creditors for the whole amount, and will not give them credit for the proportions of such as prove to be insolvent, yet in decreeing against the solvent legatees, the court will not charge them jointly, but pro rata.

Upon an appeal from a decree of the superior court of chancery for the Richmond district, pronounced the 6th of May, 1807.

The bill was filed in the names of James Hopkirk and others, surviving partners of Alexander Spiers, John Bowman & Co. against John Dennis and others, children of Henry Dennis, deceased, for a discovery of assets, and payment of a debt by bond from the decedent to the company; the plaintiffs alleging that he died, leaving a large real and personal estate, subject to the payment of his debts by his last will and testament, whereof he appointed his wife executrix, who proved the same, and

(2) Note. This was the date of the county court decree: beyond which time interest allowed by the appellate court could not run, according to the decision in *Scott's Executors v. Trent and others*, 4 H. & M. 361.

The costs in this case were payable de bonis testatoris, si, &c. si non de bonis propriis, but the decree for the principal and interest was against the appellant personally, so that execution should be levied de bonis propriis.—Note in Original Edition.

(3) Note. See the General Rule as to correction of errors operating to the injury of the appellee, or defendant in error. 1 Munf. 400.—Note in Original Edition.

***Legatees—Liability to Creditors of Estate.**—Where legatees are called upon to refund at the suit of a creditor, the general principle is that all the legatees must be before the court if solvent, and the burden apportioned among them, if it can be done without material delay or injury to the creditor. If, however, some of the legatees are insolvent, the others will be required to make good the deficiency, to the extent of what they have received. *Leake v. Leake*, 75 Va. 810; citing *Hopkirk v. Dennis*, 2 Munf. 326; *Chamberlayne v. Temple*, 2 Rand. 400; *Lewis v. Overby*, 81 Gratt. 601; *Ryan v. McLeod*, 32 Gratt. 375. This last case also cites the principal case and discusses the decision therein at pp. 374, 375.

See generally, monographic note on "Legacies and Devises" appended to *Early v. Early*, Gilm. 124; monographic note on "Debts of Decedents" appended to *Shores v. Wares*, 1 Rob. 1.

afterwards departed this life intestate; since which, no person had taken administration on his estate; but his children, the defendants, had taken possession of the whole, claiming it under the will, and refused to satisfy the claim of the plaintiffs.

Answers were filed by the defendants, John Dennis, Edward Dennis, Owen Haskins, (who married one of the daughters,) Thomas Dennis, Lucy Dennis and Sarah Johnson, the wife of John L. D. Johnson, setting forth (though not distinctly, or particularly, as to items) the proportions in value, or thereabouts, of real and personal estate by them respectively received. From Sarah Johnson's answer it appeared, that John L. D. Johnson was insolvent, having wasted the property belonging to her, and had left the commonwealth. Nicholas Bourden and Jane his wife, failed to answer, and a decree nisi was entered, but does not appear to have been served upon them.

From a copy of the will, it appeared that all the real and personal estate was given to the wife for life, (after payment of the testator's debts,) and afterwards to be
327 *divided equally among the children, except some unimportant specific legacies. The personal property was of itself sufficient to satisfy the claim of the plaintiffs.

The chancellor decreed, "that the defendant John L. D. Johnson, and Sarah his wife, pay to James Hopkirk, the surviving plaintiff, 19l. 3s. 5d. and one eighth of the costs, unless the said John L. D. Johnson, on or before the tenth day of the term next after he shall have been served with a copy of this decree, show cause to the contrary; that the defendant Richard Dennis pay 28l. 15s. and one eighth of the said costs, unless he, being in like manner served with a copy of this decree, show cause to the contrary; that the defendants, Edward and John Dennis, each pay the like sum of money and proportion of costs; and that the defendants Owen Haskins and Catharine his wife, Lucy Dennis, Thomas Dennis and Nicholas Bourden, and Jane his wife, each pay 19l. 3s. 5d. and the same proportion of costs."

From this decree the plaintiff Hopkirk appealed.

Williams, for the appellant. If the decree stands, the plaintiff must lose the sum for which John L. D. Johnson, the insolvent legatee, is made responsible.

Our claim is against the whole estate. The decree ought, therefore, to be joint. One legatee's having dissipated his share is no reason for the creditor's losing any part of his claim. If the estate had been distributed among them by an executor, he would have taken their joint bond to refund for payment of debts.⁽¹⁾ Their dividing the estate among themselves cannot exempt them from this responsibility. Their own act of intermeddling with the estate should not diminish the creditor's security. Even if the general principle were, that, where the legatees are all solvent, the court will
328 hold *them responsible pro rata, it ought to be otherwise in a case like this.

The other legatees ought not to have permitted Johnson to go out of the state without giving security for his proportion. The decree should be, in general terms, that they pay the debt; leaving them to settle their proportions among themselves.

Judge Roane here called the attention of Mr. Williams to the words of the court in *Burnley v. Lambert*, 1 Wash. 312, that "all the legatees must be made parties, that the charge may not fall upon one, but may be equally borne by the whole."

Williams. I do not understand by this that the decree must always be pro rata; but that all the legatees must be parties, in order that, after the recovery against them all collectively, such as pay may have remedy against the rest for contribution.

No counsel for the appellees.

Monday, September 23d. The president pronounced the following as the opinion of the court:

"The court, not deciding whether it was proper in decreeing the several proportions against the sons, in this case, to take into consideration the lands they severally received under the will of the testator, Henry Dennis, nor whether the answers of the several defendants, now appellees, are sufficiently explicit as to the proportions of the said estate they respectively received, (no objection being made by the appellees on either ground,)(2) approves the decree, except as is hereafter mentioned; but the court is further of opinion, that the said decree is erroneous in having decreed
329 the sum of 19l. 3s. 6d. *against

Nicholas Bourden and Jane his wife, who have not answered the bill of the appellants, and upon whom the conditional decree had not been served; and also in this, that the quota of debt and costs assessed on John L. D. Johnson and Sarah his wife, in and by the said decree, and who appear to be insolvent, is not made payable by the other appellees, in due and ratable proportions; therefore it is decreed and ordered that the same be reversed and annulled, and that the appellees pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here: and it is ordered that the cause be remanded to the said court of chancery for further proceedings to be had therein, agreeably to the principles of this decree; reversing also to the appellant the right to resort to the other appellees for similar contribution for the quota which may be found due by Nicholas Bourden and wife, in the event of their not having received an adequate proportion of the testator's estate, or being found insolvent."

Stratton v. Minn .

Friday, June 21st, 1811.

Detinue*—Evidence—Case at Bar.—In detinue for slaves, parol evidence t^o prove that a deed was executed for the purpose of defrauding creditors, and therefore void, is admissible upon the plea of non detinet and issue.

In an action of detinue, (plea non detinet and issue,) the plaintiff, on the trial, claimed

(1) Note. Quære, if this doctrine be correct? The words of the act of assembly (Rev. Code, v. i. p. 166, s. 51), are, "until bond and security be given by the person entitled to distribution, to refund 'ue proportions,'" &c.—Note in Original Edition.

(2) Note. See the General Rule, in the note to 1 Munford, 466.—Note in Original Edition.

*See monographic note on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578.

The principal case is cited in Bird v. Wilkinson, 4 Leigh 274.

the slave Tom, the subject of controversy, under a bill of sale from William P. Skillern, part of the consideration expressed in which was a debt stated to be due to Minnie, the plaintiff, from the said Skillern's wife, previous to her intermarriage. The defendant, who had purchased him at a sheriff's sale under an execution against the said Skillern, alleged the said bill of sale was fraudulent as to creditors and purchasers, and, among other evidence, introduced a witness to prove that the plaintiff had, since the said Skillern's marriage, and not long before the date of the said bill of sale, told the witness, in a conversation upon the subject, *that Mrs. Skillern, at the time of her intermarriage with the said William P. Skillern, lived with him, the plaintiff; and that she was clear of debt, and owed him nothing, and that he had taken a bill of sale of all the property of the said Skillern to protect it from his creditors, and asked the witness if he was not right in so doing. The defendant also wished to prove that the said Skillern, but a little time before the date of the said bill of sale, had paid large sums of money to the plaintiff; but the district court considered all this testimony inadmissible, and refused to let it go to the jury; whereupon a bill of exceptions was filed.

Verdict and judgment for the plaintiff; from which the defendant appealed.

Wickham, for the appellant.

Call, for the appellee.

Monday, June 24th. The court reversed the judgment, and awarded a new trial, with a direction that the evidence be permitted to go to the jury.

Tuttle v. Eskridge.

Saturday, June 23d, 1811.

Partnership*—Evidence—Deed of Lease from One Partner.—A deed of lease from one of two copartners, sealed with his seal, and in terms, binding himself only, is not admissible evidence in support of an avowry laying a demise by the copartners, notwithstanding the deed be expressed as, "for himself and his partner," and it be proved that the other partner knew of the demise, and was satisfied with it.

See the case of Shelton v. Pollok & Co., 1 H. & M. 438, to a similar effect.

In an action of replevin in the county court of Fairfax, by William Eskridge, surviving partner of Charles and William Eskridge, against William Tuttle, bailiff of Morris and Mitchell, for a distress made by the said bailiff for rent arrear; he filed his avowry, acknowledging the taking the goods, at the place, &c. for rent due, by virtue of an agreement of lease sealed with the seals of

331 *the said Morris and Mitchell. The plaintiff (among other pleas) having pleaded non demisit in modo et forma, the defendant in his replication said that Morris and Mitchell did demise the premises, in the avowry mentioned, to the said Charles and William Eskridge in manner and form as stated in the avowry. Issues being joined, the counsel for the defendant, at the trial of the cause, offered in evidence an instrument of writing in these words: "Articles of agreement made and entered into, this 6th day of August, 1801. between Robert Morris,

for himself and Adam Mitchell, of the one part, and Charles Eskridge, and William Eskridge, of the other part, witnesseth that the said Robert Morris hath rented to the said Charles and William Eskridge, their houses and lots which they purchased of William Lane, jun. in the town of Centreville, for the term of six years from the first day of October next ensuing, for which said houses and lots the said Charles and William Eskridge hereby oblige themselves to pay to the said Robert Morris, or his assigns, the sum of eighty pounds annual rent, and to return the said houses and lots, at the expiration of the term, to the said Robert Morris, in good tenantable order. The said Robert Morris obliges himself to enclose the lots with a good sufficient post and rail fence," &c. Signed "Robert Morris, (seal,) Charles Eskridge, (seal,) William Eskridge, (seal,)" He also proved, by the testimony of a witness, that Adam Mitchell was a copartner in trade with Robert Morris, whose seal is affixed to the said instrument; that the property described in the defendant's avowry was purchased out of the copartnership effects; that the said Adam Mitchell was informed of the demise made by the said Morris to the plaintiff, and was satisfied with it; and that the tenants occupied the premises to the month of April, 1803.

Whereupon the counsel for the plaintiff prayed the court to instruct the jury, that the evidence so offered was not admissible to prove the demise laid in the said

332 avowry; *but the court, being divided in opinion, did not give the instruction.

The jury found the issues for the avowant, and that the rent distrained for was justly due at the time of making the distress in the avowry mentioned. The court accordingly entered judgment for the avowant for double the rent in arrear, and distrained for, and the costs, agreeable to the act of assembly in that case made and provided. (a) The plaintiff appealed to the district court held at Haymarket, where the judgment was reversed, and no farther proceedings directed. The defendant then appealed to this court.

Call, for the appellant.

No counsel for the appellee.

Monday, September 23d. JUDGE BROOKE pronounced the opinion of the court.

The deed offered in evidence to the jury being essentially different from the deed set forth in the conuance and replication of the defendant, the court is of opinion that the county court erred in not instructing the jury (upon the application of the counsel for the plaintiff) that it was inadmissible evidence; and approves of the judgment of the district court, so far as it reversed the judgment of the county court; but is also of opinion that the district court erred in not sending the cause back to the county court for further proceedings to be had therein, with an instruction that the deed was inadmissible evidence. The judgment of the district court must, therefore, be reversed, and the cause now sent back to the superior court of the county, where the verdict and judgment must be set aside, a venire facias de novo awarded, and the cause sent to the county court with the foregoing instruction.

*See monographic note on "Partnership" appended to Scott v. Trent, 1 Wash. 77.

(a) Rev. Code, v. 1, c. 80, s. 15, p. 156.

333

***Waugh v. Carter.**

Saturday, June 22d, 1811.

1. **Office Judgment—Common Order Entered before Declaration Filed—Effect.**—It is error sufficient to reverse an office judgment that the common order was entered before the plaintiff filed his declaration.
2. **Escape of Prisoner—Remedy.**—A judgment cannot be entered against the defendant and sheriff, upon his return that the writ was executed, and the defendant escaped; the proper remedy against the sheriff for an escape, being by a separate suit.

In an action of debt, in the Haymarket district court, on behalf of Moore F. Carter against Samuel Oliver and John Pash, the writ was returned by Alexander Waugh, deputy for James Waugh, sheriff of Fairfax county, "executed the 19th day of August, 1805, and the defendants escaped out of custody."

At the rules, in November, 1805, a common order was entered against the defendants and sheriff, which, in March, 1806, was confirmed; and this office judgment, not being set aside at the ensuing May term, was confirmed against the defendants and James Waugh, the sheriff. The plaintiff's declaration was filed in January, 1806. A writ of supersedeas to the judgment was awarded by a judge of this court.

Saturday, June 22d, 1811. JUDGE BROOKE pronounced the following opinion of the court:

"It seems to the court here that the said judgment is erroneous in this, that the office judgment was entered at rules before the plaintiff (now defendant) had filed his declaration; (1) and in this, also, that the judgment was entered against the plaintiff (in error) as sheriff, upon his return that the said Samuel Oliver and John Pash had been taken and escaped; the court being of opinion that the sheriff could not be made liable for an escape, but by a suit brought against him for that purpose." (2) Judgment, therefore, reversed; all proceedings subsequent to the writ set aside; and cause remanded to be further proceeded in.

ESCAPES.

- I. Escapes in General.
- II. Responsibility of Prisoner.
 - A. Escape Warrant.
 1. In General.
 2. What It Must Show.
 3. Presumption Arising from Lapse of Time.
 4. Escape Warrant Showing That Escape Not from a Prison.
 - B. Indictment.
 - C. Punishments.
 1. Escape as a Criminal Offence.
 2. Where Party Escapes before His Term Is Up.
 3. Punishment of Convicts.
- III. Responsibility of Sheriff.
 - A. Criminal Responsibility.
 - B. What Sheriff's Return Must Show.
 - C. Defenses.
 1. Defenses Held Insufficient.
 - a. No Jail or an Insufficient One.
 - b. Recapture after Suit Brought.
 - c. Insolvency of Prisoner.

(1) Note. See the 35th and 36th sections of the district court law. Rev. Code, v. 1, p. 80.—Note in Original Edition.

(2) Note. See the 3d section of the law concerning escapes. Rev. Code, v. 1, p. 119.—Note in Original Edition.

2. Defenses Held Sufficient.

- a. Prisoner Released under Insolvent-Debtor Act.
- b. Prison-Bonds Bond Taken.
- D. Damages.
- E. Verdict of Jury.
- F. Evidence.
 1. Burden of Proof.
 2. Succeeding Sheriff Disqualified.
- IV. Responsibility of Jailor.
- V. Penalty in Appellate Court.
- VI. Remedies.
 - A. In General.
 - B. Effect of Voluntary Return on Remedies.
 - C. Eject after Debtor's Escape.
 - D. Motion against Sheriff.
 - E. Necessity for Separate Suit against Sheriff.

I. ESCAPES IN GENERAL.

Two Kinds.—By the common law there were but two kinds of escape of a debtor in execution: 1st. voluntary; 2d. negligent. Voluntary escapes are such as are by the express consent of the sheriff or jailor; negligent, where the prisoner escapes without the consent or knowledge of the sheriff or jailor. *Stone v. Wilson*, 10 Gratt. 529.

II. RESPONSIBILITY OF PRISONER.**A. ESCAPE WARRANT.**

1. **IN GENERAL.**—It is established by statute that a justice of the peace may issue an escape warrant to retake and secure persons who escape out of prison. *McClintic v. Lockridge*, 11 Leigh 253.

2. **WHAT IT MUST SHOW.**—Although an escape warrant ought regularly to show on its face that the person who issues it is a justice of the peace, yet, on a *habeas corpus* sued out by the person arrested under it, if it is proved that he is a justice, the prisoner ought not to be discharged. *Jones v. Timberlake*, 6 Rand. 678.

3. **PRESUMPTION ARISING FROM LAPSE OF TIME.**—Where an escape warrant is sued out for a debtor, the presumption which arises from the length of time which has intervened since the day the warrant was issued, and before the prisoner was arrested thereunder, that the debt for which the prisoner was held has been discharged, is rebutted by the fact that there was no jail in the county where the warrant was issued in which the debtor could be placed. *Jones v. Timberlake*, 6 Rand. 678.

4. **ESCAPE WARRANT SHOWING THAT ESCAPE NOT FROM A PRISON.**—The statute, 1 Rev. Code, ch. 136, § 1, which, "for the more effectual retaking and securing persons who escape out of prison," enacts that "if any person committed, rendered or charged in custody, in execution or upon mesne process, to any county or corporation prison or to the jail of any district, shall thence escape, a justice may issue an escape warrant," does not authorize such warrant in the case of a person who escapes out of the custody of a sheriff, before being committed to prison; and if a person be taken and detained in custody under an escape warrant which shows on its face that the escape was not from any prison, but merely from the custody of the sheriff, he may be discharged by writ of *habeas corpus*. *McClintic v. Lockridge*, 11 Leigh 253.

B. INDICTMENT.

Convicts Escaping from Penitentiary.—Proceedings against convicts under the 54th section of the penitentiary act must be by indictment. *Com. v. Ryan*, 2 Va. Cas. 467.

C. PUNISHMENTS.

1. **ESCAPE AS A CRIMINAL OFFENCE.**—By the common law the offence of prison breaking was deemed in all cases a felony; but by the common law, as

modified by the act passed in 1794, if a person is actually committed to jail for any treason or felony for which if convicted he might be sentenced to loss of life or limb and breaks his prison he is a felon, but if he is confined for an inferior offence he is punishable for misdemeanor. *Com. v. Ryan*, 2 Va. Cas. 467.

2. WHERE PARTY ESCAPES BEFORE HIS TERM IS UP.

—Where a party has been indicted and the verdict of the jury finds him guilty and orders that he be imprisoned for a certain time and before that time has expired the party escapes from jail and is afterwards retaken, he is to be kept in prison beyond the prescribed period for the length of time he was out when he escaped; and this though he has already been indicted for the escape. *Cleek v. Com.*, 31 Gratt. 777.

3. PUNISHMENT OF CONVICTS.—The 54th section of the Penitentiary Act prescribes a punishment for convicts escaping from that prison: the punishment consists in such additional confinement and hard labor, agreeably to the directions of the act, and such additional corporal punishment not extending to life or limb, as the court before whom such person shall be convicted of said escapes shall, in the exercise of a sound discretion, adjudge and direct. *Com. v. Ryan*, 2 Va. Cas. 467.

III. RESPONSIBILITY OF SHERIFF.

A. CRIMINAL RESPONSIBILITY.—The sheriff in Virginia is *ex officio* jailor of his county, but may devolve the duties of jailor on a deputy, and will not be criminally liable for a negligent escape permitted by him. If, however, a prisoner is permitted to go at large with the knowledge and approval of the sheriff, and by his discretion and authority, and while so at large the prisoner escapes, the sheriff is himself criminally liable for the escape. *Watts v. Com.*, 99 Va. 872, 39 S. E. Rep. 706.

B. WHAT SHERIFF'S RETURN MUST SHOW.—A return by the sheriff that a debtor taken in execution had escaped without his consent or negligence without adding that he had made immediate pursuit of the prisoner or that the prisoner could not be retaken is not sufficient to protect the sheriff; to add the latter is as much a matter of defense which the sheriff is bound to show as that the escape was made without any negligence on his part. *Stone v. Wilson*, 10 Gratt. 529.

C. DEFENSES.

1. DEFENSES HELD INSUFFICIENT.

a. *No Jail or an Insufficient One.*—Neither the fact that there was no jail provided nor that the one provided was insufficient is a good excuse for the sheriff's allowing the prisoner to escape. *Stone v. Wilson*, 10 Gratt. 529; *Parsons v. Lee*, Jeff. 49.

b. *Recapture after Suit Brought.*—Recapture is not a good defense to an action of escape brought against the sheriff, if the recapture was made after the action was brought even though before issue was joined. *Parsons v. Lee*, Jeff. 49.

c. *Insolvency of Prisoner.*—It is no defense to an action of escape brought against the sheriff, that he, knowing of the insolvency of the prisoner, asked the plaintiff, who had a judgment against him, security for the prison fees and that they were refused. It was still his duty to hold him twenty days and for releasing him before that time he was liable in the action brought against him. *Webb v. Ellgood*, Jeff. 59.

2. DEFENSES HELD SUFFICIENT.

a. *Prisoner Released under Insolvent-Debtor Act.*—A sheriff, who has released a debtor, taken in custody upon a *ca. sa.*, by authority of a warrant of discharge from a magistrate under the act for the relief of insolvent debtors, is not liable to the judg-

ment creditor in an action of debt for an escape, although it is shown that the notice by the debtor to the creditor, of his intention to apply for the benefit of the act, was insufficient. *Price v. Holland*, 1 Pat. & H. 220.

b. *Prison-Bonds Bond Taken.*—Where a sheriff has taken a prison-bonds bond from a debtor he has no authority to authorize or prevent an escape and therefore he cannot be held liable for the debtor's escape. *Meredith v. Duval*, 1 Munf. 80; *Vanmeter v. Giles*, 1 Rob. 328; *Lyle v. Stephenson*, 6 Call 54; *McGuire v. Pierce*, 9 Gratt. 167. See further, on subject of prison-bonds bond, monographic note on "Official Bonds" appended to *Sangster v. Com.*, 17 Gratt. 124.

D. DAMAGES.—Although in an action against a sheriff and his surety upon the official bond of the sheriff the recovery can only be of such damages as the relator may have sustained by reason of the breach of the condition of the bond, yet these damages are not necessarily equal to the amount of the debt. *Perkins v. Giles*, 9 Leigh 397.

E. VERDICT OF JURY.

General Rule.—When an action of escape is brought against the sheriff it is not sufficient for the jury to bring in a general verdict of guilty but they must expressly find that such debtor escaped with the consent or through the negligence of such sheriff or officer; or that such prisoner might have been retaken and that the sheriff or his officers neglected to make immediate pursuit. *Johnson v. Macon*, 1 Wash. 5; *Johnston v. Macon*, 4 Call 370; *Vanmeter v. Giles*, 1 Rob. 328; *Hooe v. Tebbs*, 1 Munf. 501.

An Exception.—But see *Burley v. Griffith*, 8 Leigh 443, which holds that this rule applies only to debtors confined under execution. And that where an action on a case is brought by the owner of a slave committed to jail for safe-keeping under section 4 of the Act passed Feb. 25, 1829, against the sheriff for suffering the slave to escape, the verdict for the plaintiff need not have been expressly that the slave escaped with the consent or through the negligence of the defendant.

F. EVIDENCE.

1. BURDEN OF PROOF.—Where an action of escape is brought against the sheriff, the burden of proof is on the plaintiff to prove the escape; on the defendant to prove that there was no consent or negligence on his part and that due means were used to retake the prisoner. *Stone v. Wilson*, 10 Gratt. 529; *Johnston v. Macon*, 1 Wash. 4; *Johnson v. Macon*, 4 Call 367.

2. SUCCEEDING SHERIFF DISQUALIFIED.—In an action brought against the sheriff for escape, the succeeding sheriff is not a proper witness to prove that the prisoner was not turned over to him, as it goes to exonerate himself. *Johnston v. Macon*, 4 Call 367.

IV. RESPONSIBILITY OF JAILOR.

An indictment against a jailor, for permitting a prisoner in his custody to have an instrument in his room with which he might break jail and escape, and for failing carefully to examine at short intervals the condition of the jail, and what the prisoner was engaged at in said jail, in consequence of which the prisoner escaped, does not state an indictable offence, although if this were an indictment against the defendant as jailor, for negligently permitting a prisoner committed to his custody to escape, there could be no doubt but it would be good; as it is well settled that such an indictment can be sustained. *Com. v. Connell*, 8 Gratt. 587.

V. PENALTY IN APPELLATE COURT.

Escape While Appeal Pending.—Where a prisoner

convicted of felony obtains a writ of error and then escapes from jail and is still at large, the appellate court will order that the writ of error be dismissed by a certain day unless it shall be made to appear to the court before that day, that the plaintiff in error is in custody of the proper officer of the law. *State v. W. Va. v. Connors*, 20 W. Va. 1; *State of W. Va. v. Sites*, 20 W. Va. 18; *Sherman v. Com.*, 14 Gratt. 677; *Leftwich v. Com.*, 20 Gratt. 716. And see *Franklin v. Peers*, 95 Va. 608, 29 S. E. Rep. 331, approving *Sherman v. Com.* and *Leftwich v. Com.*, *supra*.

No Necessity for Notice.—The appellate court may make such order of dismissal upon motion based on affidavits without previous notice of the grounds of such motion to the plaintiff in error or to his counsel. *State v. Sites*, 20 W. Va. 18.

Part of Order Dismissed.—And on such escape under the circumstances mentioned above, the appellate court will discharge so much of the order awarding the writ of error as directed it to operate as a supersedeas to the judgment. *Sherman v. Com.*, 14 Gratt. 677.

Notice of Escape Brought to Court Too Late.—But see *Leftwich v. Com.*, 20 Gratt. 716, which though approving the general rule says that after it has heard and reversed a case without having been informed of the escape of the prisoner, the court will not set the reversal aside.

VI. REMEDIES.

A. IN GENERAL.

Right of Election.—When there has been either a tortious escape or a voluntary discharge of a debtor by the sheriff, the creditor has the right of election either to procure an escape warrant from a justice of the peace for the purpose of retaking the fugitive, or to bring an action of debt against the sheriff for the escape. *Fawkes v. Davison*, 8 Leigh 554; *Carthrae v. Clarke*, 5 Leigh 268; *Windrum v. Parker*, 3 Leigh 361.

At Common Law.—And see *Stuart v. Hamilton*, 8 Leigh 508, which says that upon the escape of a debtor, the creditor had at common law, and independent of the statute of Will. 8, a right to proceed against the sheriff, or to retake the defendant or to bring an action of debt or *scire facias* upon the judgment, and thereupon have any execution whatever.

B. EFFECT OF VOLUNTARY RETURN ON REMEDIES.—When the debtor voluntarily returns without any escape warrants being sued out, there is no necessity for the debtor to make his election, as, by the voluntary return, the debtor is considered as held under original process, and the creditor can still hold him or bring an action of escape against the sheriff. There is no reason for presuming that the creditor elected to pursue his remedy against the sheriff and not to hold his right to keep the debtor in prison because he did not take any action to imprison the debtor, as the debtor already having voluntarily returned to prison there is no other step which the creditor could take. *Carthrae v. Clarke*, 5 Leigh 268.

C. ELEGIT AFTER DEBTOR'S ESCAPE.—If a debtor charged in execution escape, the creditor may sue out a *scire facias* to have a new execution; and after judgment on such *scire facias*, an elegit may issue to have delivered to the creditor a moiety of all the lands whereof the debtor was seized at the date of the original judgment or at any time afterwards. *Stuart, etc., v. Hamilton*, 8 Leigh 508.

D. MOTION AGAINST SHERIFF.—Under the Act, 1 Rev. Code of 1819, ch. 134, § 48, p. 542, a motion may be maintained against a sheriff for an escape. 1st. Where the return on the execution states that

the officer has taken the body of the debtor and has it ready to satisfy the execution, and the plaintiff can show the escape aliunde. 2d. When the return shows such a state of facts as would entitle the plaintiff to a verdict in an action of debt for an escape. *Stone v. Willson*, 10 Gratt. 530.

E. NECESSITY FOR SEPARATE SUIT AGAINST SHERIFF.—A judgment cannot be entered against the defendant and sheriff, upon his return that the writ was executed, and the defendant escaped; the proper remedy against the sheriff for an escape, being by a separate suit. *Waugh v. Carter*, 2 Munf. 333.

334 *Wallace and Others v. Baker.

Saturday, June 23d, 1811.

1. **Statute—Reformation of Court Practice—Application.**—The 1st section of the act "to reform the practice of the district, county, and corporation courts," which took effect the 1st of April, 1805, applies to suits instituted after that day, though upon writings of a previous date.
2. **Same—Same—Interest.**—Under that act, the clerk is to issue execution for interest, though not mentioned in the writing, and not demanded by the declaration.
3. **Appearance Bail—Judgment.**—When the appearance bail having been admitted to defend the suit, afterwards waives his plea, judgment is to be entered against the principal, as well as the bail.

This was an action of debt, in the county court of Hardy, on a joint single bill, dated the 27th of February, 1802, from Alexander Wallace, George Harness (3d) and Jacob Fisher, to Evan Payn, (who assigned it to James Baker), for the sum of one hundred pounds, payable on or before the 15th day of September, 1805; saying nothing of interest. The declaration was in the usual form, for the debt, and fifty dollars damages, without mentioning interest. The writ was issued in May, 1806, and executed on Wallace and Harness; Fisher not being found. A common order was entered and confirmed against them and George Harness, jun. their appearance bail, for the sum of one hundred pounds, with legal interest from the 15th day of September, 1805. In August, 1806, on the motion of the bail, this office judgment was set aside, and he pleaded payment. (1) In the June preceding, an alias capias was issued against Fisher, and returned to August term executed. At September and October rules, a common order was entered and con-

***Judgment—Interest.**—In an action on a writing for the payment of money, no objection will lie to the judgment on the ground that it includes interest though none is demanded in the declaration; since, if the judgment is rightly entered, the clerk, under Act of 1804, ch. 8, will include interest also in the execution, which will produce the same result. *Metcalfe v. Battaille*, Gilm. 193, citing the principal case.

See generally, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 426; monographic note on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 541.

***Appearance Bail—Judgment.**—Where the defendant to a suit has not pleaded, but his appearance bail has a judgment stating, "that the attorney for the defendant withdraws his plea, etc., and therefore that the plaintiff recover against the defendant," must be understood as a judgment against the bail only (without including the principal), and is therefore erroneous. *Lee v. Carter*, 3 Munf. 131, citing principal case in note.

If an office judgment be set aside and the suit defended by the appearance bail, and he afterwards waives his plea, judgment is to be entered against the defendant as well as the bail. *Vanmeter v. Fulkmore*, 1 Hen. & M. 329.

See further, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 426.

(1) See Rev. Code, v. 1, c. 67, s. 20, p. 67, and c. 66, s. 26, p. 78.

firmed against him. In November, he gave special bail, and pleaded payment, but afterwards, together with the bail, waived his plea, and acknowledged the plaintiff's action for the debt, with interest and costs. Judgment was accordingly entered against all the defendants, and Adam Harness, jun. the bail; which judgment was affirmed by the district court; whereupon the defendants again appealed.

Wirt, for the appellants. Interest was improperly allowed on the debt; not being demanded in the declaration. (a) The confession of judgment could not release
335 *this error, because the bail for appearance could not bind his principals by his confession, further than the amount demanded by the plaintiff; and Fisher's separate confession could not authorize a judgment at all, the bond being joint.

Munford, for the appellee, relied upon the 1st section of the act "to reform the practice of the district, county, and corporation courts," passed January 29th, 1805, (b) as authorizing the judgment for interest, though not demanded. The process being served at different times, it was necessary to enter separate office judgments, though the bond was joint; according to the practice recognised in *Moss v. Moss's Administrator*, 4 H. & M. 293, and Fisher's confession was binding on himself, if not on his co-obligors.

Wirt, in reply. The act of 1805 could not apply to this case; the date of the bond being in 1802.

If Fisher's confession authorized a judgment against him, it did not against the other defendants.

Monday, September 23d. JUDGE BROOKE pronounced the following opinion of the court:

"The bail having waived his plea, and confessed the judgment, the court considers the office judgment as having the same effect against the other defendants as if it had never been suspended; and, though it would have been irregular, according to the decision of *Brooke v. Gordon* in this court, it being for a greater amount than the demand in the declaration, yet, under the operation of the act of 1805, to regulate the practice of the district, county, and corporation courts, (by the first section of which act the clerk is authorized to issue an execution for interest as well as principal,) no injury is done the defendants; because if the office judgment in this case had been for no more than the principal sum demanded *in the declaration, and had not been set aside, the clerk would have included the interest in the execution. The judgment, therefore, is affirmed."

Norris v. Tomlin and Gray.*

Monday, June 24th, 1811.

Appeals—Reversed Judgment of County Court.—When, upon the reversal of a county court judg-

(a) *Hubbard v. Blow and Barksdale*, 1 Wash. 70; *Brooke v. Gordon*, 2 Call. 212.
(b) *Rev. Code*, v. 2, p. 82.

*In *Janey v. Blake*, 8 Leigh 91, it is said that the case of *Norris v. Tomlin*, 2 Munf. 335, is badly reported, and is no authority for the doctrine laid down therein.

†**Appeals.**—See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 263.

ment, a cause has been retained in the district court by consent; if, at a subsequent term, the order for retaining the cause be set aside, an appeal cannot then be taken, to the court of appeals, even by consent of parties, but the cause should be sent back to the county court for farther proceedings.

In this case a judgment of the county court of Fauquier, in an action of ejectment, was reversed by the district court of Haymarket. The parties consented that the cause should be retained in the district court for a new trial to be had therein; and, after various proceedings in that court, again consented that the former order for retaining the suit for trial be set aside; and Norris prayed an appeal to the court of appeals, which, by the like consent, was granted.

This court ("deeming it unnecessary to say any thing in relation to the judgment of the district court, because it did not appear that there was any appeal from that judgment") was of opinion that, when the order retaining the cause in that court was set aside, it ought to have been sent back to the county court for farther proceedings to be had therein; and therefore dismissed the appeal, as having been improvidently allowed.

Buckner and Wife v. Blair, Surviving Executor of Mitchell.

Wednesday, June 26th, 1811.

1. **Debt—By Surviving Executor—Declaration—Necessary Allegations.**—In an action by a surviving executor for a debt due to the testator in his lifetime, if the declaration charge that the debt was not paid to the plaintiff, without charging, also, that it was not paid to the testator, nor to either of the co-executors, the defect is fatal, and not cured by verdict. (1)
2. **Court of Appeals—Practice—Revivor.**—Process of revivor is not necessary in the court of appeals, if the appellee died between verdict and judgment.

The appellee, as surviving executor of Henry Mitchell, obtained a judgment in the district court of Fredericksburgh,

Debt—By Surviving Executor—Declaration—Necessary Allegations.—A long train of Virginia Decisions has settled beyond controversy that in this state and in West Virginia, in an action for the recovery of a debt whether it be assumpsit or debt, the plaintiff in his declaration must not only allege the nonpayment of his debt but this allegation of nonpayment must be general and not confined to the time when it became due, and must therefore be extended to every person who had a right to receive the payment either at the time it fell due or at any subsequent time. Thus if the action is brought by a surviving executor for a debt due from the testator, the declaration must aver nonpayment to the testator or to the deceased executor, or to the surviving executor. *Douglas v. Central Land Co.*, 12 W. Va. 511, citing the principal case.

So, in *Nicholson v. Dixon*, 5 Munf. 198, the court, basing its decision particularly on the authority of the principal case, held, that, in debt on a bond, in behalf of the survivor of two joint assignees a declaration, charging that the defendant has not paid the debt to the obligee, or to the plaintiff, without averring, also, that he did not pay it to the other assignee in his lifetime, is bad on general demurrer. To the same effect, the principal case is cited in *Mitchell v. Thompson*, 2 Pat. & H. 429.

As to the necessary allegations of the declaration in an action of debt on an assigned bond, see *foot-note* to *Braxton v. Lipscomb*, 2 Munf. 282.

To the point that, in an action to recover a debt, whether debt or assumpsit, nonpayment of the debt demanded must be averred, the principal case is also cited in *Fisher v. City of Charleston*, 17 W. Va. 615; *Reynolds v. Hurst*, 18 W. Va. 651; *foot-note* to *Strange v. Floyd*, 9 Gratt. 474, quoting from *Reynolds v. Hurst*, 18 W. Va. 651. See also, monographic note on "Debt. The Action of" appended to *Davis v. Mead*, 13 Gratt. 118.

(1) Note. See *Braxton's Administratrix v. Lipscomb*, ante.

337 *against the appellants, for a debt charged as due to the testator in his lifetime.

"This Court (not deciding upon certain questions made by bills of exceptions) was of opinion that the declaration was defective in this, that it was not averred that the debt in the declaration mentioned was not paid to the testator of the plaintiff, or to either of his co-executors, but only that the same was not paid to the plaintiff." The judgment was therefore reversed, and it was considered that the appellee take nothing, &c.

Blair being dead, a question was raised whether there should not be process of revivor; but, as he died between the verdict and judgment, and no alteration in the parties had taken place since the appeal, the court considered process of revivor unnecessary.

Drummond's Administrators v. Richards.

Tuesday, June 25th, 1811.

Covenant*—Proviso in Mortgage Deed.—An action of covenant does not lie upon the proviso in a mortgage deed that upon payment of a certain sum of money the deed shall be void; there being no express covenant for payment of the money.

The appellants instituted an action of covenant, in the county court of Spottsylvania, against William S. Stone and Thomas Richards. They declared upon the proviso in a mortgage deed, that "if the defendants should pay certain sums of money, at certain times therein mentioned, then the said deed should be void," &c. and also on an express covenant, that the mortgagee might re-enter and quietly enjoy the premises in case of failure of payment. The breach laid was non-payment of the money, and not permitting the re-entry and quiet enjoyment.

At June term, 1805, office judgment was confirmed, and writ of inquiry awarded. At November term the pleas of "conditions performed," and "conditions not broken," were filed. The jury found a verdict for the defendant, William S. Stone; he being

338 a certificated bankrupt. *They found for the plaintiff, against the other defendant, part of the sums of money specified in the declaration; that part was not yet due, and another part had been paid; and, as to the other covenants, they found for the defendant. Upon this verdict judgment was entered against the defendant, for 850 dollars, the principal sum due, with interest from the 1st day of December, 1804, till payment, and costs.

A bill of exceptions shows that, before the defendants filed the two pleas, they offered, at August court, 1805, eight formal pleas, covering, in various shapes, the same matter that the two pleas contained; which eight pleas the court rejected. There was an appeal to the district court, where the judgment was reversed, and the suit dismissed with costs. The plaintiffs then appealed to this court.

Botts, for the appellants, insisted that the action of covenant might well be maintained

***Covenant—Trust Deeds.**—A demurrer lies to an action of covenant on trust deed executed merely as collateral security for payment of promissory note. *Wolf v. Violet*, 78 Va. 57, 62, citing principal case.

See further, monographic *note* on "Covenant. The Action of" appended to *Lee v. Cooke*, 1 Wash. 306. The principal case is also cited in *Moss v. Green*, 10 Leigh 274.

on the proviso, even standing alone; but certainly, when connected with other parts of the deed showing an implied covenant to pay; that no particular form of words is necessary to constitute a covenant: so debt lies on a instrument acknowledging the defendant indebted to the plaintiff, without any express engagement to pay. (a)

Williams, contra, maintained that no breach of covenant can be assigned upon a proviso; there being no express covenant that the money shall be paid; and relied on. *Suffield v. Baskerville*, 2 Mod. 36, and *Briscoe v. King*, Cro. Jac. 281.

Wednesday, September 25th. JUDGE ROANE reported the opinion of the court.

"This court (not deciding whether the judgment of the county court was erroneous in refusing leave to the appellee's counsel to file the eight pleas, mentioned in

339 *the bill of exceptions, on setting aside the office judgment) is of opinion that the judgment of the district court, reversing that of the county court, and rendering judgment for the appellee, is correct; so much of the declaration in the cause as charges the non-payment of the several sums of money therein mentioned being insufficient, in point of law to sustain an action; and the issue joined, on the other part thereof, being found in the appellee's favor. The judgment of the district court is, therefore, on this ground, affirmed."

Winchester and Others v. the President and Directors of the Bank of Alexandria.

Wednesday, June 26th, 1811.

1. **Judgment by Default**—Writ Unreturned.—A judgment by default cannot be entered, when the writ has not been returned.

2. **Statute—Establishment of Bank—Construction.**—The true construction of the 30th section of the act "for establishing a bank in the town of Alexandria" is, that the power of granting appeals, writs of error, or supersedeas is taken away from the appellate court, in relation only to judgments rendered pursuant to that act, and upon writs of *capias ad respondendum* executed according to the directions thereof.

See, also, as to the right of appeal to the supreme court of the United States, from judgments of the circuit court of the district of Columbia, in favor of the bank of Alexandria, 4 Cranch, 384-398. *Young v. The Bank of Alexandria*.

Upon a writ of supersedeas awarded by a judge of this court to an order of the Fredericksburgh district court.

The plaintiffs in error presented a petition to the district court, praying a writ of supersedeas to a judgment of the county court of Spottsylvania, recovered against them by the president and directors of the bank of Alexandria, as assignees of Ricketts & Newton. The judgment was obtained on the 8th of April, 1807, against the drawers of a note, expressed on the face thereof to be negotiable at the said bank; the declaration being filed and a jury empanelled, without any appearance, or opposition on the part of the defendants; and the clerk certified that the writ was not returned by the sheriff at the time the judgment was rendered. The district court overruled the petition, being of

(a) 2 Bac. Abr. (Gwill. ed.) 65. tit. Covenant. letter (B.)

***Judgment by Default.**—See monographic *note* on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

opinion that, under the act incorporating the bank of Alexandria, an appeal, writ
340 *of error, or supersedeas, will not lie, in any case, where a suit is brought by the said bank against the drawer of a note expressed to be negotiable at the said bank.

Williams, for the plaintiffs in error.

Botts, for the defendants.

Saturday, October 26th. JUDGE ROANE pronounced the following opinion of this court:

"Without considering, or deciding upon, the other questions made in this cause, the court is of opinion that, under the true construction of the twentieth section of the act for establishing a bank in the town of Alexandria, (a) the power of granting appeals, writs of error, or supersedeas, is taken away from the appellate court in relation only to judgments rendered pursuant to the act aforesaid, and upon writs of *capias ad respondendum* executed according to the directions of the act; and, as it does not appear of record, in this case, either that any writ issued, or was served upon the plaintiffs, or either of them, prior to the rendition of the judgment in question, the order of the district court is erroneous, because, as is aforesaid, the correcting power of the district court was not prohibited by the act aforesaid, in relation to the case presented to that court by the petition for the supersedeas; therefore it is considered that the order aforesaid of the district court be reversed and annulled, with costs, and this court, proceeding to make such order as the said district court ought to have made, doth order that a writ of supersedeas issue to the judgment aforesaid of the said county court, upon the plaintiff's entering into bond with sufficient security in such penalty as the superior court of law of the county of Spotsylvania shall direct."

341 *Dunton v. Robins.

Thursday, Sept. 19th, 1811.

Executors—Appeal—By Security.—Rule as to bond and security for prosecuting appeals, where the decree is partly against an executor, as such, and partly against him in his own right. See *Sadler's Executors, &c. v. Green*, 1 H. & M. 26.

The president reported the opinion of the court that, the decree being, in part,

(a) Sessions acts of 1792, p. 105.

Executors—Appeal—When Security Required.—The question as to when an executor, appealing from a judgment or decree, is required to give security for the prosecution of the appeal, has been discussed at some length in notes in this series of reports and the rule deduced that, where the object of the appeal is to assert the rights or protect the interests of the estate which the executor represents, no bond or security is required; but, on the other hand, where the judgment or decree appealed from is against the executor personally, and does not affect in any way the estate of the decedent, he should be required to give bond and security as any other individual, before he can appeal. No appeal bond is required in the first case above mentioned because the official bond, already executed, will bind the personal representative and his sureties to pay the amount of the judgment or decree in case of affirmance, provided there be assets of the estate; and that is all the appellee has a right to demand. See *foot-note* to *McCauley v. Griffin*, 4 Gratt. 9; *foot-note* to *Wilson v. Wilson*, 1 Hen. & M. 15; *foot-note* to *Sadler v. Green*, 1 Hen. & M. 26; *monographic note* on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

On this subject, the principal case is cited in *Shearman v. Christian*, 1 Rand. 394; *State v. Johnson*, 28 W. Va. 65, 79.

against the appellant as an executor, and, in part, against him in his own right, he must give bond and security for prosecuting the appeal, in a penalty equal to double the amount of such part of the decree as was against him in his own right.

Alexander v. Deneale.

Thursday, Sept. 19th, 1811.

1. Sale of Personality—Retention of Possession by Vendor—Fraud Per Se.—It seems now settled, that an absolute deed of slaves, or other personal property, the possession of which remains with the vendor, is fraudulent per se, as to creditors. See *Edwards v. Harben*, 2 T. R. 587; *Hamilton v. Russel*, 1 Cranch. 315; *Roberts on Fraudulent Conveyances*, 552-566, and 2 H. & M. 302, 303. JUDGE ROANE's opinion.

William Henry Washington and Philip Alexander instituted an action of trespass in the Haymarket district court against William Deneale, as sheriff of Fairfax county, for taking certain slaves claimed by them as their property. The declaration was in the usual form; plea not guilty, and issue. The suit afterwards abated, as to the plaintiff Washington, by his death.

A bill of exceptions disclosed the following case: George Minor obtained a judgment against John Luke, and informed him of it, in pursuance of his previous request. Luke then executed to Washington and Alexander a deed, which was duly recorded, conveying absolutely to them all his personal property, (comprehending the negroes in question,) in consideration of the sum of three thousand dollars, according to the instrument itself; but, according to other evidence, in order to secure them, they being his creditors to a considerable amount. Part of the property was delivered at the time, but immediately restored to the vendor, and remained in his possession. Minor afterwards sued out execution on his

342 *judgment, and Deneale, as sheriff, seized and sold the negroes as the property of Luke, though the sale was forbidden, and the recorded deed produced by Washington. The defendant moved the court to instruct the jury that the deed was fraudulent. The court stated that, "as the law now stands, an absolute conveyance of personal estate, where the party making it retains possession, is void, as to creditors, even without other evidence of fraud; though this appears to be carrying the matter too far, and, perhaps, agreeably to ancient determinations, it would have been better to have considered it as evidence of fraud, connected with other circumstances." To this opinion the plaintiff excepted. Ver-

***Sale of Personality—Retention of Possession by Vendor—Fraud Per Se.**—The proposition laid down in the principal case and in many other early Virginia cases—that an absolute sale of personality, the possession of which remains with the vendor, is fraudulent per se—is repudiated in *Davis v. Turner*, 4 Gratt. 422. See *foot-note* to *Davis v. Turner*, 4 Gratt. 422, where the subject is discussed, the cases in point collected, and where it is shown that *Davis v. Turner* is considered binding authority by decision subsequent thereto.

The principal case was cited on the point in *Hardaway v. Manson*, 2 Munf. 238; *Hill v. Harvey*, 3 Munf. 525; *Land v. Jeffries*, 5 Rand. 252, 258; *Land v. Jeffries*, 5 Rand. 606, 608; *Glasscock v. Batton*, 6 Rand. 88; *Claytor v. Anthony*, 6 Rand. 304; *Davis v. Turner*, 4 Gratt. 447, 456, 459; *Bindley v. Martin*, 28 W. Va. 792; *Howard v. Prince*, 12 Fed. Cas. 661.

dict and judgment for the defendant, and appeal taken by the plaintiff.

Peyton Randolph, for the appellant.

Edmund I. Lee and Botts, for the appellee.

Saturday, September 28th. JUDGE ROANE pronounced the opinion of this court.

"The court, being of opinion that the instruction of the judge of the district court conforms, in substance, to the settled rule that an absolute deed of slaves, or other personal property, the possession of which remains with the vendor, is fraudulent, per se, as to creditors, approves of that instruction, and affirms the judgment."

Wells's Heirs v. Winfree and Others.

Decided Tuesday, October 8th, 1811.

Guardian Ad Litem*—Necessity of Accepting Appointment.—A guardian ad litem, appointed to prosecute an appeal on an infant's behalf, is not obliged to accept the appointment. A reasonable time ought, therefore, to be given him to consider whether he will accept, and to prepare for trial.

This suit having abated by the death of the appellant, a scire facias to revive was awarded, and returned executed on two infant children. At October term, 1810, on motion of Mr. Hay, counsel for the 343 appellees, a guardian **ad litem* was assigned them by the court, and notice was served upon the person appointed. On Saturday, the 16th of November, (during the same term,) Mr. Hay moved to take up the cause, exhibiting proof of service of the notice; and no counsel appearing for the infants. But the court (consisting of Tucker, Roane and Fleming, Judges) unanimously determined that time should be given to the person appointed, until the next term, to consider whether he would act as guardian, and to prepare for trial; observing that stronger reasons existed, in this case, than in that of a scire facias to revive against an executor or administrator. (a)

In March, 1811, Mr. Hay moved to dismiss the appeal for want of prosecution, no counsel appearing for the appellants. He contended that where infants are plaintiffs, they occupy the same ground as adults; and quoted 2 P. Wms. 519. Lord Brooke v. Lord and Lady Hertford; and 3 Atk. 626, Gregory v. Molesworth.

JUDGE BROOKE observed that, in this case, the infants are not plaintiffs, but defendants, to the scire facias.

JUDGE TUCKER was of the same opinion, observing that the person nominated as guardian ad litem could not be compelled to take upon him the office; (b) and that, therefore, the infants must be protected as involuntary parties brought into court by process.

The court overruled the motion for an absolute dismissal; but made an order "that the appeal be dismissed, unless good cause be shown to the contrary, on or before the 18th day of May next, satisfactory proof being required that a copy of such order shall have been served on the appellants, at least twenty days previous to that time.

*See monographic note on "Infants" appended to Caperton v. Gregory, 11 Gratt. 505.

(a) See Rev. Code, v. 2, c. 101, s. 1, p. 127, and a Rule of Practice, 3 H. & M. 270.

(b) Fox v. Cosby, 2 Call, 1.

Friday, September 20th. The cause 344 was again called, *when Wickham appeared as counsel for the appellants, and Hay, for the appellees. The points made in argument, and circumstances appearing in the record, are not worth reporting; because the court affirmed the decree, without assigning any particular reason; and, therefore, (considering the nature of the case, the claim of the appellants being subject to objections either of which was sufficient to overthrow it,) no certain conclusions can be drawn concerning the grounds on which the decision was founded. (1)

Brooks v. Scott's Executor.

Friday, April 8th, 1811.

General Indebitatus Assumpsit*—Evidence—Special Agreement.—In an action of general indebitatus assumpsit, for services rendered as an overseer, or of quantum meruit for like services, the plaintiff cannot give in evidence proof that the defendant had employed him as an overseer, and was to pay him a certain quantity of tobacco. In such case, he should declare upon the special agreement.

In an action of assumpsit by Hezekiah Brooks against James Scott, in the county court of Prince Edward, the declaration contained four counts, viz. 1st. A general indebitatus assumpsit for goods sold and delivered; 2d. A like count for money lent; 3d. A like count for services done and performed in the capacity of an overseer; and, 4th. A common quantum meruit for like services. At the trial, on the general issue, the plaintiff offered evidence to prove that the defendant had acknowledged he had employed the plaintiff as an overseer for the term of three years, and was to pay him the quantity of two thousand pounds of tobacco per year; to which testimony the defendant objected; but the objection was overruled by the court, and the evidence permitted to go to the jury; to which opinion of the court a bill of exceptions was filed. Verdict and judgment for the plaintiff. Upon an appeal, the district court was of opinion that the county court "acted improperly in admitting evidence to

345 *go to the jury, of a special agreement to support the general charges laid in the declaration." The judgment was therefore reversed with costs; the suit retained for trial, and leave given to amend the declaration; whereupon the plaintiff obtained a writ of supersedeas from a judge of this court.

Samuel Taylor and Munford, for the plaintiff.

(1) Note. This was often the case, with respect to the court's decisions during the present year; the crowded state of the docket having induced the judges, for the sake of expedition, to refrain from specifying their reasons in many instances, especially in cases involving points already settled.—Note in Original Edition.

***Indebitatus Assumpsit**—When It Lies on Special Contract.—Where the terms of a special contract for work and labor, not under seal, have been performed, the stipulated compensation, if payable in money, may be recovered in an action of general *indebitatus assumpsit*. Brown v. Ralston, 9 Leigh 532, 545, 548, citing the principal case.

See generally, monographic note on "Assumpsit" appended to Kennard v. Jones, 9 Gratt. 183.

Assumpsit—Money Paid.—In an action of assumpsit, the count for money paid can only be supported, by proof of an actual payment of money or its equivalent. Butterworth v. Ellis, 6 Leigh 114, citing the principal case.

Wickham, for the defendant.

Monday, April 15th. The judges pronounced their opinions.

JUDGE CABELL. (After stating the case.) The only question now to be decided is, whether the evidence was properly admitted, under either count in the declaration. The first two counts, being for goods sold and money lent, are so totally variant from the evidence as to be thrown entirely out of view. Nor do I think the evidence admissible under the 3d count. It is true that, with respect to debts for work and labour, or other personal services, the rule is, that, however special the agreement was, yet if it was not under seal, and the terms of it have been performed on the plaintiff's part, and the remuneration was to be in money, the party may declare either specially on the original executory agreement, or in indebitatus assumpsit, on the express promise to remunerate, (if there was one,) or on the promise which the law implies on the execution of the agreement. But this rule, so far as relates to the indebitatus assumpsit count, has never been carried farther than to those cases where the remuneration contemplated by the parties was to be in money. When the remuneration was not to be in money, but was to be in any other kind of personal property, or in personal services, or in the doing any collateral act, (as the delivery
346 of a bond or the like,) there, *the general indebitatus assumpsit count is not sufficient, but the declaration must be special. This principle applies, I conceive, with full force to the case now before the court, (where the remuneration was to be in tobacco,) and proves the error of the county court.

Every reason for excluding the testimony under the third count, is at least equally applicable to the fourth, or quantum meruit count; for it cannot be contended that the latter count admits a greater range of testimony than the former. In fact, they are both emphatically termed money counts, "being founded on express or implied promises to pay money in consideration of a precedent debt." To extend them farther would be to demolish the distinction, wisely adopted, between general and special counts, and, with it, all those barriers established for the safety of the defendant, by apprizing him of the real nature of the plaintiff's claim, and by enabling him to plead a former recovery in bar of a subsequent action.

The cases cited by the appellee's counsel are not at all applicable. In the case of *M'Williams v. Willis*, (a) the question was whether a written agreement not under seal could be given in evidence, under a declaration which set forth the same agreement truly and substantially, but without stating it to be in writing; and the court very properly decided that it might; because a parol agreement is not changed in its nature by being reduced to writing. It is in fact, and in law, the same agreement. The case of *Wroe v. Washington* and others (b) was a special action on the

case; and the principle in such actions being that the allegata and the probata must correspond, the question was, whether the case made out in evidence corresponded with that specially stated in the declaration. Upon the view of the subject which I have taken, I am clearly of opinion that the judgment of the county court was erroneous; and, therefore, that the judgment of the district court, reversing that of the county court, ought to be affirmed.

347 ***JUDGE ROANE** was of the same opinion.

JUDGE FLEMING. The only question in this case is, whether the evidence excepted to by the defendant was properly admitted by the county court to go to the jury, on the trial of the issue; and it appears to me that it was not.

The use of pleading, as laid down in the books, is, on the one hand, to set forth and state, with precision, the fact or facts which in law show the justice of the plaintiff's demand; and on the other hand, the discharge or defence made by the defendant in bar of the plaintiff's action; and, on the trial, the evidence ought to apply directly to the matter in issue between the parties, to prevent surprise on either side.

The declaration, then, ought to state such a case as, if supported by legal evidence, will entitle the plaintiff to recover. It ought, also, to be stated in such a manner as to afford the defendant a fair opportunity of making a full and complete defence; and, lastly, so that a recovery in the suit may be pleaded in bar to any future action for the same thing.

Let us apply these rules or principles to the case before us. The material count in the declaration states that "the defendant was indebted to the plaintiff in the sum of 164l. 14s. for work before that time done and performed, by the plaintiff in the capacity of an overseer, for the defendant, at his request; and the defendant, being so indebted, in consideration thereof, assumed," &c.

The plea was non assumpsit, and issue thereon. The evidence excepted to was, that the defendant had acknowledged, before a witness, that he had employed the plaintiff as an overseer for three years; and was to pay him 2,000lbs. of tobacco per year. The evidence then proves a special agreement to pay a quantity of
348 tobacco, *for certain services, which was allowed to support a general charge of a sum of money, said to be due for services performed as an overseer, which, in my conception, was irrelevant to the issue, and tended to take the defendant by surprise. Every plaintiff is presumed to understand his own case, and to know what evidence he can bring forward in support of it; which ought to apply directly to the charge in the declaration, and not by inference or implication.

Mr. Taylor, in his argument, cited and relied on two cases, *M'Williams v. Willis*, 1 Wash. 199, and *Story v. Atkins*, 2 Stra. 719, but neither of them, in my conception, applies to the case before us. In the first, the declaration charged the defendant on a

(a) 1 Wash. 199.

(b) 1 Wash. 357, 363.

colloquium, and agreement for 30l. per annum for the term of seven years, for a race field, for the use of the Jockey Club; with a second count, on an *indebitatus assumpsit*, for the use and occupation of a race field, and an *assumpsit* of the defendant to pay, &c. and general issue. At the trial, the plaintiff was allowed to give in evidence a written agreement, corresponding with that stated in the declaration, except that the defendant is styled in the agreement given in evidence, treasurer of the Jockey Club, which description is omitted in the declaration. But, had the agreement given in evidence been for a quantity of tobacco, instead of money, to be paid for the use of the race field, it would have been inadmissible, as being inapplicable to the issue. And, in the case cited from *Strange*, in an action of *assumpsit*, for money lent, a promissory note was allowed to be given in evidence to prove the charge laid in the declaration; but, if the note had been for tobacco, or any other kind of merchandise, the evidence could not have been allowed; because the charge being for money due, the evidence of a promise to pay a specific commodity would not have been pertinent to the issue.

349 *In the case before us, the plaintiff, in order to avail himself of the evidence excepted to, should have brought a special action on the case, stating the agreement, his performance of the services, for which the law would have implied an *assumpsit*, his demand for the tobacco, and the defendant's refusal to pay: with an averment that the tobacco contracted for was worth so much money, and laid his damages accordingly; and then the parties would have gone to trial on fair and equal ground; and no surprise on either side. But, as the case appears, the judgment of the county court cannot be sustained; and was properly reversed by the judgment of the district court, which is affirmed by the unanimous opinion of this court.

Thomas Scott & Co. v. Dunlop, Pollok & Co.

Thursday, March 21st, 1811.

1. *Partnership—Suit against*—Name of Partners Omitted in Writ—Judgment.*—In a suit against a mercantile company, if the names of the partners be omitted in the writ and declaration, and the writ be served on a person not named in either, a judgment against the company, for that person's failing to appear, cannot be sustained.
2. *Same—Same—Same—Same.*—*Quære.* In such case, whether any judgment by default could be sustained?

This was an action of debt in the county court of Chesterfield, brought by Dunlop, Pollok & Co. against Thomas Scott & Co. upon a penal bill, alleged in the declaration to have been sealed and delivered "by the said defendants;" without specifying their names.

The writ was against "Thomas Scott & Co. or either of the partners, if they be found," &c. and was executed on Archibald M'Rae; the sheriff returning that Thomas Scott was not found. M'Rae gave

bail for his appearance, but failing to appear, an office judgment was entered and confirmed, "against the said defendants," for the debt in the declaration mentioned. This judgment was affirmed upon a writ of *supersedeas* awarded by the district court of Richmond; and thereupon the plaintiffs in error appealed to this court.

Hay, for the appellants. 1. The judgment is erroneous because it does not appear from the record that *Archibald M'Rae was a member of the concern of Scott & Co., or ever sealed and delivered the bond; or that there was any connexion between him and the defendants.

It may be said that a judgment by default admits the facts; but a judgment by default can only be considered as an admission of that which is stated in the declaration. In this case, the declaration only charges that Thomas Scott & Co. signed and sealed the penal bill; but not that Archibald M'Rae signed it, or was a partner. Neither does a defendant admit, by default, every thing necessary to maintain the plaintiff's action; the gist of the action must be set forth in the declaration. But, even if M'Rae was bound by his default, the other defendants, upon whom no process was served, were not.

2. If M'Rae was a partner, and had been so averred in the declaration, he was not legally bound by this bill penal, which has only one seal, and is signed "Thomas Scott & Co." (1)

One partner cannot bind the company by a bond signed by himself only, unless it be done with the assent of the rest, and on their behalf. (a) If the declaration had said that M'Rae signed for himself and the other partners, the judgment could only have been against M'Rae.

3. Service of the writ upon a partner might have warranted a judgment against that partner, but not against the company. (b) The rule in England is that, where the process is against two, on a joint cause of action, and one only appears, the other must be outlawed before there can be any further proceedings. (c) It is, indeed, preposterous that judgment should be rendered against a man who had no opportunity to defend himself; such a position is contrary to the first principles of justice.

4. A judgment on behalf of, or against, persons not named, is erroneous; except in the case of corporate bodies, who may sue and be sued by their corporate names; but

(1) Note. The bill penal set forth in the record is worded as follows: "Know all men, &c. that we Thomas Scott & Co. of Powhatan county, do promise to pay or cause to be paid unto Dunlop, Pollok & Co. of Chesterfield county and town of Manchester, the just and full sum, &c. on demand, for value received. We bind ourselves, our heirs, &c. in the penal sum, &c. Witness our hands and seals this 1st day of June, 1799. Thomas Scott & Co." (seal.)—Note in Original Edition.

(a) *Bail v. Dunsterville*, 4 T. R. 318; *Harrison v. Jackson*, 7 T. R. 207; *Shelton v. Pollock & Co.*, 1 H. & M. 423.

(b) *Brown v. Belsches*, 1 Wash. 9; *Moss and others v. Moss's Administrator*, 4 H. & M. 293.

(c) *Edwards v. Carter and others*, 1 Str. 473; *Symonds v. Parmenter and Barrow*, 1 Wils. 78; *S. C.* 1 W. Bl. Rep. 31; *Sheppard v. Baillie*, 6 T. R. 327; *Saunderson v. Hudson*, 3 East, 144.

*See monographic notes on "Partnership" appended to *Scott v. Trent*, 1 Wash. 77.

individuals cannot. (a) Dunlop, Pollok & Co. the plaintiffs, should have shown who were the partners of their company; and, as to the defendants, judgment could only be against such of them as were named; and after process served upon them.

Call, contra. The cases of Stott & Donaldson v. Alexander & Co., 1 Wash. 331; Keel & Roberts v. Herbert's Executors, ib. 138, and Taylor & Co. v. M'Clean, 3 Call, 557, are examples of suits brought for, or against, mercantile companies without naming the partners. The uniform custom of this country (and such custom is greatly regarded in this court) (b) sanctions the practice. It was introduced and warranted by the situation of this country before the revolution, when business was generally carried on by Scotch factors, representing great numbers of persons residing in Great Britain. In such a state of affairs, the names of the partners being often unknown, the safe and fair way was to sue the company by the name of the firm. And in this there was no inconvenience; for the plaintiff was to take care that his execution was levied on the right property. The case of Murdock, &c. v. Herndon's Executors, 4 H. & M. 200, shows that the death of a partner will not abate the suit, unless it be suggested on the record.

The British authorities quoted by Mr. Hay only show the practice in that country, but have no applications, if I am right about the practice here, as founded in necessity. Yet, even there, a foreign company, not acknowledged as corporate in England, has been permitted to sue by its corporate title. (c) So a scire facias upon a recognisance lies against executors, 352 without naming them by their *proper names. (d) Another analogous case is that of terretenants; against whom a scire facias may issue generally, and be served on whom you please.

JUDGE FLEMING. In a suit by executors, must not all the plaintiffs be named?

Call. Prec. in Ch. 131; 1 Ch. Cas. 204, and 11 Vin. 20, are cases showing that courts will entertain general suits, where, otherwise, difficulties would multiply, and abatements be frequent. This is often done in equity when parties would be excessively numerous.

If the suit was regularly brought, the service on M'Rae was sufficient. In a suit against two executors, service on one is enough. It has also been frequently decided, that one partner may appear for the whole; and, if he does, the whole will be concluded. (e) Does not this prove that he represents the suit for all? Does his being an active or passive agent make any difference?

It has been settled in this court that, where several defendants are sued, and the writ is served on part, judgment may be entered against those on whom it is served.

Judgment, then, might be entered in this case against M'Rae, if the court should be of opinion that it could not, with propriety, be against the other defendants. The defect in the declaration was on a ground of special demurrer, and could not be taken advantage of after judgment by default.

It may be said, that this is one of the inconveniences arising from partnerships; but, in fact, there is no inconvenience; for any person aggrieved may have his remedy by audita querela, or writ of error coram vobis.

As to the obligatory effect of this bill penal; all the company, their heirs, &c. are bound, in which respect the case does not resemble that of Shelton v. Pollock & Co., 1 H. & M. 423, which makes against

Mr. Hay. Walker in that case did not 353 bind the company, but himself *only.

The plain innuendo is, that he might have worded the bond so as to bind the company; but the point is not expressly decided. Apply, then, the principles which governed the case of Robertson v. Campbell & Wheeler, 2 Call, 421, to this case, and they appear conclusive. Shall a man who has sold a hundred hogsheads of tobacco to a company have no remedy but against their factor? Transactions in the usual course of business by individual partners are surely binding on the companies they represent; and I think it has so been decided in the federal circuit court of North Carolina.

Hay, in reply. Mr. Call's broad and unqualified assertion that the uniform custom of the country supports the practice he contends for, is certainly incorrect. The reports of the cases cited as examples, do not state the manner in which the suits respectively were brought. The style of each mercantile company is mentioned in the heading of each case; and that is all. Does Mr. Call himself ever bring a suit, in the name of a company, without specifying the partners? But if this were the practice of a few lawyers, it could not make the law of the land. So, in England, the practice of merchants, as to suits against endorsers of bills of exchange, did not fix the law. They wished to sue endorsers in the first place, but Lord Holt arrested all their judgments, and an act of parliament was at length passed at their instance.

None of the authorities adduced by Mr. Call justify the conclusions he attempts to draw from them. 4 H. & M. 200, proves the reverse of the proposition intended to be established by it. As, in that case, the suit would have abated by the death of William Cunningham, (had it been suggested on the record,) it shows that the word Co. was not sufficient to keep it on the docket. According to Mr. Call's 354 argument that all parties are *properly before the court, though not named, a scire facias to revive (in case of the death of a party not named) would be unnecessary, though expressly required by the act of assembly. (f) Yet he cannot deny that, in consequence of the death of only one named on the record, there must

(f) Rev. Code, v. 1, p. 110, s. 20.

(a) 1 Bac. Abr. (Gwill. edit.) p. 50; tit. Action, letter (B.) 1 Chitt. on Plead. 29; Id. 356; The King v. Harrison & Co., 8 T. R. 508.

(b) Rose v. Murchie, 2 Call, 409.

(c) Henriques v. The Dutch West-India Company, 2 Ld. Raym. 1533; S. C. more at large, 1 Str. 612.

(d) 1 Com. Dig. 38.

(e) Hill et al. v. Ross, 3 Dall. 331; Green and Mosher v. Beals, 2 N. Y. Term. Rep. 364.

be a scire facias; from which it is evident this suit is improperly brought.

Henriques v. The Dutch West-India Company, 2 Ld. Raym. 1532, is a case of a corporation, and does not resemble this. If the doctrine laid down in 1 Com. Dig. 38, be law, it must be considered as an exception to the general rule; but the practice of the court of chancery, and of this court, is not to award process of revivor until the names of executors are furnished to the clerk. The passage quoted from 11 Viner, 20, may be law; on the ground, perhaps, that the plaintiff has no opportunity of knowing who the terretenants are; but it is only another exception to the general rule. *Hill et al. v. Ross*, 3 Dall. 331, so far as it applies to the subject now in question, is pointedly in my favor; showing that "partners cannot compel each other to appear to suits, nor undertake to represent each other in courts of law." But if the service of a writ upon one partner were service upon all, an appearance of one would be an appearance for all.

Mr. Call thought proper to take no notice of the authorities cited by me from Chitty and 8 T. R. To these I will add 1 Dall. 119, *Gerard v. Basse et al.*, in which it was decided that the course of trade does not authorize one partner to execute a deed for another. 10 East, 419, and 3 Esp. Rep. 107, *Abel v. Sutton*, are to the same effect. He contends there is no inconvenience in the practice of suing persons without naming them. But is there no inconvenience in entering judgment against a man who has had no opportunity of defence?

The writ of audita querela is now 355 obsolete; but it may only for matter of discharge arising after the judgment. The writ of error coram vobis could give no relief. If the defendant, on whose property execution was served, was a partner, he could not, by that writ, get relief on the ground that the debt had been paid before the suit was brought.

As to its being too late, after judgment by default, to take advantage of the defect in the declaration, the rule applies to persons only who have had it in their power to make defence, and failed to do so.

Monday, April 22d. The judges pronounced their opinions.

JUDGE BROOKE. (After stating the case and the points made by counsel.) I shall not notice all these points in the opinion which I am to deliver; except to remark that I know of no practice in the courts of this country of sufficient authority to contravene the English decisions referred to and relied upon by the counsel for the appellants; nor have I been able to perceive any force in the objections of the counsel of the appellees to the application of them to cases here, either founded on the necessity of such a practice, or on reasonings drawn from the decisions of this court, to which he referred; none of which, in my opinion, contradict the English adjudications.

Upon the first point, I am very clear that no case has been produced to warrant a judgment against a person, not alleged to be a party in the declaration, nor named as a defendant in the writ; the reasoning

from the supposed analogy between such a case and the case of executors upon a scire facias to revive a judgment against them, or the case of terretenants after a judgment against the land, can have no force. In the first, (if, indeed, it be law, which I very much doubt,) there is less necessity 356 for naming the executors in the process, than in the one under consideration; their names are of record, and there is less difficulty in identifying them by the officer serving the process; and less injury would result from mistakes, since they are not held to bail by the writ. The same remarks apply to the case of suing out the scire facias against the tenants; though not named in the record, they must be found on the land against which the judgment has been rendered; names which are said by the counsel for the appellees to be the indicia of persons, are not necessarily so in these cases; but great inconvenience and often great injury would result from extending this doctrine to original process. Any person, however ignorant of the demand of the plaintiff, and though totally unconnected with the concern against whom it might exist, would be liable to be arrested either by the mistake of the officer, or of the party pointing him out; he might not be able to give bail, and the law will not subject an individual to injury on the ground that he may afterwards be relieved in an action against the party injuring him; nor am I of opinion that the defendant M'Rae is concluded, by the judgment rendered against him in this case, from objecting to the irregularity of the proceedings; he cannot be said to have admitted (by not defending himself) any thing not alleged in the writ or declaration; nor can his admission, as far as it goes, affect the other defendants. For this doctrine, see 1 Dall. p. 119, and 3 Dall. p. 331. I am therefore of opinion the judgment must be reversed.

JUDGE ROANE was, also, for reversing the judgment, upon the ground that M'Rae was not alleged to be a partner. But he gave no opinion relative to the other points.

JUDGE FLEMING. Without considering minutely the several points made in the cause, I am also of opinion 357 that the judgment be reversed.

Archibald M'Rae, the only person on whom the writ was executed, was not alleged to have been a partner of the firm, nor even named in either the writ or declaration.

Judgment unanimously reversed, and entered that the plaintiffs take nothing, &c.

Walker's Executor v. Aicklin.

Friday, May 31st, 1811.

Contract for Purchase of Land.—When Final and Conclusive between Parties.—The point in *Vance v. Walker*, (8 H. & M. 288.) again solemnly determined.

This was a suit brought by Aicklin against Walker's executor, in the superior court of chancery for the Staunton district, to obtain the benefit of certain terms upon which the plaintiff, as he alleged, had settled a part of Doctor Thomas Walker's

Wolf-hill tract of land. He had accepted a conveyance from Francis Walker, the executor, of 840 acres, and executed bonds and a deed of trust to secure the payment of the purchase-money, at twenty shillings per acre; but contended that F. Walker, at the time of executing the writings, verbally agreed that if he could, at any time thereafter, prove the contract between Thomas Walker and himself, he should be allowed the benefit of it. The evidence in the cause was of the same nature, and nearly to the same effect, with that adduced in *Vance v. Walker*, 3 H. & M. 288.

On the 4th of July, 1804, the chancellor pronounced his opinion and decree: "That, as almost all the affidavits in this cause, as well as in the cause of *Vance* against the said defendant Walker, go to prove an advertisement, or public declaration, on the part of Dr. Walker, or his agents, that settlers on the Wolf-hill tract should be entitled to the lands by them settled, at 11l. per hundred acres, the court must believe that such inducements were held out by the said Dr. Walker, or his agents; and

that those terms could not relate to 358 the lands of the Loyal *Company, of which the said Walker was a partner and an agent, because the price required of the settlers for the lands of the Loyal Company was but 3l. per hundred acres. The court is also of opinion that Dr. Walker's promise to the plaintiff, (some years after his settlement,) that he should hold lands on the same terms with those who settled under the faith of his proposals, provided he took a certain quantity, then described, by metes and bounds, (by which the plaintiff was induced to remain on and improve the lands,) entitled him to a settlement right equally as if he had first settled under the faith of those proposals; more especially, as 8l. 10s. were paid to Dr. Walker's agent, Daniel Smith, in part consideration of the purchase money, and Dr. Walker always acknowledged the plaintiff's right to some land in the Wolf-hill tract; this acknowledgment is proved by the receipt itself, by Dr. Walker's letter to his agent Smith respecting the controversy between Vance and the plaintiff, and by the deposition of Jacob Murrell. It then only remains to be inquired, to how much land was the plaintiff entitled? For an answer we must look to the bill, (not absolutely contradicted,) and to the affidavits of Murrell and Andrew Vance; from these it will appear that the plaintiff was entitled, on the terms of settlement, to not less than the quantity for which he has obtained a deed from the defendants, to wit, 840 acres. And it is further the opinion of the court that the plaintiff has not waived his right to demand a fulfilment of the contract with Dr. Walker, by the execution of his bond and the deed of trust in the bill and answer mentioned. This case differs from the case of *Vance* and the defendant. In that case, the agreement, as set forth in the bill, (except for three hundred acres,) was too vague and uncertain for the court to act upon; three hundred acres, or thereabouts, appeared to be in the contemplation of the parties, and for that quantity Vance ob-

tained a title on the terms of settlement; the bounds to which he claimed a 359 title *were undefined; and, for more than three hundred acres, there was no mutuality of contract." The decree, therefore, (though in *Vance's Case* it was for the defendant,) was in this case for the plaintiff; whereupon the defendant appealed.

After argument, by Wirt and Call, for the appellant, and Wickham, for the appellee, the judges, on Wednesday, June 12th, pronounced their opinions seriatim.

JUDGE COALTER. From the statement in the bill itself, the plaintiff's first settlement on the land in controversy was not under the faith of Walker's propositions to settlers; though he says that after seeing those proposals, he contented himself to live on and cultivate the land for several years. He did not, however, intend to purchase as much land as he now claims; on the contrary, says he objected to purchase so much, but Walker would not let him have any unless he took the whole; to which, on Walker's saying he would make the matter easy, and take property, he finally assented. When this conversation between him and Walker took place is not stated; nor does it anywhere appear. From the quantities for which taxes were paid, it would seem that 300 acres was the quantity the plaintiff first contemplated taking; and this was all he claimed from 1793 until 1799. Yet his witness, Jacob Murrell, says that, in 1793, Dr. Walker told him he had given to the plaintiff, when last in that country, the pre-emption for 1,000 acres! Why did he not, then, pay taxes for that quantity? But, even in 1800, he is charged with only five hundred acres. Yet it is said that in April, 1800, he purchased from Francis Walker. He had probably directed an extension of his claim, on the commissioners' books, as far as 500 acres before Francis Walker went to that country; and, in 1801 and 1802, he is charged with 840 acres, the quantity sold 360 by Francis Walker. When Dr. Walker had been last in that *country, next preceding the year 1793, (at

which time, it is said, the contract with him took place,) does not appear; and it may be that it was after the statute to prevent frauds and perjuries was in force. The plaintiff, therefore, ought to have stated and proved the time more precisely than he has done; in order to show that his case did not come within the influence of that statute, even as to Thomas Walker.

But, with respect to Francis Walker, the contract with him is since the statute; and was reduced to writing. It is said, however, that a very important verbal condition accompanied that written contract, whereby, at any future day, it could be done away. But such condition, forming, as it is said, part of the contract, ought to have been reduced to writing, as well as the principal contract itself. Otherwise, the statute, which requires a writing, would be completely evaded, if verbal conditions, totally changing its nature, are to be set up as part of the contract. It would be contrary to the statute, therefore, to admit of such evidence, unless there was

clear proof that such condition's not being introduced into the writing was superinduced by fraud.

But it is said the plaintiff does not claim under the contract with Francis Walker, but under that made with Thomas Walker. To this I answer, first, that it does not appear that that, even, was made prior to the statute; but the reverse is presumable from the circumstances above stated. But, if that contract was before the statute, how would the case stand, stripped of what is said to be the verbal agreement of Francis Walker? It would be this, that the plaintiff, about the year 1773, took possession of, or settled on, part of the lands of Thomas Walker; that, some time afterwards, Walker agreed to sell him a quantity, supposed to be 1000 acres, at 11l. per hundred; that he neither gave a bond for the price, ascertained the quantity, or took one for the title; (nor does it sufficiently appear that he ever paid a

361 cent for it;) *and even had a smaller quantity taxed to him on the commissioners' books than he now claims to have purchased; that, after the death of Thomas Walker, he voluntarily purchased the land from his devisee, paid him 225l. (a sum greater than would have been due for the 850 acres, under the alleged contract with Thomas Walker,) and gave his bonds, and a deed on the land to secure the balance. Would not all these acts and omissions preclude him, at this day, from setting up this stale, verbal agreement with Thomas Walker, so as to set aside his subsequent written agreement with Francis? The plaintiff, therefore, must make out a case for a court of equity by means of the verbal condition said to be entered into with Francis Walker. To admit of such proof, without proof that the non-reduction of that condition to writing was induced by fraud, I think would open a door intended to be shut by the statute.

I think the case of Vance v. Walker, for the quantity claimed beyond the 300 acres, was a case as strong, or stronger, for that plaintiff, than this is for the present plaintiff, as to the 850 acres he claims; and that that case is conclusive as to this.

The decree must, therefore, be reversed.

JUDGE CABELL. This case comes completely within the principles settled in this court in the case of Walker v. Vance, 3 H. & M. p. 288. I am therefore of opinion, that the decree of the chancellor be reversed.

JUDGE BROOKE. This case comes clearly within the rule laid down by this court in the case of Vance v. Walker. There is certainly no proof of fraud in obtaining the deed of trust, nor of mistake in the execution of it. The important question in controversy seems to be whether, at the time of executing that deed, there was an effectual agreement between the parties that, if at any time afterwards, the appellee could prove
362 a prior agreement with *the father of the appellant of a different nature from the one which was the basis of the deed of trust, and going to avoid it, in that case the deed should not be a bar to such agreement, and that the appellee

should have the full benefit of it. The proof offered of the alleged prior agreement is not, in my opinion, conclusive to establish it; but, if it were, the principle is settled by the case before referred to, that proof of any agreement which would operate as a proviso to a deed solemnly executed, must be in writing. None of the evidence in this case is of that character. I am therefore of opinion, the decree of the chancellor must be reversed.

JUDGE ROANE. In conformity to the decision of the court in the case of Vance v. Walker, I concur that this decree should be reversed; my own opinion, however, is otherwise, for the reasons assigned by me in that case, though, perhaps, this is rather a weaker case than that.

JUDGE FLEMING. I have examined this record with great attention, and discover nothing to distinguish it, in principle, from the case of Vance v. Walker; and, though the evidence, in the case before us, is more copious, it is of the same complexion and character with that adduced by Vance; which varies the two cases in some immaterial circumstances only; and, in my conception, is inadmissible to annul a solemn contract, deliberately entered into, committed to writing, and signed, and sealed by the parties. The admission of oral testimony, for such a purpose, would, in my apprehension, be a virtual repeal of one of the most wise and beneficial acts in our statute-book.

The grounds, or reasons, on which this court decided the case of Vance v. Walker, are so cogent, explicit, and conclusive to my mind, that a volume written on the subject would throw no new light upon the cause; and I shall only add my opinion
363 ion that the decree ought to be *reversed, the injunction dissolved, and the bill dismissed with costs.

Decree unanimously reversed, and bill dismissed.

Coutts and Others v. Greenhow.

Friday, June 7th, 1811.

1. *Marriage Settlement**—Effect as to Creditors.†—A marriage settlement on a wife and her children by the husband, though born in fornication, is a conveyance to purchasers for valuable consideration, as to the children as well as the wife; and not void as to creditors; no fraudulent intention being proved.

**Marriage Settlements*.—See monographic note on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

†*Same*—Effect as to Creditors.—However much a man may be indebted, an antenuptial settlement, made by him in consideration of marriage, is good against his creditors, unless it appears that the intended wife is cognizant of the fraud. And even though it conveys his whole estate, it is not, simply on that account, void; and when a settlement is made in contemplation of marriage, the law presumed it was an inducement to it, and the courts cannot assume the contrary to be the fact. Furthermore, the fact of the cohabitation of the parties and the birth of children before the marriage will not avoid the conveyance. *Herring v. Wickham*, 29 Gratt. 628, 642, 647, examining and following *Coutts v. Greenhow*, 2 Munf. 363. To the same effect the principal case was cited in *Bogges v. Richard*, 39 W. Va. 569, 30 S. E. Rep. 600. Va. Code 1887, sec. 2459, provides that as against creditors whose debts were contracted at the time the conveyance or settlement was made, marriage shall no longer be a valid consideration. The principal case was also cited in *Triplett v. Romine*, 33 Gratt. 656; *Greenhow v. James*, 30 Va. 638, 650.

2. **Mortgages.—Land Sold for Taxes.—Rights of Mortgagee.—Quære.**—If a mortgagee of lands (though not in his actual use or occupation) suffer them to be sold for taxes: quære, whether he shall be indemnified out of other property bona fide conveyed, by the mortgagor to a mere volunteer.

Upon an appeal from the decree of the superior court of chancery for the Richmond district, in the case of Greenhow against Coutts and others, reported in 4 H. & M. 485.

Call, for the appellants. The decree is erroneous upon principle. Marriage of itself is a sufficient consideration for a settlement; not marriage and previous chastity. Property, also, is not necessary. If a man as rich as Croesus marries a poor woman worth nothing, and makes a marriage settlement, it is good. Neither is the husband's being indebted of any consequence.

In another respect, marriage settlements differ from all other contracts. Although they contain mutual stipulations, and a failure on one side take place, a court of equity will decree in favor of the party failing; (a) "for a woman's fortune falling short of the husband's expectations is no reason for setting aside a marriage agreement." (b) The very circumstance of prior cohabitation has been considered effectual to support the agreement. In *Gray v. Mathias*, 5 Ves. jun. 286, a voluntary bond, during cohabitation, to a woman previously of a very loose life, was supported in equity; and in *Hill v. Spencer*, (Amb. 641,) the same thing was done in favour of a common prostitute, which is not the case here. In that case there was no circumstance of fraud; neither is there in this case; for fraud is denied, and there is not a title of proof. The argument in support of a voluntary bond applies, a fortiori, to a marriage contract; first,

364 because the woman, by entering "into marriage, gives up many privileges; and, secondly, because marriage alone is a valuable consideration.

The conveyance here is good in law. Upon what ground can a court of equity take away the legal right. Coutts's motive was one of the most honourable that could be. He had long lived with his intended wife, and had no complaint against her that she had connexion with any other man; he had several children by her; the object of the marriage was to legitimate those children in conformity with the act of assembly. Where agreements are entered into to save the honour of a family, and are reasonable, a court of equity will, if possible, decree a performance. (c) The woman might have abandoned Coutts, and endeavoured to maintain herself and chil-

dren in some other way; or she might have married another man with a better fortune; she gave up the chance of this, and, in honour and conscience, Coutts was bound to provide for her. (d)

In *Eppes v. Randolph*, 2 Call, 183, the circumstance that rights of creditors were involved was decided to be unimportant. But it appears in evidence that Coutts retained other property sufficient to satisfy Greenhow, the creditor now suing; and his particular debt was secured by a mortgage upon land in Kentucky. As mortgagee, having the legal estate, it was his duty to have paid the taxes, and not to have suffered the land to be lost.

The decree is erroneous on another ground. The chancellor should not have disturbed the marriage settlement until the other property, not included in it, had been applied to satisfy Greenhow's claim. The case of *Galton v. Hancock*, 2 Atk. 430, is similar in principle to this.

As to the right of the children to the benefit of the settlement; it appears from *Tabb and others v. Archer and others*, 3 H. & M. 400, that a marriage settlement is good, even in favour of collateral relations.

Williams, for the appellee. I admit 365 the general rule of "law that marriage is a sufficient consideration; but this court ought not to carry the doctrine farther than it has been carried in England. The court of equity will never, in favour of volunteers, disappoint the just expectation of creditors. In all the cases cited by Mr. Call, the question was between the holder of the estate and parties claiming under the agreement; in not one of those cases were the rights of a creditor in question.

According to the British authorities children born before the marriage are but volunteers, and cannot be preferred to creditors. As between the husband and wife, and the issue of the marriage, the marriage is a valuable and sufficient consideration; but all other persons, in whose favour limitations may be made in marriage settlements, are mere volunteers. (e) No consideration for this settlement existed, except the marriage: and that was only on the part of the wife. The children are provided for, by name, and, at the date of the settlement, were not legitimated.

Does the act of assembly (f) change the doctrine? According to that act, the marriage must first take place, and afterwards the children must be recognised, to make them legitimate. It does not say they shall be considered as children of the marriage, and entitled, as such, to the benefit of a settlement, but only empowers them to take by descent, as being legitimated. Whether this woman might have had children after the marriage, is nothing to the purpose. It is sufficient that she had not. If there had been such other children, a different question might have been presented for discussion.

It is not necessary, in this case, to prove actual fraud; for a voluntary conveyance, even without fraud, is void

Mortgages.—See monographic note on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197.

Creditor—No Security Taken—Rights.—Where a creditor takes no specific security from his debtor, he trusts him on the general credit of his property, and a confidence that he will not diminish it to his prejudice. He has therefore a claim on all that property whilst it remains in the hands of the debtor: and may pursue it into the possession of a mere volunteer. But if he or his volunteer convey to fair purchasers, they, having the law and equal equity, will be protected against the creditor. As recognizing this doctrine laid down in *Eppes v. Randolph*, 2 Call 108, the principal case is cited in *Hunters v. Walte*, 3 Gratt. 54.

(a) 1 Bridgm. Dig. 209.

(b) 1 Atk. 150.

(c) 1 Atk. 5; *Newland on Contracts*, 78.

(d) 2 Wills. 341, *Turner v. Vaughan*.

(e) *Sugden*, 484; 2 Bro. Ch. Cas. 148.

(f) *Rev. Code*, v. 1, p. 170, s. 19.

against creditors; and Coutts was as much bound, "in honour and conscience," to pay his just debts, as to provide for the woman and children in question.

As to the mortgage; it contained a covenant, that Greenhow should not proceed to foreclose "until after *the year 1804;" before which time the land was sold for taxes. The universal custom of this country is for the mortgagor to remain in possession. He cannot be turned out but by ejectment, or decree to foreclose. The mortgagee holds the deed only as a security; and it never has been decided that he is bound to pay the taxes. Surely, the person in possession ought to pay them. No person would take a mortgage if he was responsible for the taxes, though not in possession of the land.

Wickham, in reply. It was Greenhow's duty to have saved himself by means of the mortgage, if he could. According to the maxim "sic utere tuo ut alienum non lædas," he should have taken care of his own security, so as not to injure us. He is plaintiff in equity, and ought to have done equity. The general question, whether the mortgagee of lands ought to pay the taxes, need not be discussed in this case. The land was in a distant country, and not in the actual occupancy of Coutts. Greenhow, therefore, was equally bound to see that it was not forfeited for non-payment of taxes. But if Coutts was to blame, his wife and children, who are purchasers under the marriage settlement, are not responsible for his neglect. After the deed to them was executed, it was particularly incumbent upon Greenhow to have taken care to get satisfaction out of his mortgage.

As to the effect of the settlement; Mrs. Coutts had a good right to dower: why not, then, to the benefit of a settlement? Wherever a woman is entitled to dower she may take by jointure. I believe that, in fact, Mrs. Coutts made a bad bargain; the jointure secured to her by the deed, being worth less than her dower would have been. But the plus, or the minus, is a matter of no consequence. Mr. Williams admits the decree must be reversed as to her. Why not, then, as to her children?

In the case of children born of the marriage, no consideration moves from 367 them: they claim only through *their mother, without any merit of their own. Yet whatever consideration flows from her enures to their benefit. The same reason applies to her children born before marriage. They are equally meritorious, and she is equally bound to provide for them. Indeed, there are stronger motives, on her part, to provide for children actually existing, than for mere potential children.

There never was a decision, that a child, begotten before the marriage, and born afterwards, should lose the benefit of a settlement made after it was begotten. Yet such child is not a child of the marriage. The principle upon which such a settlement is held good in England, is, that every child born in wedlock, is legitimate; and this entitled such child to the benefit of the settlement. Under our act

of assembly, (which makes children, born before the marriage, and recognised by their father, legitimate,) the same principle applies in favour of children born before the marriage, if recognised. All such children must, in this country, be considered children of the marriage. Recognition need not be after the marriage: if made at any time, it is good: and in this case they are recognised in the settlement itself.

In Tabb and others v. Archer and others, the collaterals could not have been considered volunteers. In that case the conveyance was defective; yet the court decreed the defect to be supplied. This they would not have done in favour of mere volunteers. The court must have regarded the consideration of the marriage as enuring in favour of the collaterals.

But even if the children were volunteers, the court will respect their rights; and, if there be other estate, will make the creditors take satisfaction out of that. There is no proof in this record that Coutts was insolvent, or that he had not other funds to satisfy creditors. The estate of which he died possessed was liable for his debts (whether in the hands of executor, heir, or devisee) *before the property in the hands of volunteers, claiming by deed, could be disturbed. Even a voluntary bond is preferred to a legacy.

The chancellor, therefore, should have directed an account of all the estate to be taken in the first place, and should not have subjected to Greenhow's claim the property mentioned in the settlement, until all the rest had been exhausted.

Thursday, June 20th. The judges pronounced their opinions.

JUDGE COALTER. In the case of Eppes v. Randolph, (a) Judge Pendleton, in delivering the opinion of the court, lays it down as a general doctrine, "that where a creditor takes no specific lien, he trusts his debtor upon the credit of his property generally, and on a confidence that he will not lessen it to his prejudice. He has, therefore, a claim upon all that property whilst it remains in the hands of the debtor, and may pursue it into the hands of a mere volunteer; but not having restrained the debtor's power of alienation, if he, or his volunteer, convey to fair purchasers, they, having the law, and equal equity, will be protected against the creditor." The only question is, whether, in this case, as in that, the appellants are such fair purchasers for valuable consideration.

There can be no doubt whatever but that this deed is good, against creditors, as to the wife and the issue of the marriage. The only question is, whether the children born before the marriage are mere volunteers, and the deed, as to them, void against creditors.

As to this point, the case has some analogy to the case of a man, or woman, about to contract a second marriage, and making a provision for the children of a former. In such cases, very strong 369 authority, I believe, *can be produced

(a) 2 Call. 183.

to prove that those children are not mere volunteers. (a)

This, however, is a stronger case. These are the children of both the contracting parties. They were bound as well by the ties of affection, as by those of morality and justice, not only to provide a comfortable support for their innocent offspring, but to raise them to that station in society in which the laws of their country, upon the marriage of their parents, place them; and, in this point of view, I cannot perceive the difference between the situation of these children, and a child, in England, who is born a week after marriage.

That child is not (in *rerum natura*) a child of the marriage, yet he is so by the laws of his country, and would be a purchaser for valuable consideration under a marriage settlement. In this case, too, the marriage, under the influence of our laws, makes these the legitimate children of the parties contracting. And, in this particular case, nothing but marriage was wanting; inasmuch as Coutts had always recognised them as his children; they bore his name and are called his children in the marriage settlement.

I am therefore of opinion that they were not volunteers, but purchasers for a valuable consideration. But, it may be said, that a deed may be fraudulent and void under the statute, though made upon a good and meritorious consideration; nay, that even valuable consideration will not avail, unless it be also *bona fide*. (b) And to avoid the deed on this ground, it is charged in the bill, that Coutts conveyed all his property in trust, &c. The amended bill, however, admits that the party, on the day he gave his bond for the debt, executed a mortgage for a moiety of 7,000 acres of land in Kentucky to secure it.

If this land was not considered sufficient for that purpose, why did not the party then take additional security? But, in addition to this, Coutts died possessed
370 of *a considerable real estate in lots and lands in Manchester and Henrico, and his executor is now in pursuit of a large debt, which may be recovered.

I will not pretend to say how far the neglect of the creditor to pay the taxes on the lands in Kentucky might affect him, in a controversy with the mortgagor, were they the only parties before the court; but, surely, there is a wide difference between the case, as it would stand between those parties, and the case where the mortgagee suffers the mortgaged premises (which may have been a sufficient security) to become forfeited, and then comes into a court of equity to set aside the legal rights of the appellants; even admitting that they are mere volunteers.

In the case of *Eppes v. Randolph*, the court noticed the improper conduct of the plaintiff in not proceeding, in time, to charge the lands in the hands of the devisees, which he might have charged, in exoneration of the purchasers.

In this case there are not only lands in

the hands of devisees, which may yet be charged, but I am by no means certain that the Kentucky lands are entirely lost. The last sale made, probably in 1804, or 1805, (for it was for the taxes of 1802 and 1803,) was of 5,355 acres, which was sold to Philip Buckner. The patent was originally granted to him; and it is not improbable that he was the cotenant of the other moiety, equally bound to pay the taxes, and now holds the land in trust for the creditor, if he would take the trouble to look after it.

The decree must, therefore, be reversed; and, as the amended bill mentions the mortgage, and there is a prayer for general relief, the cause must be sent back, to be proceeded in to a foreclosure of the mortgage; with liberty to the plaintiff to amend his bill, so as to pursue the property devised into the hands of the devisees; unless, indeed, the consent of the parties, before the commissioner, (as stated in his report,) would have authorized a decree
371 against them for a sale of the property devised, *and a foreclosure of the mortgage; in which case, this court might at once pronounce the decree.

JUDGE CABELL. The appellants, claiming under the marriage settlement, must be considered either as volunteers, or as purchasers for a valuable consideration. Admitting them to be volunteers, the settlement will not be void, even as to creditors, unless the creditors cannot be otherwise satisfied. For, although the maxim is, that a man must be just before he is generous, yet an act that is merely generous, or voluntary, can be set aside in favour of those only who are injured by it. He who asks equity, must first do equity. Greenhow should have gone against the other estate of Coutts before he invaded the settlement; and even common justice required that he should resort to that fund which had been set apart, with his own consent, for the payment of his debt, before he disturbed arrangements made in favour of others, for whom Coutts was, at least, morally bound to provide. There is nothing like actual fraud proved in this case. It does not appear that Coutts owed any other debt than that to Greenhow: and for the payment of that debt, he conveyed, before the execution of the marriage settlement, property which is admitted to have been amply sufficient for the purpose. If that property has been lost in consequence of the non-payment of taxes, it will be a question for subsequent inquiry on whom that loss shall fall; at least, so far as relates to the payment of Greenhow's debt.

But the appellants are purchasers for a valuable consideration; and, as such, will hold the property settled on them, even against all creditors. So far as relates to Mrs. Coutts, it seems difficult to imagine on what ground a doubt could have been founded. That marriage is a valuable consideration seems to be so firmly established as a general principle, as to preclude the necessity of referring to authorities. I

will, however, barely mention
372 *the case of *Eppes v. Randolph*. But the chancellor, in declaring the

(a) 1 Ves. 216; 1 Atk. 265. and Tabb and others v. Archer, 3 H. & M. 369, and the cases there cited.

(b) 5 Ves. jun. 870; 8 Co. 80. *Twyne's Case*, and *Cowp. 706. Doe v. Routledge*.

settlement void, must have gone, I presume, on the idea that the cohabitation of the parties, before the marriage, will take this case out of the general rule. This is the first time, so far as I have observed, that this exception has been contended for, either in this country or in England. Supported neither by authority, nor reason, it cannot be admitted. I shall not be the apologist of the conduct of the parties before their marriage. They have, however, legitimated the innocent offspring of their criminal intercourse, and have made to society all the atonement in their power; and I am unable to perceive any reason, in justification of marriage settlements generally, which does not apply to this in particular. If the consideration of the marriage be valid as to the parties to the marriage, it would undoubtedly be equally so, as to the issue of the marriage; for there has never been an attempt to distinguish between them. Nor does our act of assembly make any difference between children, born (as in this case) before the marriage, but recognised by the father, and those born after it. As far as relates to the husband, they are the children of the marriage; for, without the marriage, they would not be considered as his children. By the common law, a child begotten before, but born after marriage, is legitimate, and would certainly be entitled to the benefit of a settlement providing for the issue of the marriage; and our act of assembly has placed the children, in this case, on the same ground. I am therefore of opinion that the decree of the chancellor, so far as it affects the marriage settlement, is erroneous, and ought to be reversed; and that the cause be remanded for farther proceedings in relation to the property not contained in that settlement.

JUDGE BROOKE. It does not appear by any thing in the record, that it was the intention of the parties, by
373 *executing the marriage settlement, to commit a fraud on the creditors of Reuben Coutts. On the contrary, it does not appear that there were any debts except the one, the payment of which was provided for by the mortgage of the Kentucky lands.

With respect to the want of personal inducement to the marriage, if it existed, as seems to be supposed by the chancellor, I am not prepared to say that fraud would be deducible from that circumstance. The case appears to me (with the exception of a single circumstance attending it) to present the naked question, whether a marriage settlement, intended to provide for the husband and wife and their children, is a valid contract against creditors. In the case of *Eppes v. Randolph*, on a question between creditors and those claiming under the marriage articles, it was decided by this court that the settlement was valid against creditors, and that those claiming under it were purchasers, and not volunteers; but it is relied on, in this case, that, though the settlement, as to the husband and wife,

is valid, within the rule laid down in the foregoing case, yet that, as to the children born before the marriage, the consideration of the contract cannot enure to them, and that they must take as volunteers, and not as purchasers.

By the common law, base begotten children, if not base born, are legitimated by the marriage of the parents.

By the civil law, the marriage of the parents legitimated base born children. Our act of assembly on this subject has adopted the rule of the civil law, with this addition, that the children must be recognised by the father to be his. This was obviously to remove the objection of those who contended for the superiority of the common law rule over the rule of the civil law, (in this,) that, by the latter rule, the husband by the marriage was compelled to father children not acknowledged to be his own, and, of consequence, the motive to marry would not be so strong as under the rule of the common law.

374 *The case now under consideration is, completely, as to this point, within the act of assembly before mentioned: the children, though base born, are legitimated by the marriage of the parents, and the recognition of them, as his own, by the husband, both before and after the marriage. Upon this view of the subject, I cannot perceive the accuracy of that reasoning which would put them in a worse situation than that of those born after the marriage. It cannot be founded on any thing, in the moral condition of the parties, to invalidate the contract. It never has been contended, that I know of, that a base begotten child could not be provided for by marriage settlement, to the exclusion of creditors, by the principles of the common law. No case to that effect has been produced; and I can see no difference in reason between a provision for a base begotten child, legitimated by the marriage of the parents according to the rule of the common law, and for base-born children legitimated by the marriage of their parents under the rule of our law. The policy is the same, though, perhaps, not so strong in the last case as in the first.

The time of the marriage must be unimportant. Upon this point, then, I am of opinion the chancellor erred, and that the decree should be reversed, and this cause sent back to the court of chancery for further proceedings to be had in relation to the property of Reuben Coutts, not comprehended in the marriage settlement; the claim to which not having been charged in the bill, nor controverted in this case, I give no opinion respecting it.

JUDGE FLEMING. On an attentive examination of the record, it appears to me that the decree is erroneous, and that the bill ought to have been dismissed with costs. The decree is expressly founded on an opinion that the deed of marriage settlement, in the proceedings mentioned, was fraudulent as to the creditors of
375 Reuben Coutts. To *show the grounds of a contrary opinion, and my reasons for thinking the bill ought to

have been dismissed, I must take a short view of the facts and circumstances as they appear on the record.

Reuben Coutts being indebted to Hicks & Campbell, on the 29th of August, 1799, executed to them three notes, or single bills, under seal, for 154l. 8s. 4d. each, payable respectively, on the first days of September, 1800, 1801, and 1802, with interest from the dates; which bills were immediately assigned to George Greenhow, with recourse on the assignors, in case of insolvency. On the same day Coutts executed a mortgage to George Greenhow, the assignee of the bills, for a moiety of a tract of 7,000 acres of land, on Locust Creek, north fork of Licking, in the state of Kentucky, which mortgage was duly recorded in the court of appeals in the state of Kentucky, the 29th of June, 1800. In the years 1802 and 1803, Greenhow instituted suits, and obtained judgments against Coutts on those bills; and issued writs of fieri facias thereon, which were returned "no effects," and, in July, 1806, those judgments were assigned to James Greenhow, the complainant in this suit: who, in his original bill, charges that Coutts, being indebted, not only to George Greenhow and himself, but also to various other persons, on the 10th of September, 1799, executed to Samuel M'Craw and others a conveyance of his whole estate, real and personal, under the guise and pretence of marriage articles, &c. when it appears by the record that Coutts was not indebted to him, but by the assignment of the judgment aforesaid, which took place near seven years after the date of the marriage settlement. In his amended bill, he charges that the said Reuben Coutts executed a mortgage to George Greenhow upon some lands, alleged to belong to him in the state of Kentucky, to secure the payment of the debt; and further charges, that Coutts executed the mortgage, merely as a colour to justify the fraud, then meditated, of conveying away all the property he had; that being informed of it, he

376 made inquiry respecting *the same, (having understood that to be the only objection to paying the debt out of the pretended trust estate,) and has been informed, believes, and therefore charges, that Reuben Coutts having neglected to pay the taxes on the said land, it was sold for the same, about the time of executing the said mortgage, of which the said Coutts had notice; and George Greenhow, in his answer to this amended bill, says "that some time after the execution of the said mortgage, he, upon inquiry, discovered that the lands had been sold for the payment of taxes; and understood the sale happened some time in, or about, the year 1799: and, finding the mortgage afforded him no security, he instituted the suits on the single bills, and recovered the judgments referred to by the plaintiff." It seems that both the plaintiff and himself (whose duty it was to pay particular attention to the important subject) had been most egregiously misinformed, from whatever source their information might have been derived; for it appears, by a

certificate of George Madison, auditor of public accounts in the state of Kentucky, that, on the 11th day of November, 1802, (upwards of three years after the date of the mortgage,) 750 acres, part of the said land, were sold, for the tax of 1800, to Samuel C. Hall and Anthony Foster, for the sum of 8 dollars and 75 cents. At an after date, (but when is not stated in the certificate,) 875 acres more were sold (supposed to be for the tax of 1801) to J. & L. Henderson & Co. for the sum of 7 dollars and 81 1-2 cents. And 5,355 acres, the remainder of said undivided 7,000 acres of land, were sold for the taxes of 1802 and 1803, to Philip Buckner, (who, it seems, was equally interested with Coutts in the said 7,000 acres,) for the sum of 19 dollars and 31 cents. The precise time of this latter sale is not stated; but it could not have been before the year 1804; (long after the judgment had been obtained on the notes;) for the sales of lands in Kentucky for taxes, are never made sooner than October next succeeding the year after

377 *which they become due. Thus did George Greenhow, the mortgagee, (in whom the legal title to the land was vested, no interest remaining in Coutts, except his equity of redemption on paying the debt with interest thereon,) suffer this valuable tract of land (a moiety of 7,000 acres) to be sold for about half a cent per acre, when less than 36 dollars, divided into four equal annual payments, would have saved the whole undivided 7,000 acres! And James Greenhow, the assignee of the judgments, (standing on no higher ground than George Greenhow occupied,) comes into a court of equity to annul, and set aside, as fraudulent, a marriage contract, fairly and bona fide made, upon one of the most important and valuable considerations known in civil society. Coutts, after having lived many years with Jane New, and having several children by her, born out of wedlock, took the laudable resolution to marry her; and, on the 10th of September, 1799, (12 days after the date of the notes and mortgage,) executed the marriage settlement, in the proceedings mentioned; and on the 17th day of the same month, intermarried with the said Jane New; and thereby legitimated his said children, five in number; which I consider a very laudable and meritorious transaction, especially as he had given ample security for the debt, now sought to be made out of the trust estate, or marriage settlement; which security was lost, as I conceive, through the gross negligence of the mortgagee, as it may be fairly presumed that the taxes of the land had been regularly paid, down to the date of the mortgage; it appearing by the record, that the first sale of the land for taxes, was for the tax of 1800, though not made until the 11th day of November, 1802. Admitting, however, that the mortgagee was no way responsible for the loss of the mortgaged land, the deed of marriage settlement, bona fide made, on a valuable consideration, was, nevertheless, valid, both in law and equity, and ought to be supported. See the decree in the case

378 of Eppes v. *Randolph, 2 Call,

188, where the deeds to Richard Randolph, jun. and to David Meade Randolph were sustained, upon much slighter foundations. It seems, by the report of the commissioner, that Coutts was possessed of considerable property, not comprised in the marriage settlement; which he afterwards disposed of by his will; (but whether acquired before, or after the settlement, does not appear;) and which was neither charged in the bill, nor noticed in either of the answers; but may perhaps be liable to satisfy Greenhow's debt. On this point, however, I give no opinion, as there may be other superior claims upon it. My opinion, upon the whole, is, that the decree be reversed, and the bill dismissed with costs; but without prejudice to any future suit the appellee may be advised to bring for the recovery of his debt, to be satisfied out of other property than that comprised in the marriage settlement. But a majority of the court being of opinion that the cause ought to be remanded for further proceedings to be had therein, the following entry (which has been seen and approved by Judge Roane)(1) is to be made.

"The Court is of opinion that the decree is erroneous in adjudging the deed of trust, or marriage settlement in the proceedings mentioned, to be fraudulent as to the creditors of Reuben Coutts, and in ordering the slaves and personal estate mentioned in the said deed, and in the commissioner's report of the 18th of September, 1810, to be sold to pay to the plaintiff his debt and costs, also in the proceedings mentioned; this court being of opinion that the said deed of settlement, having been bona fide made on a valuable consideration, is valid, and ought to be sustained, and that no part of the estate therein comprised is subject to the debts of the said Reuben Coutts."

Decree reversed, and cause remanded for further proceedings.

379 *Hook v. Nanny Pagee and Her Children.

Tuesday, June 18th, 1811.

Suit for Freedom*—Plaintiff White Person—Verdict.—In a suit for freedom, if it appear to the jury, from inspection, that the plaintiff is a white person, they ought to find a verdict in his favour; unless it be proved, on the other side, that he descended in the maternal line from a slave.

In a suit for freedom, the jury returned a verdict in the following words: "We of the jury find that the plaintiff Nanny Pagee was brought into the commonwealth of Virginia from the state of North Carolina, by Thomas Jones, subsequent to the fifth of October, 1778; that if the said plaintiff was a slave, it doth not appear to the jury that the said Thomas Jones did comply with the provisions of the act, entitled 'An act for preventing the further impor-

tation of slaves.' (a) We of the jury also find, from inspection, that the said plaintiff Nanny Pagee is a white woman. We of the jury, therefore, find that the plaintiffs are free persons and not slaves; and we find for them one penny damages."

Judgment for the plaintiffs, and appeal.

Three bills of exceptions were taken by Hook, the defendant, to sundry instructions and opinions of the court upon the evidence. But since the decision by this court chiefly turned upon one circumstance, and the general scope of the exceptions sufficiently appears in the following opinions, a farther statement may, with propriety, be dispensed with.

The cause was argued by the Attorney General and Wirt, for the appellant, and Wickham, for the appellees, at considerable length, on a variety of points.

It was contended, on the part of the appellant, that the verdict was not general but special. The word "therefore," compels the court to inquire whether the premises were correct from which the jury drew their conclusion. Where the verdict makes a statement of facts, and concludes with a general finding, the court have a right to

consider it a special verdict. Hobart, 380 p. 53. The question *then is, do the facts found warrant a judgment for the plaintiffs? The mere circumstance, that they are white, is not of itself sufficient. If it be admitted that, *prima facie*, every white person is free, it is only a presumption which stands until rebutted by other circumstances: but other circumstances appear in this record showing the plaintiffs were slaves. The first part of the verdict is incomplete, and too uncertain. To entitle the plaintiffs to recover, the jury should have found that they were not held by Jones either by descent, marriage, or devise, and that he failed to take the oath prescribed by law. The prominent fact, that the plaintiffs were slaves when imported, is stated hypothetically only; and *ex propositione hypothetica nihil sequitur*. The jury have left it to the court to find a fact which they should have found themselves.

On the other side it was said, that the verdict closed all other questions by finding that the plaintiffs were white persons; that if the court, in *Hudgins v. Wrights*, 1 H. & M. 134, could form its judgment by inspection, so might the jury, in this case; that the jury's stating the facts on which their opinion was founded, did not prevent their verdict from being general; and that, as to the other point, the finding "that the plaintiffs were brought into this state after the fifth of October, 1778," was sufficient to entitle them to freedom; it being incumbent on the defendant to show facts bringing the case within some of the exceptions of the act; which he had not done.

Saturday, June 22d. The Judges, COALTER, CABELL and BROOKE, (Roane and Fleming being absent,) pronounced their opinions seriatim.

JUDGE COALTER. The jury in this case find two facts; 1. That the plaintiff Nanny was brought into this commonwealth, from the state of North Car-

(1) Note. JUDGE ROANE was one of the court which heard the cause argued, but was not present when the opinions were delivered.—Note in Original Edition.

*The principal case was cited in *M'Michen v. Amos*, 4 Rand. 140; *Gregory v. Baugh*, 2 Leigh 682, 683, 686; *foot-note* to *Hudgins v. Wrights*, 1 Hen. & M. 134.

(a) See Act of October, 1778. c. 1, Ch. Rev. p. 80

381 olina, by *Thomas Jones subsequent to the 5th of October, 1778; 2. They also find, from inspection, that the said plaintiff Nanny Pagee is a white woman.

After finding these two facts, the jury go on to say, "We of the jury, therefore, find that the plaintiffs are free persons, and not slaves; and we find for them one penny damages."

I say nothing of the other finding, to wit, "that if the said plaintiff was a slave, it doth not appear to the jury that the said Thomas Jones did comply with the provisions of the act for preventing the further importation of slaves;" because the jury need not find the negative of a fact which the defendant must show, in order to support his plea of justification. That part of the verdict, therefore, must clearly be rejected as surplusage. The case, then, will stand upon the other two facts, accompanied with the general finding that the plaintiffs are free.

The facts aforesaid are entirely distinct in their nature, and not depending at all on the same testimony; and either of them, if found upon proper and legal testimony, will entitle the party, ipso facto, to freedom, unless the defendant can show something to take his case out of their influence.

I am farther of opinion that, if the court erred in any instruction, or opinion given, which might have had an improper influence with the jury, on the finding of either one of those facts, yet, if the other fact was properly and legally found, the judgment ought not to be reversed because of that error. For example, if the court erred as to the first finding, in not permitting the jury to presume that the oath required by law was taken, yet, if it is properly found that the plaintiff Nanny is a white woman, and, therefore, she and her children free, they cannot be turned round to contest their right to freedom on another and independent point, even if that other point might ultimately be found against them. Suppose the court had permitted the jury to presume, nay, suppose

382 pose the *defendant had positively proved, and the jury had found, that Jones took the oath prescribed by the 4th section of the law; yet, if the jury had found that the plaintiff was a white woman, and, therefore, she and her children free, they could not be continued in slavery because they had been claimed and held as slaves. So, e converso, if she is black, and that circumstance had been found against her, or if it had been improperly found that she is white; yet, if the other point was well found in her favour, she would prevail.

But I incline to think that both these points were well found in her favour.

The bills of exceptions admit that the plaintiff Nanny was imported into this state about the year 1780; and, consequently, if she was a slave, her case would be subject to the act of 1778 above referred to: and the defendant alleges, in the bill of exceptions, that Jones came within the provisions of the 4th section of that act, to wit, that he had taken the oath, &c. He does not pretend that his case was embraced by any of the other provisions in the law, but states

the reverse. A great deal of testimony is brought into the record, under one of the bills of exceptions; and the testimony of the defendant goes to show that Jones purchased Nanny, as a slave, in North Carolina, and brought her into this state, where he resided for several years; so that the bill of exceptions, as well as the testimony, exclude the idea that he claimed immunity from the general provisions of the law, on any ground other than that of having taken the oath; and he moves the court to instruct the jury, that it is not necessary, under the circumstances of this case, that the defendants should prove by positive testimony that Jones took the oath required by law; but that the jury may, at this distance of time, presume it to have been done.

What are the circumstances of the case, upon which this court are to form an opinion of the correctness of *the judgment below? Those circumstances were considered as entitled to important weight with the court below in forming their decision; and, unless the party chose to detail them in his exceptions, how are we to judge of the correctness of that decision? The question is not an abstract one, how far, in any possible case, the jury might be left to presume that the oath was taken; (and if it was, it would have been improperly propounded, and the opinion extrajudicial;) but the question is whether, under the circumstances of this case, the jury might presume it?

It may be said that, though the circumstances of this case are not detailed in this bill of exceptions, they are to be found in a preceding one. If we resort to that, what are they? That this plaintiff Nanny was imported about the year 1780, or 1781; that the defendant purchased her at a sheriff's sale, to satisfy his own debt, at which time it was rumoured that she was free, and others thereby were deterred from bidding, so as to put him on his guard; that this suit had been depending about five years from its institution, until the verdict aforesaid was found; and that, notwithstanding this warning, and this time to prepare; notwithstanding, too, the prima facie evidence, from complexion, that this woman was free, (a circumstance well calculated to produce early inquiry and scrutiny,) there is not a particle of testimony going to prove (although several neighbours, of the party, at the time, are examined) that Jones ever went to a magistrate to take the oath; ever said he had done so; or any circumstance whatever, save the lapse of time, whereon to ground a presumption that he had complied with the law.

I therefore incline, at present, to think that the direction of the court, going to negative this application, was under the circumstances of this case, correct. But it is said the court went farther, and by that may have prevented the defendant from offering proof that he held by
384 *devise, &c. If the court did go farther, it must have been in discussing an abstract question which did not arise in the case, was extrajudicial, could do no injury in the case, and was, there-

fore, not a ground for exception: or, if the party did lose any thing by that part of the opinion, he ought to have shown, by the bill of exceptions, its operation on the case. This, however, is not pretended. The reverse appears to be the fact. But I do not understand the opinion to go so far as to require positively a certificate of the magistrate. It requires positive testimony, it is true, to prove that Jones took the oath; and that the jury could not, in this case, presume, &c. This latter was the great question propounded. The party does not pretend to have either positive, or circumstantial testimony; and the court say that the jury, in this case, cannot presume; and, as I before said, I incline to think that, so far, it was rightly decided.

But, if I am wrong as to this, and if the first point is found under circumstances that would require another trial, if that were the only point on which the plaintiffs could succeed, yet I am clear that there can be no objection to the other finding, to wit, "that the plaintiff Nauny is a white woman."

The jury find this fact upon their own knowledge, in other words, by inspection. Was this improper?

The jury are to ascertain the fact one way or the other, and from evidence.

"All certainty is a clear and distinct perception; and all clear and distinct perceptions depend upon a man's own proper senses; and, as all demonstration is founded on the view of a man's own proper senses, by a gradation of clear and distinct perceptions, so all probability is founded upon obscure and indistinct views, or upon report from the sight of others." (a)

If the plaintiff Nanny had not been before the jury, they must have found their verdict upon the testimony of others,

which would have amounted only to a probability. *But here, they have the highest evidence, the evidence of their own senses; and upon that they find a verdict: in other words, the jury find a verdict upon their own knowledge. They find a fact which makes it impossible for the defendant rightfully to hold this woman and her children as slaves; and they superadd to this finding, "that, therefore, they are free persons, and not slaves." Touching the evidence, as to this fact, there is no objection, or exception. The defendant introduces witnesses to prove that she is not a white woman. Those witnesses give their opinions from the evidence of their senses: no person proves her birth, or parentage. The jury believe their own senses, in preference to the opinions of the witnesses; and, if the court were in error on every other point, this fact, being fairly and legally found, must conclude the case.

I am, therefore, in favour of affirming the judgment.

JUDGE CABELL. The issue in this case was, whether the appellees were free persons, or slaves; and that issue was found in their favour. It is no objection to this verdict that the jury have stated the grounds on which it is founded. The principle that verdicts should not find,

argumentatively, the matter in controversy, means only that they shall not leave it to be inferred by argument, but shall find it expressly. Here, it is expressly found. The case in Hobart does not apply. There, the jury, after finding a fact specially, drew from it a conclusion not warranted by law, and then referred the whole to the consideration of the court, to determine whether the law was for the plaintiff or defendant; and the court, very properly, rejected their unwarrantable inference. This is a general verdict, leaving nothing for the decision of the court. Besides, it being ascertained that Nanny Pagee was a white woman, the law infers her (and of course her children) to be free, unless the contrary appears; and the jury having expressly found her "to be a white woman, and, therefore, free, the court (even if it had been a special verdict, referring the matter to them) would have intended every thing which can fairly be intended, in order to support the verdict. Much more will they do so, where the verdict is a general one.

I deem it unnecessary to enter minutely into the bill of exceptions, with a view to decide whether the opinions therein, pronounced by the judge, were correct, or incorrect. I have no doubt, however, of the propriety of the most of them; and if the others were erroneous, they related to points of which Hook could not have availed himself in repelling the presumption of freedom growing out of the fact of Nanny Pagee being a white woman. As to that important ground, on which the jury have placed her freedom, they were abstract questions, having no application to the cause. And, as a court is not bound to decide mere abstract questions, the expression of erroneous opinions on such questions (questions raised, perhaps, for the sole purpose of entangling the court) cannot be a sufficient ground for reversing the judgment. Believing, therefore, that there is nothing in the verdict itself which should induce us to set it aside, and not perceiving that it actually was, or might have been, influenced by any improper act, or opinion of the court, I am for affirming the judgment.

JUDGE BROOKE. In the case of *Hudgins v. Wrights* (b) it is laid down that, where white persons are claimed as slaves, the onus probandi lies upon the claimant. It is said, also, that the distinguishing characteristics of the different species of the human race are so visibly marked, that those species may be readily discriminated from each other by inspection; and that, in the case of a person visibly appearing to be of a slave race, it is incumbent on him to make out his freedom; but, in the case of a person visibly appearing to be of a free race, it is *required of his adversary to show that he is a slave. This I understand to be the doctrine of this court as settled in that case.

Applying it to the one under consideration, I have no doubt the judgment of the district court was correct upon the verdict of the jury; putting out of the case everything in the verdict, except the finding of

(a) Glib. Law of Ed. 2, 8.

(b) 1 H. & M. 138.

the jury that, from inspection, the said plaintiff, Nanny Pagee, is a white woman; and this was quite sufficient; it being incumbent on the defendant to have proved, if he could, that the plaintiff was descended in the maternal line from a slave. Having not proved it, she and her children must be considered as free.

It is unnecessary to notice the objections arising out of the bill of exceptions, on this view of the subject. None of them touch the ground of the opinion now delivered. The judgment of the district court must be affirmed.

Edgar v. Donnally and Jones.

Saturday, September 21st, 1811.

1. **Partnership—Purchase of Realty with Partnership Fund*—Effect on Purchaser with Notice.**—Prior to the act of 1788, concerning partitions and joint rights and obligations, two men, who were partners in a drove of cattle, applied part thereof to a joint purchase of a settlement right to land; and one of them died; the survivor had the land surveyed by virtue of a land office treasury warrant, and sold it to a third person, who, having notice of the partnership right, obtained a grant of the whole from the commonwealth; a purchaser from the heir of the deceased partner was, nevertheless, entitled, in equity, to his share of the land.

2. **Same—Same—Suit in Chancery—Parties.**—In such case, the surviving partner, and the purchaser from him, being defendants to the bill, the heir of the deceased partner is not a necessary party; a deed from him, conveying all his right to the plaintiff, being produced.

3. **Chancery Practice—Assigned Bond—Answer—Effect as Evidence.**—If the plaintiff in equity call upon the defendant, as assignee of a bond, to say whether he had notice of the consideration thereof, when he received the money due thereon; and, in his answer, he say, that he had no such notice when he took the assignment, the answer is not to be considered as admitting notice at the time of receiving the money.

See *Dangerfield v. Claiborne*, 2 H. & M. 17, and *Page's Executor v. Winston's Administrator*, ante, p. 208.

Thomas Edgar, of the county of Greenbrier, brought a suit, in the late high court of chancery, (which was afterwards transferred to the Staunton district,) against Andrew Donnally and John Jones, to recover a moiety of a tract of land in Kenhawa county, the right to which he claimed as assignee of John Matthews, son 388 *and heir of Archer Matthews, deceased; setting forth in his bill that Andrew Donnally and Archer Matthews, some time previous to the year 1778, brought a settlement right to the said land of a certain John Pryor, and obtained the proper certificate, from the commissioners for the district of Montgomery and Washington, in the year 1782; that separate advances were made by them for the said right, and it was agreed and understood that they should hold separate interests; but, the right to the land not being complete, no division could be made; that, in

the year 1786, the said Matthews died, and the plaintiff, by purchase from his heir at law, became vested with his right; but that Donnally had since sold to Jones the whole of the said tract of land, without accounting to the plaintiff for any part of the purchase money, or asking his consent to the sale; and that Jones knew, at the time of his purchase, that Donnally was not entitled, in equity, to more than one half of the said land. The plaintiff, therefore, prayed a decree for partition of the land against Jones; and an account of profits against Donnally.

The answer of Donnally denied the partnership between Matthews and himself; averring that he separately bought Pryor's settlement right for his own benefit; (but admitting that he agreed to sell to Matthews one half, upon his paying the purchase money, which Matthews never did pay;) that he afterwards had the land surveyed by virtue of a land office treasury warrant, which survey he sold and assigned to Jones, to whom a grant was issued.

The defendant Jones, in his answer, said that, at the time he made the purchase, "he had no certain knowledge of any partnership between Donnally and Matthews in the right to said land."

It appeared, from exhibits in the cause, that the certificate of the commissioners for the land in question (dated September 11,

1781) was to Andrew Donnally and 389 *Archer Matthews; that a survey was made on their behalf, the 3d of May, 1785; that another survey of the same land was made for Donnally, March 20, 1791; assigned by him to John Jones, May 5, 1791; to whom the grant was issued on the 21st of March, 1792; and that, on the 24th of March, 1798, John Matthews, son and heir at law of Archer Matthews, deceased, conveyed, by deed, "for and in consideration of five shillings," all his right and title in the said land to the plaintiff.

The depositions clearly prove that Jones knew of the title of Matthews, at the time of his purchase of Donnally; that Matthews and Donnally were partners in a drove of cattle; and that part of the cattle were paid to Pryor for his settlement right.

On the 1st of March, 1803, the defendant Jones filed a cross bill against Edgar, stating that, at the time of his purchase of the land, he executed sundry bonds to Donnally for the purchase-money, payable at different times; that one of those bonds was assigned by Donnally to Edgar; that, at the time of such assignment, the said Edgar was executor, or administrator, of the estate of Archer Matthews, and guardian of John Matthews, his infant son; was acquainted with the claim of the said Matthews to the said tract of land, and knew, or believed, that the same would be prosecuted; that Edgar also knew that the bond, which had been assigned to him by Donnally, was for part of the purchase-money of said tract of land; yet he requested and received payment of the amount, without giving notice to Jones that any claim was about to be set up. The cross bill, therefore, called upon him to answer and say whether, at the time of his receiving the amount of the said bond, he

***Partnership—Purchase of Realty with Partnership Funds—Conveyance to One Partner—Effect.**—See principal case cited in *Hancock v. Talley*, 1 Va. Dec. 442; *foot-note* to *Brooke v. Washington*, 8 Gratt. 248, quoting from *Hancock v. Talley*, 1 Va. Dec. 442. See principal case cited in *Pierce v. Trigg*, 10 Leigh 425.

See generally, monographic note on "Partnership" appended to *Scott v. Trent*, 1 Wash. 77.

†**Chancery Practice—Answer—Effect as Evidence.**—On this point, the principal case is cited in *Richardson v. Donehoo*, 16 W. Va. 706.

See further, on the subject, monographic note on "Answers in Equity Pleading" appended to *Tate v. Vance*, 27 Gratt. 571.

did not know that the same was given in payment for the land in question?

The answer of Edgar, to this bill, averred, that, at the time he took from Donnally the assignment of Jones's bond, he knew not the consideration of said bond, and
390 *had no idea that the land in question was the consideration thereof.

No exception was taken to this answer as insufficient; and no testimony was exhibited in support of the cross bill.

The causes came on to be heard the 1st of December, 1804; when Chancellor Brown (without deciding upon the plaintiff Edgar's right, as it appeared in the original cause) dismissed the original bill with costs, and decreed that Edgar should pay the costs of the cross suit; "It appearing to the court, from the allegations in the cross bill, not denied by the answer, that the defendant Edgar, knowing of the claim of his ward to the land in controversy, and that that claim would be prosecuted, took an assignment on one of the bonds given by Jones for the purchase-money, the payment of which he pressed and received, knowing at the time of receiving payment the consideration for which it was given, and not disclosing the claim of his ward, which he has since purchased for five shillings, and which the original bill is brought to recover."

To this decree a writ of supersedeas was awarded by a judge of this court.

Wickham, for the plaintiff in error.

Peyton Randolph, for the defendants.

On the part of the defendants, it was contended, that John Matthews, under whom Edgar, the plaintiff, claimed, ought to have been a party to the suit; and Hoover v. Donnally, 3 H. & M. 316, was relied upon, as a case in point. Edgar was guardian of Matthews and bought the property of his ward for five shillings! Ought not the ward to have been a party, for the purpose of showing, if he could, that the purchase
391 made by his guardian was *fraudulent, or that his right had not, in fact, been relinquished?

On the other side, the position in the first marginal note to the case of Hoover v. Donnally was denied to be law, in the general terms there made use of; being contrary to the whole current of authorities. Where a derivative purchaser sues for a title, the first purchaser need not be a party, if he has parted with all his right. The only case, in which it is necessary to make him a party, is where the equitable or legal title remains in him. Mr. Call's yielding the point in that case, (3 H. & M. 319, in the note,) proceeded from a misapprehension of the law. The case of Hobart v. Abbott, 2 P. Wms. 643, only shows that, where the assignee, in part, of a mortgage brings a bill to foreclose, the original mortgagee must be a party. But a mortgagee, who has parted with the whole of his interest, need not be a party.

In the present case, Matthews had, originally, nothing but an equity; and, by his deed to Edgar, parted with the whole of that. No decree could be rendered against him; therefore, it would have been improper to have made him a party.

Monday, September 30th. Judge Brooke mentioned a point which had not yet been argued. It appeared that Matthews

and Donnally had purchased the settlement right jointly; and, as Matthews died in 1786, before our act of assembly concerning joint rights and obligations took effect, it might be a question whether Donnally was not entitled to the whole, as survivor?

Wickham. I am prepared with authorities to show that courts of equity lean against the doctrine of the right of survivorship, in all cases of purchases in partnership. (a) Donnally and Matthews were partners in a drove of cattle, and out of that property payment was *made to Pryor for the land. This made the land partnership property, and, therefore, not a joint tenancy, but an estate in common; the survivor being, in equity, a trustee for the representative of the deceased partner.

Peyton Randolph, contra. The testimony proves a partnership in cattle, but not in the land. Two partners may purchase lands jointly; and it will be considered a joint tenancy, unless it appear that the purchase was in the way of trade, and contemplated by them to be held as partnership property; (b) or unless their advances of money were unequal. But there is nothing in this record to countenance the idea of unequal advances for the land. After the drove of cattle was sold, the partnership was concluded, and the subsequent application of the money to the purchase of land was a different transaction.

Wickham. Whenever a partnership subject is converted into land, it partakes of the nature of the partnership, whether it related to a single transaction, or to a series of transactions.

Thursday, October 3d. JUDGE BROOKE pronounced the opinion of the court, consisting of himself and Judges Cabell and Coalter.

"Not deciding what would be the effect of an admission, by the appellant, that he had notice of the consideration of the bond of John Jones, one of the appellees, at the time he received the money due thereon; the court is of opinion that such notice is not admitted by the answer of the appellant to the cross bill, as seems to have been relied on by the chancellor. And the court is further of opinion, that the right of the appellant to one moiety of the land, surveyed by virtue of the certificate of settlement right, alleged in the bill of the
393 appellant *to have been purchased in partnership, by Andrew Donnally and Archer Matthews of John Pryor, is well proved; that it sufficiently appears that the appellee, John Jones, had notice of the title of Archer Matthews, and of the fraud practised by Andrew Donnally, at the time he purchased; and that the said decree is erroneous; therefore it is decreed and ordered that the same be reversed, &c.; that the cross bill of the appellee, John Jones, be dismissed; that the said appellee pay to the appellant his costs by him expended about his defence of that suit in the said court of chancery; and that the said appellee, Jones, deliver possession of one moiety of the one hundred and fifty-two acres of land surveyed by virtue of the certificate of settlement before mentioned, according to quality and

(a) Hawes v. Hawes, 8 Atk. 524; Lake v. Craddock, 8 P. Wms. 158, and Sugden, 407.
(b) Sugden, 406.

quantity, to be ascertained by commissioners to be appointed by the court of chancery; and also execute a good and sufficient deed for the land, with special warranty, to the appellant; and that an account of improvements and profits be taken, if required by either party. And it is ordered that the first suit be remanded to the said court of chancery, to be further proceeded in according to the foregoing opinion and decree."

Murray (a Pauper) v. M'Carty.

Monday, April 15th, 1811.

1. **Statute—Importation of Slaves—Construction.**—The proviso in the 4th section of the act of 1792, concerning importation of slaves from other states of the union, did not authorize such importation by citizens of this commonwealth, returning thereto, after a temporary residence elsewhere, without having made a permanent settlement in, or become citizens of, the state from which the slaves were imported. See farther on this subject. Acts of 1805, p. 35; Rev. Code, v. 2, p. 95; Acts of 1810, p. 15, 16; Acts of 1811, p. 34, 35, and Acts of 1812, p. 20, c. 18.
2. **Constitution of United States—Fourth Clause—Construction.**—Construction of the clause, in the 4th article of the constitution of the United States, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."
3. **Citizenship—Relinquishment.**—Quære, whether the right of citizenship in Virginia can be relinquished without complying with the terms of our act of assembly, concerning expatriation, Rev. Code, v. 1, c. 110, s. 5, p. 307?

This was an appeal from a judgment of the district court of Haymarket, affirming a judgment of the county *court of Fairfax, in favour of the appellee, against the appellant, prosecuting for her freedom.

At the trial in the county court, it was agreed that Daniel M'Carty, the defendant, was born in Virginia, and resided there, in his father's family, until his marriage; that his grandfather, Daniel M'Carty, left to his father, Daniel M'Carty, to be by him left to the defendant, a large estate, real and personal, lying in Virginia, on which he entered, and of which he took possession; that, in October, 1800, before he arrived at full age, he intermarried with Matilda M. S. Magruder, daughter of Dennis Magruder, living in Charles county in the state of Maryland; that, after his said marriage, and during the life of his father, he went to Maryland, expressing an intention to reside in that state, where he continued between three and four years, living in the family of his wife's father; that the defendant had no landed property in Maryland, and no place of residence, except in the family of his father-in-law; that, in the year 1802, he told his mother, Mrs. M'Carty, that he had relinquished all idea of ever settling in Virginia, and should live with Mr. Magruder until he could build, purchase, or rent a place in Maryland; but he did not, at any time, either build, buy, or rent any such place. It was also agreed that, during the time that he was in Maryland, he did not sell, or otherwise dis-

*Statute—Importation of Slaves—Construction.—The act of 1792 requiring persons removing to Virginia with slaves, to observe certain formalities, has no application to a citizen of Virginia, removing to another state with slaves, and returning with them to Virginia before the repeal of the law. Barnett v. Sam. Gilm. 232.

See the principal case also cited in Hunter v. Fulcher, 1 Leigh 181; Betty v. Horton, 5 Leigh 421.

pose of, his estate in Virginia, and that he never did any act relinquishing his right of citizenship in Virginia, except as before is stated; and never took the oath of allegiance to the state of Maryland; that, in the month of June, or July, 1803, the plaintiff, who had been purchased by the defendant in Maryland, was, at her own request, sent over by the defendant to Virginia, to the family of the defendant's mother, there to remain during her lying-in; that, shortly after, and during the summer of 1803, the defendant and his wife came over to Virginia, and remained about a fortnight in the family of his mother,

395 *on a visit; after which, he returned again to Maryland with his wife, where he remained until March, 1804, when he and his family again returned to Virginia, and went to housekeeping; that, on the 24th day of April, 1804, the defendant took the following oath before a justice of the peace of the county of Fairfax: "I Daniel M'Carty do swear that my removal into the state of Virginia was with no intent of evading the laws for preventing the further importation of slaves; nor have I brought with me any slaves with an intention of selling them, nor have any of the slaves which I have brought with me been imported from Africa, or any of the West-India islands, since the first day of November, 1778." That the plaintiff had continued and remained in the state of Virginia, for one whole year, since her removal into it in the month of June, or July, 1803, and previous to the commencement of this suit.

It was further agreed that the defendant did, in the month of April, in the years 1802 and 1803, vote at the elections for delegates to the general assembly of Virginia for the county of Fairfax; and that John Mason, a resident and citizen of Maryland, who was born in Virginia, and who did not relinquish his citizenship of Virginia, according to the laws of Virginia, did also vote in the county of Fairfax. It was further agreed, that the plaintiff, at the institution of this suit was, and now is, detained in slavery by the defendant.

On the foregoing statement of facts, the plaintiff's attorney moved the court to instruct the jury that the law was for the plaintiff, and that she was entitled to her freedom; which instruction the court refused to give, a majority of the court being of opinion that the law was for the defendant. To this opinion the plaintiff's counsel excepted.

Verdict and judgment for the defendant; which being affirmed by the district court, the plaintiff again appealed.

396 *Botts, for the appellant.

Hay, for the appellee.

Monday, June 17th. The judges delivered their opinions.

JUDGE CABELL. The appellant was a slave in Maryland, and was purchased there as such by the appellee, but now claims her freedom under the second section of our act of assembly, passed the 17th of December, 1792, (a) which establishes, as a general rule, "that slaves, which shall hereafter be brought into this commonwealth, and kept therein one whole year, or so long, at differ-

(a) Rev. Code, v. 1, p. 186.

ent times, as shall amount to one year, shall be free."

It being admitted by the parties that the appellant has been brought into this state since that law took effect, it is obvious that her right to freedom is thereby established, unless the appellee can show that this case comes within some of the exceptions contained in the act of assembly. He relies, for this purpose, on the 4th section, which declares "that nothing in this act contained shall be construed to extend to those who may incline to remove from any of the United States, and become citizens of this, if, within sixty days after such removal, he or she shall take" a certain oath therein prescribed.

But it is evident that the privilege conferred by this clause, of bringing slaves into this commonwealth, can be claimed by those persons only, who, at the time of their removal, were citizens, not of this, but of some other state, and as it is admitted that the appellee was a native of this state, the question arises, whether he had laid aside the character of citizenship thereby acquired, so as to entitle himself to the benefit of this proviso.

Nature has given to all men the right of relinquishing the society in which birth or accident may have thrown
397 *them; and of seeking subsistence and happiness elsewhere; and it is believed that this right of emigration, or expatriation, is one of those "inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive, or devert their posterity."(a) But, although municipal laws cannot take away or destroy this great right, they may regulate the manner, and prescribe the evidence of its exercise; and, in the absence of the regulations juris positivi, the right must be exercised according to the principles of general law. As we have no act of congress on this subject, and as doubts are entertained whether our act of assembly concerning expatriation is still in force; or, admitting it to be in force, whether it was ever intended to apply to the case of a citizen of Virginia, removing to, and becoming a citizen of, some other of the United States, I shall, in considering M'Carty's citizenship, confine myself to the principles of general or universal law: and I am clearly of opinion, that, even according to those principles, his removal from this state, under the particular circumstances of this case, would not amount to an expatriation. A temporary absence will not devert a man of the character of citizen, or subject of the state, or nation to which he may belong. There must be a removal with an intention to lay aside that character, and he must actually join himself to some other community.(b) The intention to abandon this state is not proved by any other evidence than the declarations of M'Carty himself; and, although this is one of those cases in which a man's own declarations will be received in his favour, yet, in the present instance, they are contradicted by his own

acts, and thereby lose all their weight; for he left his property behind him, and continued to exercise the most important right of a citizen of this state, by voting at the election of the representatives of the people. I do not mean to say that a citizen of this state cannot become a citizen of another state, without carrying his property with him;

398 *for, although that would be required according to the principles of general law,(c) it is dispensed with under our particular system, which provides that "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."(d) I have mentioned the circumstance of his leaving his property, to show, with the aid of other testimony, that he did not intend to cease to be a citizen of this state. But, although the constitution of the United States has wisely given to a citizen of each state the privileges of a citizen of any other state, yet it clearly recognises the distinction between the character of a citizen of the United States, and of a citizen of any individual state; and also of citizens of different states; and, although a citizen of one state may hold lands in another, yet he cannot interfere in those rights, which, from the very nature of society and of government, belong exclusively to citizens of that state. Such are the rights of election and of representation; for they cannot be imparted to any but citizens, without a subversion of the principles of the social compact. When, therefore, I perceive M'Carty in the exercise of those rights, I am disposed to consider it as rightful, rather than wrongful; which, however, can only be on the idea that he has not relinquished his citizenship. But, admitting him to have intended to abandon this state, he has not executed that intention by attaching himself to another. He made no settlement; he paid no taxes; in fact, he claimed none of the rights, and performed none of the duties, of a citizen of Maryland. He was "a mere sojourner in the land," retaining his character of citizen of Virginia, and, therefore, not entitled to the benefit of a proviso, which, from its very terms, is applicable to those persons only who are not citizens. If mere residence in another state, by a citizen of this state, residence undefined as to object, intention, or duration, shall entitle him, on his return, to bring with him as many slaves as
399 he may think proper, *how vain and nugatory is the law which affects to prevent their farther importation.

I wish it to be distinctly understood, that my opinion that M'Carty never ceased to be a citizen of Virginia, and that, therefore, he could not bring his slaves with him on his return, has not been influenced by the circumstance of his having failed to comply with the requisites of our act of assembly concerning expatriation. The view I have taken of the subject has rendered any consideration of that act totally unnecessary. My opinion is founded solely on the impression that, according to the principles of general law, there is not sufficient evidence to prove, 1st. His intention to quit this state; and, 2d. The execution of that intention by his departing out of this common-

(a) Grot. b. 2, c. 5, s. 24; Puff. b. 8, c. 11, s. 2, p. 808; Vattel, b. 1, c. 19, s. 230, 235, 236; Virg. Bill of Rights, art. 1.

(b) Puff. b. 8, c. 11, s. 3, p. 809; Hein. b. 2, c. 10, s. 390.

(c) Puff. 808, 809; Vatt. b. 1, c. 19, s. 235.

(d) Const. of U. S. art. 4, s. 2, Art of Conf. art. 4.

wealth, and becoming a citizen of Maryland. Had there been sufficient evidence on these points, it might then have become necessary to inquire, whether he ought not, nevertheless, to be considered as a citizen of this state, inasmuch as he had omitted to relinquish that character in the manner prescribed by our act concerning expatriation. (a) But we should have been there met by the previous and important question, whether, as the principal part of that act is taken up in declaring the mode in which aliens may become citizens, the particular part relating to expatriation was not intended to point out the mode in which citizens might become aliens: and if so, whether that act can be made to apply to the case of a citizen of Virginia, who leaves this state and becomes a citizen of some other of the United States; the citizens of the other states, although contradistinguished from citizens of this state, not being aliens with respect to this state, inasmuch as both the articles of confederation, and the constitution of the United States, entitle them to the privileges and immunities of citizens of this state. If arguments drawn from the long and uniform practice of a country are ever allowed to have any influence on a question concerning the

400 construction of its laws, they might here be urged with much force. For, of the innumerable emigrants from Virginia, who have overspread the southern and western states and territories, and filled their highest offices, it is believed that not one has ever deemed it necessary to conform to our act concerning expatriation. Are they still citizens of this state? But we should also have to encounter another previous question. Admitting it to have been the intention of our legislature to give to our act of assembly the most extensive application; does the power to regulate the right of expatriation still belong to the state governments, or does it belong to congress, as incident to the power of naturalization, the power of declaring who shall be citizens? I give no decided opinion upon either of these important questions; but I deem it not improper to state it as my present impression, that, if a citizen of Virginia shall have departed out of this commonwealth with an open and avowed, fair and bona fide intention of quitting it, and of becoming a citizen of some other state, and shall, in fact, have become a citizen thereof, that, from thenceforth, he ceased to be a citizen of Virginia, notwithstanding he may have omitted to comply with the requisites of our expatriation act: and that, should he thereafter be "inclined to remove" from his newly adopted state, and again "become a citizen of this," he will be allowed to bring his slaves with him, "if within sixty days after such removal" he shall take the oath prescribed by law. But as to the particular case now before the court, M'Carty never ceased, on any principle, to be a citizen of Virginia, and had no right to bring slaves into this state. The appellant, Nancy Murray, was, therefore, brought here contrary to law, and having been kept here one whole year, is entitled to her freedom; and the county court ought so

to have instructed the jury. I am, consequently, of opinion that both judgments be reversed, and that the cause be remanded to the county court for a new trial to be had *therein, with directions to the court, to instruct the jury accordingly.

JUDGE ROANE. It was decided by the supreme court of the United States, in the case of Scott v. Negro London, (3 Cranch, 324,) that the removal by the master, and the importation of the slave, need not be cotemporaneous and concomitant. I am inclined to concur in that construction of the act in question: but that point is not necessary to be now decided in the view I have taken of the subject.

The next question is, whether the appellee is a person coming within the meaning of the proviso of the act upon this subject. (b) That act declares, that slaves thereafter brought within the commonwealth, and remaining there one whole year, shall be free: to which penalty upon the importer, is added another of a pecuniary nature. The object of the law was, to prohibit the great political evil of introducing more slaves into the commonwealth: but as this prohibition, extended to all possible cases, might be too rigid, and as it was also a favourite policy with the legislature to increase the number of our citizens, the general object of the law was relaxed and given up, in consideration of the latter benefit, in favour of the persons, and under the circumstances, embraced by that proviso. That proviso, however, does not extend to those who are already citizens of this commonwealth. I infer this, 1st. Because that idea is reprobated by the limitation, in the proviso, to those who shall "remove" from any of the United States, "and become citizens of this;" and, 2d. Because, in the latter part of the same proviso, the case of "citizens of this commonwealth" is taken up, and the privilege of importation is confined, as to them, to slaves then owned by them, in any of the United States. This provision defines the extent of the privilege of citizens of this commonwealth in this particular; not

402 only by reason of the *imperious words of the first part of the proviso before mentioned, but also from the rule of construction, as applied to the last, that expressio unius est exclusio alterius. This construction results from the express provisions of the act itself; but, were it necessary, we might, in addition, well suppose, that the legislature would discriminate, in this particular, between those who were citizens of this state, (wherever resident,) and those who were not; and considering that the animus revertendi probably existed in the former, (even under any circumstances,) the legislature might well have concluded, that they would not stand in need of such inducements to return to the commonwealth, as those would to remove into it, who had never before been citizens thereof. In the case of Talbot v. Jansen, (c) in the supreme court of the United States, it seems to have been held, that, although an expatriation, under our act, was conclusive evidence of an intention to relinquish the right of citizenship, as to the commonwealth of Virginia, and, by Judge

(a) Rev. Code, v. 1, p. 207, c. 110, s. 5, passed the 23d December, 1793; October Sess. 1793, c. 16, s. 8, Ch. Rev. 218.

(b) Rev. Code, v. 1, p. 186.
(c) 3 Dallas, 152.

Iredell, (the other judges saying nothing on that point,) was the only evidence of such intention ; or, in other words, that a citizen of Virginia cannot expatriate himself therefrom, "in any other manner;" yet that, quoad the United States, a residence in, and even a swearing allegiance to, another country was equivocal; for that a man may, at the same time, enjoy the rights of citizenship in two or more governments, and that, therefore, even under those circumstances, the absent citizen would not be construed to have expatriated himself, or to have renounced forever his intention to return to his country. These considerations entirely justify the omission, by the legislature of Virginia, to extend the invitation in question to her absent citizens also; although, at first view, the reason of the two cases might appear to be the same. The question is therefore narrowed to the single point, whether the appellee had ceased to be a citizen of the commonwealth of Virginia at the time of *the importation in question: it is not enough that he was a citizen of any, or every other state in the union if he were then also a citizen of Virginia: I mean a citizen of Virginia in a particular and limited sense, as contradistinguished from the general privilege conferred, by the constitution, upon the citizens of each state, in every other state.

That there is both a general and a particular sense in which this relationship of a citizen is contemplated in our country, is evident from the constitution itself, which speaks of "citizens of different states" (inter alia) in the judicial article; from various acts of congress, and judicial decisions on the same subject; and from the consideration, that a contrary idea would savour too much of consolidation, as throwing out of view the particular sovereignties of which the American confederacy is composed. We are told by Judge Paterson, in the aforesaid case of Talbot v. Jansen, and I entirely subscribe to the doctrine, that the situation of America, in this particular, is new, and may produce new and delicate questions; that we have sovereignties moving within sovereignties; that allegiance to a particular state is one thing, and that to the United States is another; that a renunciation of the former allegiance does not draw after it a renunciation of the latter; and that a statute of the United States, on the subject of expatriation, is much wanted. If, under the non-existence of such a statute of the United States, the strong facts of a permanent residence in, and swearing allegiance to, another and a foreign country, were deemed equivocal, in that case, and as not necessarily importing an expatriation from the government of the United States, much less will the weaker and more equivocal facts existing in the case before us, be construed to have that effect, in relation to the commonwealth of Virginia; in which state, also, there being a statute upon the subject of expatriation, a noncompliance with the requisitions thereof will proportionally *weaken the inference of an intention to expatriate. The facts stated in the case before us, at most, show only a temporary residence in Maryland, and, at one time, perhaps an intention of permanent residence there; but

it is not only agreed that the appellee did not expatriate himself from Virginia, in the manner prescribed by our act, but, also, that he neither purchased permanent property in Maryland, nor took the oath of allegiance to that state. This case, therefore, is infinitely weaker than that of Talbot v. Jansen, in which the party was adjudged to be still a citizen of the United States, and that, independently of the strong additional argument derived from the existence of our act concerning expatriation, and the noncompliance, with its provisions, on the part of the appellee.

The foregoing ideas, in relation to the connexion between the United States and the several states, go a great way to justify the idea, (upon which the general assembly undoubtedly proceeded, in the case before us,) of a particular and local citizenship to Virginia, and to the other states; by which, as the case may be, an exemption from the penalties of the act will stand or fall.

Whatever the case may be, as to the concurrence of the powers of the two governments, on the subject of the naturalization of aliens, and however the construction, on that subject, is to be adjusted between the respective governments, on the ground of the principles before adopted from the opinion of Judge Paterson, (if not of the whole court,) in the aforesaid case of Talbot v. Jansen; it is clear to me, that the commonwealth of Virginia has never delegated to congress the exclusive power to legislate on the subject of the great natural right of expatriation, as relative to this commonwealth. Those topics of legislative power are entirely distinct and unconnected: the one relates to aliens, the other to citizens; the one to rights to be acquired, the other to rights to be abandoned; the one to a political, the other to *a natural right.

The power of expatriation, in relation to the commonwealth of Virginia, is one with which congress had certainly nothing to do; it is not granted in the instrument of government; and it is a fundamental principle in our system, that each state retains every power, jurisdiction, and right, which is not delegated to the United States by the constitution, nor prohibited by it to the states. (a) While, therefore, the power of legislating on the subject of expatriation, from the commonwealth of Virginia, has not been given up, and ought not to have been given up, by Virginia, to the United States; and while the legislature of Virginia has not presumed to confer this right upon her own citizens, (it being one of paramount authority, bestowed on us by the God of Nature,) it is but a small boon to ask, for the legislature of Virginia, that she should be permitted to set up a criterion of evidence for her courts, determining when, and when only, this right shall be adjudged to have been asserted.

By the standard of our act, therefore, on this subject, this case is to be tested; and I entirely agree with Judge Iredell in opinion, as aforesaid, that a citizen of Virginia cannot expatriate himself therefrom "in any other manner."

Of this construction the particular citizens of Virginia cannot complain; 1st. Because it is the act of their own government, upon

(a) Amendm. to the Const. art. 12.

a subject, undoubtedly within its power and jurisdiction; 2d. Because it is beneficial to all the citizens, that this great right should be placed upon a foundation which excludes all possible doubt as to the validity of its exercise, instead of leaving the matter at large, and carving out an infinity of litigation and uncertainty, in this particular; and, 3d. Because the exercise of that right, under the act, is as free as air, and depends upon volition only. As for the citizens of other states, it is not for them to complain, that privileges are denied to the citizens of Virginia, which are extended to them: privileges, too, 406 which are granted *in consideration of benefits conferred by them upon the commonwealth, and which it was not in the power of the other class to confer, they being already citizens of Virginia.

On these grounds, I am of opinion to reverse the judgment of both courts, and render judgment in favour of the appellant, for her freedom.

JUDGE FLEMING. The subject having been nearly exhausted by my brother judges, my opinion in this important case will be concise.

The 2d section of the act, passed the 17th of December, 1792, "to reduce into one the several acts concerning slaves, free negroes and mulattoes," declared in general terms, that "slaves, which should thereafter be brought into this commonwealth, and kept therein one whole year together, or so long, at different times, as should amount to one year, should be free." The 4th section of the same act modified this general regulation by certain provisos, or exceptions. The question then is, has the appellee, M'Carty, brought his case within any of those exceptions? And I am clearly of opinion that he has not.

The case of *Scott v. Negro London*, 3 Cranch, 324, (which has been cited and much relied on by the counsel for the appellee,) is essentially different from this case; the great point of distinction being that, in that case, the true owner of the slave was a citizen of Maryland who removed into this state, and within sixty days after his removal, took the oath prescribed by law; and it was decided that his rights were not to be affected by the acts of another person, over whom he had no control, and which were done without his knowledge or consent; whereas in this case, the appellee, M'Carty, is, and always has been, a citizen of Virginia, and evidently appears to have endeavoured to evade the provisions of the law.

The judgment, therefore, must be reversed, and entered in favour of the appellant, for her freedom.

407 *Marks v. Morris.

March, 1812.

1. *Deeds of Trust—Usury—Equitable Relief.*—Where a bill in equity is filed to stay proceedings upon a

**Deeds of Trust—Usury—Equitable Relief.*—The principles involved in *Marks v. Morris* were for many years the subject of judicial discussion, and gave rise—says one case (*Davis v. Demming*, 12 W. Va. 246)—to a controversy which lasted forty years, and which is perhaps the most remarkable to be found in the reports for the diversity of the opinions of the judges and the pertinacity and obstinacy with which some of the judges adhered to their opinions.

Much fault has been found with the decision in *Marks v. Morris*, and it has, from time to time, been questioned, distinguished, shaken, or confirmed,

usurious deed of trust, on the ground that the complainant had no opportunity at law to plead the usury, and prays for no discovery, but, on the contrary, is ready to prove the fact, the court ought not to grant him relief against the usury, upon the condition of his paying the principal sum of money, (without interest,) but should altogether enjoin the trustee from selling, until, by some proper proceeding to be instituted by the cestui que trust, he establish the validity of his contract; in which case, the injunction should be dissolved; and, in the contrary event, perpetuated.

2. *Same—Same—Same.*—Upon the result of such proceeding, if the injunction be dissolved, the deed (being then cleansed of its usurious taint, by the judgment of a competent tribunal) should be enforced as a security to compel the payment of the debt.

The decision of this case in the court of appeals, by which the decree of the superior court of chancery, for the Richmond district, (reported in 4 H. & M. 463—470,) was reversed, has settled a principle so important, that it is here inserted, without regard

and at length overruled. But, later the principles laid down therein were—according to certain cases—adopted by legislative enactment. No attempt will be made at this point to go into a complete discussion of the cases citing the principal case, showing the decisions therein and their effect on the principal case; for it is deemed unnecessary, since in the case of *Davis v. Demming*, 12 W. Va. 246, **JUDGE GREEN**, who delivered the opinion of the court, in construing §§ 7 and 10, ch. 141, Code of Va. 1860, took occasion to make a thorough examination of the state of the law of Virginia on the subject of equitable relief to a usurious deed of trust. In this examination, he reviews the decision in the principal case and devotes perhaps twenty pages to setting forth the effect of subsequent Virginia decisions thereon.

At this point, therefore, the cases citing the principal case will be collected, and their effect thereon shown only in a cursory manner; and reference is made to the case of *Davis v. Demming*, 12 W. Va. 246, for a more complete history and discussion of the principal case.

In *McPherrin v. King*, 1 Rand. 172, the judges were the same that decided the principal case. **JUDGE COALTER** thought the case of *Marks v. Morris* was one of peculiar nature and could be sustained only if confined to deeds of trust, or "new fangled judgments" as he termed them. **JUDGE BROOKE** thought the case at bar could be distinguished from the principal case. **JUDGE ROANE** referred several times to the principal case (pp. 182, 183, 189, 190) and said his impression was that in deciding it, the clear opinion of the court was that no part of the sum borrowed was to be paid as the price of relief except the plaintiff brought himself within the provision of the third section of the act of usury, and that this opinion was not abandoned by stating and relying, in the decision of the court, upon the perhaps stronger case of a deed of trust which, was the case then before the court.

In *Young v. Scott*, 4 Rand. 421, **JUDGE GREEN**, to a certain extent, reviewed the decision in the principal case; but **JUDGE CABELL** thought it unnecessary for the decision of the case then under discussion, that any of the principles in *Marks v. Morris* should be reviewed and he refrained from so doing.

In *Martin v. Lindsay*, 1 Leigh 499, the case was exactly that of *Marks v. Morris* and brought under review the correctness of the decision therein. **JUDGE CARR**, after stating the decision in *Marks v. Morris*, proceeded at some length to review this case and the two cases above cited and says (p. 502): "I have stated these cases (*i. e.*, *McPherrin v. King* and *Young v. Scott*) to show the exact situation of the subject. They clearly evince that *Marks v. Morris* has long been considered an open case, and the measure of relief in cases of usury a question wholly unsettled. * * * I shall however, give as briefly as I can, my view of the case of *Marks v. Morris*." After devoting some ten pages to the subject he concludes: "Upon the whole, I am firmly convinced that *Marks v. Morris* is not law either taken generally, or restricted in its application to deeds of trust." **JUDGE BROOKE** reviewed very briefly the case of *Marks v. Morris*, and, setting forth its scope and purpose, adheres to it. **JUDGES COALTER** and **CABELL** concurred with **JUDGE BROOKE**.

In *Pitzhugh v. Gordon*, 2 Leigh 626, 627, 628, 629, the principles involved in *Marks v. Morris* were again reviewed and the court, four judges sitting, was equally divided.

In *Turpin v. Povall*, 8 Leigh 98, **JUDGE BROCKEN**

to chronological order. It is also proper to mention that, in the following statement, an error, committed in the former report of the case, in stating the bill to have been for a discovery, is corrected.

Solomon Marks filed his bill, in the superior court of chancery, for the Richmond district, against Simpson Morris and Charles Copland, to be relieved against a usurious contract, covered by two deeds of trust; praying an injunction to inhibit Copland, the trustee, from selling the property thereby conveyed; and a rescission of the contract by a decree of the court; or such other relief as might be deemed just and equitable, and the nature and merits of the case might justify. The bill (setting forth, particularly, the circumstances of the contract) stated, moreover, that Hyman Marks, a witness, was privy to the whole transaction, and that, by his testimony, the usury could be established. The defendants were called upon, in the usual form, "to make full, true, and perfect answer to the premises, as fully as if the same were again particularly set forth and expressed."

The answer of Simpson Morris, the cestui que trust, neither admitted nor positively denied the usury, which, however, was clearly proved by the testimony in the cause.

The chancellor's decree gave the plaintiff relief against all but so much of the principal money as appeared to be due; and

allowed him all costs; directing, in case the said balance of the principal should not be paid on or before a certain day, the
408 injunction, for so much, should stand dissolved as an act of the day when the decree was rendered; that the deeds remain as a security for the same; and that Charles Copland be appointed a commissioner to proceed, agreeably to the terms of the deeds, to raise the amount thereof, and to report his proceedings to the court in order to a final decree.

From this decree the plaintiff prayed an appeal, which the chancellor allowed.

The cause was argued, on Wednesday the 11th, and Thursday the 12th of March, 1812, by Hay, for the appellant, and Williams and Wirt, for the appellee.

Monday, November 16th, (in the absence of the President,) JUDGE ROANE pronounced the following opinion of the court, consisting of Judges, ROANE, BROOKE and COALTER.

This is a bill brought by the appellant, praying that the trustee in certain deeds of trust constituted may be stayed from selling the property therein conveyed; and that (on the ground of usury) the said deeds may be decreed to be cancelled; and for general relief.

Although that bill, after setting out the particulars of the usurious contract, calls upon the defendant to answer the same, in the usual way, we, nevertheless, infer, that it is not such a bill for discovery and relief, as is contemplated in the third section of the act of usury. We infer this, not only because it omits to proffer to pay the principal money loaned by the appellee to the appellant, and to pray that the notes, given for the usurious consideration, may also be decreed to be given up and cancelled; but also, because the appellant (so far from averring therein that he stood in need of a discovery of the usury from the appellee) avers, on the contrary, that he could prove the same by a particular witness whom he names.

409 *The particular mischief intended to be remedied by that section of the act was that, as usurious contracts were frequently made in secret, there might often be a defect of evidence to detect them, in the ordinary course; it therefore authorizes a discovery in such case, from the conscience of the defendant, on the conditions prescribed by the act. This construction, which plainly results from the section itself now in question, is made more clear, by referring to its prototype, the fifth section of the act of 1748, upon the same subject; in the preamble to which the foregoing is expressly stated to be the mischief intended to be remedied. But this section, being adapted to a limited and specified case, does not interfere with, nor affect the general and ulterior jurisdiction of, the courts of equity, antecedently existing on the subject.

For example, it does not extend to, nor impose any conditions on, a party applying to a court of equity to perpetuate his testimony, touching a question of usury; (as is seen in the case of *The Earl of Suffolk v. Green*, 1 Atk. 450,) nor to the case of an application to a court of equity to relieve against a judgment at law, obtained by surprise, or accident, in a case of usury. In such

BROUGH said: "Does the rule adopted in the case of *Marks v. Morris*, 2 Munf. 407, apply to this case? I will in the first place remark that the decision in that case, however much it may have been objected to, is now too firmly established to be shaken. It has received the sanction of the court in *Martin v. Lindsay*, 1 Leigh 499, and in *Fitzhugh v. Gordon*, 3 Leigh 626. Let us then endeavor to understand the extent of that decision." JUDGES TUCKER and CABELL approved the decision of *Marks v. Morris*.

In *Thornton v. Gordon*, 2 Rob. 777, 778, and *Bank of Washington v. Arthur*, 3 Gratt. 173, 184, 185, the principal case is distinguished. But in this last case JUDGE BROOKE, in a dissenting opinion, thought the case under discussion came within the influence of *Marks v. Morris*, and said: "The case of *Marks v. Morris* has been understood as the law in cases similar for more than twenty-five years, by bar and bench, and by many members of the legislature, and never objected to that I know of; and, if overruled, would repeal the act against usury. In all cases of deeds of trust: to subject which to a trial at law, was the object of that decision."

The principal case was also cited in *Gilliam v. Clay*, 3 Leigh 696; *Wise v. Lamb*, 9 Gratt. 306; *Bank of Washington v. Hupp*, 10 Gratt. 61, 62.

In *Brockenbrough v. Spindle*, 17 Gratt. 21, 25, JUDGE MONCURE, delivering the opinion of the court, said that the tenth section of chapter 141, Code of Va. 1860, authorizing a debtor by bill requiring no discovery of the defendant to pray an injunction to prevent the sale of property conveyed to secure the payment of money or other thing borrowed at usurious interest, etc., was designed to adopt the principle of the case of *Marks v. Morris*, which had been overruled by the *Bank of Washington v. Arthur*, 3 Gratt. 173, and *Bell v. Calhoun*, 8 Gratt. 22. In *Belton v. Apperson*, 26 Gratt. 218, 219, 220, and *Turner v. Turner*, 80 Va. 382, it is also stated that the "doctrine of *Marks v. Morris*" was adopted by statutory enactment and thus became the law of the state not to be questioned by the courts.

But in *Davis v. Demming*, 12 W. Va. 280, JUDGE GREEN said: "I cannot believe that it was the purpose of the legislature in adopting this 10th section, to open again the almost endless controversies about what were the principles involved in the case of *Marks v. Morris*, or that they intended this section to apply to any case, except that of a usurious debt secured by a deed of trust; such is the plain meaning of its language; and such, I think, was obviously its purpose."

See further, monographic note on "Deeds of Trust" appended to *Cadwallader v. Mason*, Wythe 188; monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

case the mode of relief would be by granting a new trial, in which the whole contract might be vacated; and not, by subjecting the plaintiff to pay the principal sum, repeal the statute of usury, pro tanto, merely because he found it necessary to come into a court of equity, to be relieved against the accident. So, in the case before us, of this new species of judgment bonds, (if we may use the expression,) of these modern shifts and contrivances to evade, not only the statute of usury, but also the jurisdiction, at least, of the courts of law, and which, therefore, render the interposition of the courts of equity peculiarly necessary; in this case of an application, to a court of equity, to stay the hand of the trustee, until the validity of the contract can be inquired into in a court of law, by a plaintiff who wants no favour, or discovery

410 from *the defendant, but is even full-handed as to evidence to prove the usury in a court of law; neither the spirit or meaning of the act extends to impose on the plaintiff the loss of his principal sum due under the usurious contract. While such a construction would, as to that extent, operate a repeal of the statute of usury, in all cases whatsoever, secured by deeds of trust, as now practised upon and understood; the construction under which we now act does not go one jot further than the case last put, of relieving against a judgment obtained by surprise in a case of usury. In both cases, the aid of a court of equity is afforded, to enable the court of law to annul the usurious contract altogether; with this strong feature in favour of the case now before us, that the plaintiff has never before had an opportunity to do it.

The interference of a court of equity, in such case, so far as to permit an inquiry, by a court of law, into the validity of the contract, is not such a mighty boon as ought to subject the plaintiff to the loss of his principal sum. It is a power which is even exercised by the courts of law; as is seen in the case of *Cooke v. Jones*, Cowp. 727. In that case, a judgment had been entered up upon a warrant of attorney, and a scire facias was depending to revive and enforce the same. On a suggestion, that the consideration of the judgment was usurious, the court of king's bench stayed the proceedings upon the scire facias, and directed an issue to try the validity of the contract on which the judgment was founded, on the ground (which most emphatically applies to the case before us) that the defendant "had had no opportunity to plead the statute of usury, and was, therefore, without relief, but by the interposition of the court."

If this power was rightfully exercised, without condition, by a court of law, in relation to a judgment passing at its own bar, and in some sense receiving the sanction and ratification of the court, 411 it ought, a fortiori, to be *exercised in like manner by a court of equity, in relation to a transaction, passing, in pais, suggested to be tainted with usury, and presented in a form calculated to elude every other jurisdiction, save the usual and salutary jurisdiction of such court. When an usurious contract is to be enforced by a mode defying the power of the

other tribunals of justice, a court of equity will be neither tardy, nor rigorous, in extending its aid to prevent it.

The result of the foregoing observations, as applied to the case before us, is that, as the case made by the bill is not that embraced by the third section of the act for suppression of usury; as the appellant wanted no discovery from the appellee, but only found it necessary to apply to the court of equity to stay the trustee from selling, until the question of usury should be inquired into, before some competent tribunal; the chancellor ought not to have imposed on him the loss of the principal sum, but he should have enjoined the trustee from selling, until, by some proper proceeding, to be instituted by the appellee, he should establish the validity of his contract; in which case the injunction should be dissolved; and in the contrary event, perpetuated: in the former case, also, the deeds (being then cleansed of their usurious taint by the judgment of a competent tribunal) should undoubtedly be held as a security to insure the payment of the money.

On these grounds, we are unanimously of opinion that the decree should be reversed, with costs, and the cause remanded to the court of chancery for the Richmond district to be finally proceeded in, pursuant to the principles now declared.

412

*Marshall v. Thompson.

Saturday, September 28, 1811.

1. *Chancery Practice—Suit for Arrears of Annuity—Decree.*—In a suit in equity, for arrears of an annuity, the decree should be, not only for the sums due, with interest from the days when respectively payable: but reserving liberty to apply to the court, from time to time, to extend its decree, so as to embrace the payments thereafter falling due.

2. *Same—Issue—When Proper.*—Where the testimony to an important fact is such as to leave it doubtful, the court of equity ought to direct an issue to ascertain it.

This being a suit in chancery to recover arrears of an annuity, for the life of Mary Anne Thompson, the plaintiff, secured by a defective bond, executed by Daniel Marshall, the defendant, the 26th of January, 1789; (the sum payable, annually, being 12l. 10s. and the penalty of the bond only 25l.) the bill alleged that an action at law was brought on the bond to recover the first annual payment; and that, in consequence of a receipt produced by the defendant, (which the plaintiff denied to have been executed by her,) a nonsuit was advised by her attorney, to which she accordingly submitted; the answer insisted that the plaintiff, freely, voluntarily and fairly, gave the defendant, on the 2d of February, 1789, the

**Chancery Practice—Issue—When Proper.*—As a general rule, whether an issue should be directed or not, must depend on the sound discretion of the chancellor. Where an important fact is left doubtful by the testimony, the court ought to direct an issue. *Wise v. Lamb*, 9 Gratt. 308, citing the principal case; *Bullock v. Gordon*, 4 Munf. 450; *Nelson v. Armstrong*, 5 Gratt. 354. In *Wise v. Lamb*, 9 Gratt. 306, it is said that New Orleans Gas Light & Banking Co. v. Dudley, 8 Paige 452, cites the principal case on this subject.

See further, *foot-note* to *Magill v. Manson*, 20 Gratt. 527; *foot-note* to *Pryor v. Adams*, 1 Call 382; *monographic note* on "Issue Out of Chancery" appended to *Lavell v. Gold*, 25 Gratt. 473.

receipt in question, as a full and complete discharge; and the testimony on the subject leaving it doubtful whether such receipt was fairly obtained; the county court of Nottoway, on the 3d of June, 1803, decreed "that the defendant do pay to the complainant the sum of 12l. 10s. with 5 per cent. interest thereon from the first day of February, 1790, and the farther sum of 12l. 10s. for every year since that period, with interest, as aforesaid, on each sum, from the first day of February of each year, in regular succession, to the first day of February last," and costs; which decree being affirmed by the superior court of chancery for the Richmond district, September 12, 1806; the defendant appealed to this court.

The case was submitted, without argument, by Peyton Randolph, for the appellant, and Call, for the appellee.

Friday, October 4th. The following Opinion of the Court was pronounced by JUDGE ROANE.

413 "The court is of opinion that, if the agreement stated in the bill as the ground thereof has not been relinquished on the part of the appellee's intestate, (1) she should not have been limited by the decree of the courts below to the annuities which had actually fallen due before the date, but that liberty ought to have been reserved to her, thereby, to apply to the court, from time to time, to extend its decree, so as to embrace all the annuities thereafter falling due during her life. The court is also of opinion that, under the actual testimony exhibited in this cause, it would have been proper to have directed an issue to inquire whether the receipt of the 2d of February, 1789, was fairly obtained, with a full knowledge of its contents, on the part of the appellee's intestate, and whether it was then understood by her to extend to the whole bond."

Decrees of both courts reversed, and cause remanded to the superior court of chancery for an issue to be directed, and farther proceedings to be had, agreeably to the foregoing principles, in order to a final decree.

Scott's Executor v. Osborne's Executor.*

Wednesday, September 18, 1811.

1. **Case at Bar—Obligatory Promise—Consideration.**—A father-in-law having promised his son-in-law that, if he would purchase a certain tract of land, he would assist him in paying for it by letting him have the amount of a particular bond, when collected; and the son-in-law having thereupon made the purchase, this promise was determined to be upon a sufficient consideration, and obligatory in law.
2. **Same—Same—Chancery Jurisdiction—Discovery.**—It was determined, also, that the son-in-law properly sued in chancery to discover whether, and at what time, the money due on the bond was collected.
3. **Same—Same—Statute of Limitations.**—And, since his claim did not accrue before such collection, the act of limitation did begin to run against him until then.
4. **Legacies—Satisfaction of Promise by Testator.**—A legacy to a wife for her life, and afterwards to

the children of the marriage, is no satisfaction of a promise, to the husband, of the amount of a specific debt, (when recovered,) to be applied to a particular purpose: there being no declaration in the will that the legacy was intended as satisfaction for the promise.

James Scott filed his bill, on the 2d of March, 1795, in the late high court of chancery against the executors *of William Osborne, deceased; charging that, some time prior to the 16th day of February, 1785, the plaintiff being about to purchase a tract of land, in the county of Prince Edward, of a certain Robert Donald, for the sum of 946l. current money, whereof 434l. 10s. in part, was to be paid immediately, and the balance the Christmas following; William Osborne, of the county of Nottoway, in order to encourage him to make the purchase, and in consideration that he, the plaintiff, had married his daughter Elizabeth, and for her advancement, did advise and instruct the plaintiff to contract for the purchase of the said land, and to make the first payment himself; and, in consideration of his so doing, agreed that he, the said William Osborne, would pay the last payment for him, out of a debt due to him by bond from a certain Henry Anderson, (amounting to 315l. 15s. 3d. with lawful interest from the 1st of April, 1776,) when the same should be collected; that the plaintiff, depending on those promises, concluded the contract for the purchase, made the first payment to Robert Donald; and gave his bond for the balance of the purchase-money, amounting to 512l. 10s. payable the 25th day of December, 1785, in full hope and assurance that the same would be duly paid and taken up by the said Osborne; that his circumstances would not justify his making the said purchase; and that he would not have made it, if the promise aforesaid had not been made him; that, nevertheless, the said bond was not discharged by Osborne, who had not been able to collect the money from Anderson, and the plaintiff was himself compelled to pay it, with great difficulty and inconvenience, and a considerable sacrifice of property, which he finally accomplished, and took in the bond, about the year 1790; that Osborne, by his last will, made and published the 2d of October, 1786, bequeathed to his daughter Elizabeth, wife to the plaintiff, 5l. current money, and soon after departed this life, without having, in any manner, paid 415 *or satisfied the plaintiff for the said sum of 512l. 10s. or any part thereof; that his executors had, since the year 1790, completed the collection of the debt due from Anderson; but the plaintiff is unable to prove, at law, when the same was collected, and to what amount; that the said executors had assets to satisfy the plaintiff's claim, and were accountable to him, as trustees, to an amount equal to his last bond to said Donald. The bill concluded with special and distinct interrogatories, requiring the defendants to answer the several allegations aforesaid, and prayed a decree for 512l. 10s. with interest from the 25th day of December, 1785; also for the legacy of 5l. and for general relief.

The defendants, by their answer, contended, that, if the plaintiff's claim could be supported at all, it could in a court of law; that the promise of their testator (admitting

(1) Note. The suit (having abated by the death of the appellee) had been revived against her administrator. — Note in Original Edition.

*For monographic note on Accord and Satisfaction, see end of case.

†See monographic note on "Consideration" appended to Jones v. Obenchain, 10 Gratt. 269.

‡See monographic note on "Legacies and Devises" appended to Early v. Early, Gilim. 124.

that he made it) was not binding either in law or equity, because there was no consideration to support it, unless marriage shall be regarded as a continuing consideration; and because the time limited by law for the institution of actions for claims of this nature had long ago expired. They further answering said, that they were present when a conversation took place, between their testator and the plaintiff, about the purchase of Donald's land; and they understood that, if the money due on Anderson's bond could be collected, the plaintiff was to have the use of it, free from interest if returned in a short time; and that he was to give his bond for it: "they feel a conviction that such was the nature of the agreement, if it can be called one,) not only because their memories tell them so, but because, if their testator really intended that the said complainant should have the absolute ownership of the said bond, no reason can be conceived why an immediate delivery, or assignment, did not take place."

The answer further stated that the 416 complainant had *given an incorrect, if not an uncandid, statement of the will of William Osborne; who, in fact, devised to his daughter Elizabeth, wife to the complainant, during her natural life, a negro woman, named Cutchina, and all her increase that she then had, or might thereafter have, and directed his executors to lay out the sum of 280l. in the purchase of negroes, which negroes he bequeathed to the said Elizabeth during her life, and, after her death, to her children by the complainant: he also devised to the said Elizabeth, (after the death of his wife,) during her life, with a limitation to her children as before, a negro woman named Poll, and her daughter Milly; "all which, it is conceived, were certainly meant by the testator to be in full of the provision which it was proper for him to make for the plaintiff's family; the defendants aver that the complainant was spoken to by the testator, and then expressed his approbation of the manner in which the legacies aforesaid were to be made to his wife; that the said sum of 280l. has been disposed of according to his wishes, and he has received every benefit which was intended for him, or any part of his family, by the will aforesaid; that the widow of the said testator hath since departed this life, and hath made considerable bequests, to the children of the complainant, out of the residue devised to her; which residue could not be ascertained until all accounts were settled, and the estate divided; and now the complainant finding, perhaps, that he has got all that he is likely to receive, is setting up a claim, about which he has thought proper to be silent for nearly ten years."

In this answer the respondents said nothing about the time of collection of, or sum received by, them upon Anderson's bond. But from certain exhibits in the cause, (whether filed by the plaintiff, or by the defendants, does not appear,) the sum of 128l. 14s. 6d. appears to have been made, by an execution issued May 13, 1790, and the balance, amounting to 594l. 9s. 4d. besides 417 *costs, to have been recovered, in an

action of debt on the judgment, in September, 1793.

The last wills of William Osborne and Elizabeth Osborne, his widow, were also exhibits, and corresponded with the description of them given in the answer. Many depositions were taken on both sides; the general tendency of which was to prove the plaintiff's having been induced to make the purchase of Donald's land by William Osborne's promise to let him have the amount of Anderson's bond when collected.

The late chancellor dismissed the bill with costs; from which decree the plaintiff appealed to this court; and, the appellant and appellees having departed this life, the appeal was revived in favour of Scott's Executor against The Executor of Abner Osborne, who was surviving executor of William Osborne.

Wickham, for the appellant. 1. Scott came into equity upon two grounds; 1st. The trust relative to Anderson's bond; the amount of which, when collected, he was entitled to receive; and for that purpose had a right to demand an account; and, 2d. The uncertainty as to the time when the money was collected; which made a discovery necessary. (a)

2. The promise was supported by a sufficient consideration, the purchase of Donald's land having been made at the request of Osborne; and the plaintiff having thereby sustained a great inconvenience, against which he promised to indemnify him. (b)

3. The act of limitations did not bar the plaintiff's claim; which never accrued until the money due from Anderson was collected.

Hay, contra. According to Scott's own statement, the money when collected being his, an action for money had and received, or a special action for breach of contract, would have lain in his favour: adequate redress *might then have been 418 had at law; and, therefore, even if the consideration were sufficient, and the contract proved, there is no ground for coming into a court of equity.

But the consideration, in this case, was not sufficient: the promise, in fact, was merely voluntary. For the bill states that the plaintiff was about to purchase the land in Prince Edward, before his father-in-law said any thing to induce him to make the purchase. He must have applied to Osborne for help, and the promise must have been made in consequence of that application. His allegation, that the purchase was far above his ability, is no basis for a consideration; since (from his own showing) he was able, and actually did pay for the land.

The delay of bringing suit ought to bar the plaintiff; especially, since he waited till the death of Mr. and Mrs. Osborne, to get whatever might be bequeathed, by either of them, to himself, or his wife and children, and then set up this claim on account of Anderson's bond, for which, probably, the old gentleman supposed he had made him complete satisfaction by the ample provision made in his will. The bill being, in substance, for a specific performance, in which case the giving relief is discretionary with a

(a) *Chichester's Ex'x v. Vass's Adm'r*, 1 Munf. 98.
(b) *Carr v. Gooch*, 1 Wash. 260-262; 8 Burr. 167; 1 Pow. on Cont. 343, 344; 1 Roll. Abr. 22, pl. 23.

court of equity, the court ought not to countenance the present plaintiff.

Wickham, in reply. An action for money had and received will lie against every trustee; yet the bill in equity lies. That action is, in many respects, of modern date; introduced to obtain relief at law in many cases where the remedy formerly was, exclusively, in equity. But this circumstance does not take away the old established jurisdiction of the court. Proving, then, that that action will lie, does not prove that a bill in equity will not lie. But the prayer for a discovery is abundantly sufficient to give the court jurisdiction.

As to the consideration of the promise; the plaintiff's saying he was about to buy the land, proves nothing; *for this was not actually buying it. Another allegation in the bill is, that he would not have bought it, but for this promise. In all human probability, Anderson's bond was in suit at the time, and that circumstance alone prevented Osborne's assigning it to the plaintiff.

In Rowton v. Rowton, 1 H. & M. 92, there was no difference of opinion among the judges, on the point that the agreement, if proved, was upon sufficient consideration.

Mr. Hay's argument that Scott's claim is unconscientious, is not supported by the facts in the record. The devise in Osborne's will, to Scott's wife, is no satisfaction of the contract. Even a devise to himself could not have had that effect, without an express declaration in the will. Such a devise could not be presumed to have been intended as a satisfaction; especially in opposition to the testimony of witnesses, which ought always to be admitted to rebut an equity.

Hay. The suggestion of a want of discovery is merely colourable, to give jurisdiction. The time when Anderson paid the money might easily have been proved.

Wickham. The decision in Chichester's Ex'x v. Vass's Adm'r, is a complete answer to this objection. I contended, there, that the plaintiff having proved his case by evidence aliunde, a discovery was not necessary; but my argument was overruled.

Wednesday, September 25th. The following opinion was pronounced as the opinion and decree of the court, consisting of JUDGES FLEMING, ROANE, BROOKE and CABELL.

The chancellor, in this case, dismissed the appellant's bill, without assigning any reason for doing so; and the *counsel for the appellee stated four points in support of the decree;

1st. That, if the appellant had a right, he had a complete remedy at law, and therefore a court of equity had no jurisdiction of the cause.

2d. His action was barred by the statute of limitations.

3d. The promise, or declaration of Osborne, as stated in the bill, was void for want of a consideration; and,

4th. If good, the legacies to his wife, of which he had the benefit during his life, ought to be regarded as a satisfaction, pro tanto, of his engagement.

But we are of opinion, 1st. That a bill in chancery was necessary to discover whether, and at what time, the money due on Ander-

son's bond was recovered and received by Osborne's executors; 2d. That the appellant was not barred by the statute of limitations, as he had no right to the money, under the said promise, until it should be recovered of Anderson, the time of which was uncertain, and which, it appears, did not happen until the year 1793; 3d. That a very good and sufficient consideration is charged in the bill, and proved by sundry witnesses; and, lastly, that the legacies to the appellant's wife, being for life only, are by no means a satisfaction, pro tanto, of the engagement of the testator Osborne; it being a promise of a specific debt, when recovered, to be applied to a particular purpose.

The decree, therefore, ought to be reversed, with costs.

"Decree reversed; and, this court proceeding, &c. it is decreed and ordered that the appellee, Conrad Webb, executor of Abner Osborne, the surviving executor of William Osborne, out of the estate of the said William Osborne, pay to the appellant the full amount of the debt, with the interest thereon, by him recovered and received, on the bond of Henry Anderson, in the proceedings mentioned, and also interest, at the rate of 5 per centum per annum, on the said aggregate sum, from the time the *same was received by the said executor, until payment thereof shall be made by virtue of this decree. And it is ordered that the cause be remanded to the said court of chancery, for such further proceedings to be had therein, as shall be deemed necessary to carry this decree into full effect."

ACCORD AND SATISFACTION.

I. Definitions.

II. What Constitutes a Satisfaction.

1. Part Payment.

- a. In General.
 - b. Payment by a Stranger.
 - c. Payment at an Earlier Date.
 - d. Where Demand Is Unliquidated.
2. Payment by Note.
3. Payment by Check.

III. Effect of Accord and Satisfaction.

IV. Pleading and Practice.

I. DEFINITIONS.

Accord and Satisfaction.—Accord and satisfaction is a method of discharge of a contract, or cause of action arising either in contract or tort, consisting in the substitution of an agreement between the parties in satisfaction of such contract or cause of action, and an execution of that agreement. 1 Am. & Eng. Enc. Law (2d Ed.) 408.

Accord.—Accord is a satisfaction agreed between the party injuring and the party injured, which, when performed, is a bar to all actions upon the same account. Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. Rep. 718, 5 Am. St. Rep. 285.

II. WHAT CONSTITUTES A SATISFACTION.

1. PART PAYMENT.

a. IN GENERAL.

The Common-Law Rule.—The general doctrine to be deduced from the authorities from Pinnel's Case, 5 Coke's R. 117a, down to the present time, seems to be, that an agreement to accept a smaller sum in lieu of a liquidated and ascertained debt, made between the debtor and creditor, is a mere *nudum pac-*

sum, and not binding upon the creditor, and, therefore, he may accept the part and immediately sue for and recover the rest, notwithstanding his express, but unsealed, promise to release the debtor from the payment thereof. But this rule, being highly technical in its character, seemingly unjust, and often oppressive in its operation, has been gradually falling into disfavor; and the courts have therefore not only confined its operation strictly within its own narrow limits, but have seized upon every possible opportunity to evade its application. As a consequence, it has been generally, if not universally, held that where any new element entered into the agreement of compromise—as where an earlier day is fixed for the payment, or a different place selected therefor, or where the payment is made in some other thing than what was originally contracted for, *e. g.*, a chattel, or personal services, it will amount to a satisfaction of the whole debt, if the parties so agree. *Seymour v. Goodrich*, 80 Va. 303; *Smith v. Phillips*, 77 Va. 548; *Lee v. Harlow*, 75 Va. 22; *Smith v. Chilton*, 84 Va. 840, 6 S. E. Rep. 142.

Statutory Rule.—It is now provided by statute in Virginia that "part performance of an obligation, promise, or understanding, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, and rendered in pursuance of an agreement for that purpose, though without any new consideration, shall extinguish such obligation, promise, or undertaking." Va. Code (1887), sec. 2558. See also, *Smith v. Chilton*, 84 Va. 840, 6 S. E. Rep. 142.

But under this statute, where a creditor agrees to accept less than the amount due from his debtor in satisfaction of his debt, and then assigns the entire debt, of which assignment the debtor has notice, the debtor is estopped from falling back upon the compromise and release after he permits a decree to be entered against him for the entire debt. *Smith v. Chilton*, 84 Va. 840, 6 S. E. Rep. 142.

D. PAYMENT BY A STRANGER.

May Amount to a Satisfaction.—Where a stranger to the contract pays a sum which is accepted in full satisfaction of a larger sum, this amounts to a satisfaction of the larger debt. Thus where a father or other relative pays one-half of a joint note, on behalf of the promisor in consideration of the fact that the promisee will release such promisor from the payment of the other half, and the contract is executed, the money received, and the release indorsed on the note, such a transaction constitutes a valid contract of which the promisor can avail himself when sued for the remaining half of the note. *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. Rep. 487; *Seymour v. Goodrich*, 80 Va. 303.

So where a note is secured by a deed of trust, and the grantor in the trust deed conveys the property to a third party, who gives his note to the creditor for the debt with interest and executes a deed of trust to secure such new note, according to agreement, this is the payment of the old debt, and the first deed of trust is discharged. In such case, if in a release deed by the creditor in the first deed of trust he acknowledges payment of the debts so secured, this will not be an acknowledgment of the payment of the debt secured by the second deed of trust. *Dryden v. Stephens*, 19 W. Va. 1.

One-Half Payment by Stranger.—When a third person pays one-half of a joint note on behalf of one of the makers in consideration of the payee's release of such maker from payment of the other half, and the release is indorsed on the note, such transaction constitutes a complete satisfaction of the note; a release of one joint obligor being a release of all. *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. Rep. 487.

C. PAYMENT AT AN EARLIER DATE.—Where a creditor agrees to remit part of the debt upon condition that a part of the residue be paid at an earlier date, the condition must be strictly performed; but he may, by his consent, enlarge the time, and such consent will bind him in equity. *Robertson v. Campbell*, 3 Call 421. See also, *Higginbotham v. May*, 90 Va. 238, 17 S. E. Rep. 941.

D. WHERE DEMAND IS UNLIQUIDATED.—If one owing an unascertained sum of money offers his creditor a sum, declaring that it is in full payment, the contract is discharged by the acceptance of such sum. *American Manganese Co. v. Virginia Manganese Co.*, 91 Va. 272, 21 S. E. Rep. 466.

2. PAYMENT BY NOTE.

General Rule.—The general rule is that the debtor's own note does not operate as the payment of an antecedent note unless so intended by the parties. In the absence of such intention, express or implied, the note is treated as a conditional payment merely. *Hopkins v. Detwiler*, 25 W. Va. 734; *Basler v. Nevin*, 3 W. Va. 632; *Miller v. Miller*, 8 W. Va. 550; *Poole v. Rice*, 9 W. Va. 73; *Dunlap v. Shanklin*, 10 W. Va. 662; *Bantz v. Bassett*, 12 W. Va. 772; *Sayre v. King*, 17 W. Va. 583; *Bank v. Good*, 21 W. Va. 455; *Farmers' Bank v. Mut., etc., Soc.*, 4 Leigh 88; *Moses v. Trice*, 21 Gratt. 556; *Lewis v. Davisson*, 29 Gratt. 216; *First Nat. Bank of Parkersburg v. Handley*, 48 W. Va. 690, 37 S. E. Rep. 536; *Morris v. Harveys*, 75 Va. 726; *Hess v. Dille*, 23 W. Va. 90; *Taylor v. Bank of Alexandria*, 5 Leigh 471.

So where several small promissory notes are given for a large one, they will be no satisfaction of the larger one unless paid. *McGuire v. Gadsby*, 3 Call 234.

Where Note is Passed into Judgment.—The same rule applies where the note is passed into judgment; the new note is considered as a conditional satisfaction of the judgment only, and upon dishonor of the former, the latter revives and may be enforced at law or in equity. *Morris v. Harveys*, 75 Va. 726; *Feamster v. Withrow*, 12 W. Va. 611.

Where There is an Argument to Accept in Satisfaction.—But, of course, where there is an express agreement between the parties to accept the new note in satisfaction of the old one, this agreement will control. *Merchants' National Bank v. Good*, 21 W. Va. 455; *Hopkins v. Detwiler*, 25 W. Va. 734; *Morris v. Harveys*, 75 Va. 726; *First Nat. Bank v. Handley*, 48 W. Va. 690, 37 S. E. Rep. 536; *Poole v. Rice*, 9 W. Va. 73; *Dunlap v. Shanklin*, 10 W. Va. 662; *Hess v. Dille*, 23 W. Va. 90; *Moses v. Trice*, 21 Gratt. 556; *Bantz v. Bassett*, 12 W. Va. 772; *Dages v. Lee*, 20 W. Va. 584; *Kimmins v. Oldham*, 37 W. Va. 258.

Where it is agreed between the parties that the note of a third person shall be taken for the debt, the mere taking of it amounts to the payment of the debt. *Dryden v. Stephens*, 19 W. Va. 1.

Where the transaction amounts to a novation of the debt by a mere exchange of securities, and the new contract is accepted in satisfaction of the old one, it becomes an accord executed, and discharges the original cause of action, whether the new contract is ever performed or not. *Morris v. Harveys*, 75 Va. 726.

No Necessity for Any Form of Words to Make New Note a Good Satisfaction.—Where a new note is accepted in satisfaction of an old one, it is not essential that any particular form of words be used, such as "full satisfaction" or "absolute payment," but any language will be sufficient which, with the surrounding circumstances, plainly indicates a satisfaction of the debt by the adoption and acceptance of a new and different security. *Morris v. Harveys*, 75 Va. 726.

Where Agreement to Accept Is Procured by Fraud.—Whether a note is that of one previously bound, or of a stranger, it will not be regarded as an absolute payment or extinguishment of the pre-existing debt, even when so expressly received, if the agreement to so accept it was procured by fraudulent concealment and misrepresentations. *Poole v. Rice*, 9 W. Va. 73; *Merchants' National Bank v. Good*, 21 W. Va. 455.

Usurious Note.—Where usurious notes are given for a valid pre-existing note they do not amount to a satisfaction, but in such case, the usurious notes being nugatory and void, the creditor is remitted to his original title and remedy. *Parker v. Cousins*, 2 Gratt. 372.

Impeachment of Settlement by Note.—Where parties have made a settlement in regard to a transaction, and struck a balance, which has been adjusted by cash or note, it is incumbent upon the party complaining of fraud or mistake, by suit in equity, to allege it specially in his bill, and to establish it by proof. *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. Rep. 397.

3. PAYMENT BY CHECK.—The giving of a check by a debtor to a creditor is generally presumed to be only a provisional or conditional payment of the debt for which it is given. The check, however, may, by agreement between the parties, be given and received in full payment and absolute discharge and satisfaction of the debt; and whether it was so given and received is a question of fact for the jury. *Blair v. Wilson*, 28 Gratt. 165.

III. EFFECT OF ACCORD AND SATISFACTION.

An accord with and satisfaction from one of several persons guilty of a joint assault and battery is a bar to an action as to them all, notwithstanding the acknowledgment of satisfaction is expressed as applying only to the part which that one took in the trespass, and notwithstanding a proviso that it shall not operate in favor of the other trespassers. *Ruble v. Turner*, 2 Hen. & M. 38.

IV. PLEADING AND PRACTICE.

Mode of Pleading Accord and Satisfaction.—At Common Law.—At common law the defendants might have relied upon an accord and satisfaction of the plaintiff's cause of action under their plea of non-assumpsit; but as accord and satisfaction admits the original cause of action and sets forth matters in discharge thereof, they had a right to file such a plea, even though the plea of nonassumpsit had also been filed. *First National Bank v. Kimberlands*, 16 W. Va. 565; *Merchants', etc., Bank v. Dorsey*, 9 W. Va. 373; *Richmond, etc., R. Co. v. Johnson*, 90 Va. 775, 20 S. E. Rep. 148; *Virginia, etc., Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. Rep. 973.

Same—Under Statutes.—It is provided by statute, both in Virginia and West Virginia, that "in a suit for any debt the defendant may at the trial prove, and have allowed against such debt, any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise." Va. Code, sec. 3298; W. Va. Code, sec. 4, ch. 126. It follows that under these provisions the defendant, though he may rely upon the accord and satisfaction under the general issue, yet the satisfaction upon which he relies must be so plainly and particularly described in an account filed with his plea, as to give the plaintiff notice of its nature. *Richmond, etc., R. Co. v. Johnson*, 90 Va. 775, 20 S. E. Rep. 148; *Virginia, etc., Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. Rep. 973; *Smith v. Townsend*, 31 W. Va. 486; *Morgantown Bank v. Foster*, 35 W. Va. 357, 13 S. E. Rep. 996. See

also, monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 183.

When Demurrer to Plea Will Be Sustained.—Where, in an action of debt on a judgment, the defendant pleads that by an agreement in writing between the parties the judgment was discharged and satisfied by a new contract for the payment of a sum in cash, which was then paid, and for the payment of the balance by deferred instalments, whereby the said judgment was remitted and released, and accord and satisfaction thereof made, a demurrer to the plea will be sustained. *Herrington v. Harkins*, 1 Rob. 501.

Moore's Executrix v. Ferguson and Others.

Wednesday, October 9th, 1811.

1. **Husband and Wife—Separate Estate—Profits.**—A wife, who lived with her husband, and was maintained by him, cannot, after his death, demand an account of profits, which he received, of a separate estate settled upon her; no such demand having been made by her in his lifetime.

2. **Executors—Decree against—De Bonis Propriis.**—A decree, and execution thereupon, against an executor, or administrator, for a balance due on his administration account, should not be against the goods and chattels of the decedent in his hands to be administered, but against his own goods and chattels.

See the same point decided by CHANCELLOR TAYLOR, in *Barr v. Barr's Adm'r*, 2 H. & M. 26.

In a suit in chancery, on behalf of the residuary legatees of George Moore, deceased, against his widow, being his sole executrix, for a settlement of her administration account, and distribution of the balance due to the plaintiffs; the defendant, in her answer, set up a claim, against the estate of the decedent, for the profits, in his lifetime, of sundry slaves, which, before the coverture, were her property, and, by a marriage settlement, bearing date the 10th of May, 1783, were conveyed to a trustee, "upon this express condition and trust, that, at any and every time she should think proper, after the said marriage should take effect, as well the property as the use of the said slaves, all or either of them, should be in the sole and absolute disposal of her the said Molly, either by will, or otherwise, either in the lifetime of the said George, or otherwise."

It did not appear that, in the lifetime of George Moore, Mrs. Moore exercised any act of ownership over the slaves, or, in any respect, interfered with his receipt of their profits. It appeared that she lived with him, upon the usual terms of man and wife.

Commissioners, appointed by the county court, reported a balance against her of 400l. 8s. 10d. 1-2. upon the administration account; and, giving her credit for hire of her slaves from May, 1793, to the time of her husband's death, amounting, by a particular

statement of items, to the sum of 999l. 11s. 8d. charged her, also, with the same sum, for her board and clothing during

***Husband and Wife—Separate Estate—Profits.**—See monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 150.

The principal case was distinguished in *Roper v. Wren*, 6 Leigh 40.

†**Executors—Decree against—De Bonis Propriis.**—To the point that a decree against an executor or administrator for a balance due on his administration account should be *de bonis propriis* and not *de bonis testatoris*, the principal case is cited in *Templeman v. Fauntleroy*, 3 Rand. 446; *Franklin v. Depriest*, 13 Gratt. 272.

See further, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

the same time, and the expense of partly raising fourteen negro children.

To this report the defendant excepted; but the county court decreed (accordingly) "that the plaintiffs recover against the said defendant 400l. 1s. 10d. and costs, to be levied of the goods and chattels of the said George Moore, deceased, in the hands of the defendant to be administered, if so much thereof she hath; if not, that then the costs be levied of the proper goods and chattels of the said defendant."

Upon an appeal to the superior court of chancery, this decree was affirmed; whereupon, a farther appeal was taken to this court.

Hay, for the appellant, admitted that, after examining all the authorities, he was not prepared to contend that Mrs. Moore was entitled to a credit for the profits of the slaves during her husband's life.

Munford, for the appellees, observed; that this admission by Mr. Hay was very properly made; the authorities being clear that, although the wife may take a separate estate from her husband, and even have a decree against him in respect of such estate; (a) yet, if she do not demand the produce during his lifetime, and he maintain her, an account of such separate estate shall not be carried back beyond the year in which he died. (1)(b)

Wickham, on the same side. The decree is not sufficiently favourable to us. It ought to have been *de bonis propriis*; the balance due on the administration account

423 *being a debt from the executrix, for which she is personally responsible

Friday, October 11th. The President pronounced the court's opinion, that the decrees of both courts be reversed, with costs against the appellant; the decree of the county court having been erroneous in limiting the recovery of the sum decreed to the goods and chattels of the testator in her hands to be administered; and, therefore, the appellees being the party substantially prevailing in this court; and it was decreed and ordered that the appellant pay to the appellees 400l. 1s. 10d. with lawful interest thereon from the 16th day of March, 1802, till paid, and the costs by them expended in prosecuting their suit in the said county court.

Mayo v. Haines and Coutts.

Friday, October 4th, 1811.

Injunction—Awarding—Court of Appeals.*—The judges

(a) *Cecil v. Juxon*, 1 Atk. 278.

(1) Note. "This rule, however, proceeds on the notion of the wife's consent: but if, during the husband's lifetime, she demand such account, and he promise to pay whatever is due to her, she shall be allowed to come upon his estate, as a creditor, for the amount." *Ridout v. Lewis*, 1 Atk. 269; *Countess of Warwick v. Edwards*, 1 Eq. Cas. Abr. 140, pl. 7, 1 Bac. Abr. 482.—Note in Original Edition.

(b) 1 Bac. Abr. 482, *Powell v. Hankey*, 2 P. Wms. 82; *Thomas v. Bennett*, id. 341; *Fowler v. Fowler*, 3 P. Wms. 265; *Lord Townsend v. Wyndham*, 2 Vez. 7; *Peacock v. Monk*, id. 190.

***Injunction—Awarding—Court of Appeals.**—Virginia Code 1887, § 3433, confers no original jurisdiction upon one of the judges of the court of appeals to award an injunction, except in the case where the application has been made, first to a judge of an inferior court, either in term or in vacation, and has been refused. *Fredenheim v. Rohr*, 87 Va. 760, 18 S. E. Rep. 198, citing the principal case, and *Randolph v. Randolph*, 6 Rand. 194.

See further, monographic note on "Injunctions" appended to *Clayton v. Anthony*, 16 Gratt. 518; monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268.

of the court of appeals, or any one of them, out of court, have power to award injunctions, which have been refused by the judge of any superior court of chancery; but this power is not possessed by the court of appeals.

This was a motion to the court of appeals to grant an injunction which had been refused by the judge of the superior court of chancery for the Richmond district.

Saturday, October 5th. The President reported that "the court, being unanimously of opinion that the judges of this court, or any one of them, have the power to award injunctions, after a refusal thereof by the chancellor, in the case provided for by the second section of the act of the 27th of January, 1810, 'authorizing the superior courts of law and chancery to issue writs of certiorari in certain cases, and for other purposes,' (Sessions Acts of 1799, c. 11, s. 2,) is yet of opinion that such power has not been given to this court; and, on this ground, without considering the merits of the bill, the application is rejected."

424 *Watkins v. Taylor and Mewburn.*

Monday, October 14th, 1811.

Usury—What Constitutes—Case at Bar.—T. being indebted to H. in the sum of 1,200l., payable, by four equal instalments, in little more than three years; an agreement took place, between T. and W., that W., in consideration of 800l. cash, paid him by T. should exonerate T. from his debt to H.: this agreement is usurious and void; notwithstanding W. might have reaped advantage from it, by buying the bonds of H. at a discount, or by selling him tobacco at a high price. (2)

Upon an appeal from a decree of the superior court of chancery for the Richmond district, pronounced the 12th day of May, 1807, in a suit in which Robert Watkins was plaintiff, and Thomas Taylor and William Mewburn defendants.

The bill stated that, some time in the year 1798, Thomas Taylor purchased of Harry Heth a tenement, at the price of 1,200l. payable, in instalments of 300l. each, in the month of September, of the years 1798, 1799, 1800 and 1801; that the said Thomas Taylor applied to the complainant to know how much he would take in cash, as the consideration for binding himself to discharge the said 1,200l. at the periods aforesaid, in the bonds of the said Harry Heth; meaning that he should be at liberty to discharge the same by discounts arising from the said Harry Heth's bonds; that the complainant thereupon agreed to pay the said 1,200l. in manner aforesaid, for the sum of 800l. in cash; that, in pursuance of this agreement, he purchased a bond given by the said Heth, which

*For JUDGE ROANE'S opinion in this case, see Appendix to 3 Munf. 595.

†**Usury—What Constitutes.**—See monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

The principal case is cited in *Brakeley v. Fuller*, 3 W. Va. 134.

(2) Note. If the agreement in this case, had been, that W. was to pay the debt in the bonds of H. if to be had, and not otherwise: it seems that, since the principal sum of 800l. would have been in jeopardy, the contract would not have been usurious. See *Gibson v. Fristoe*, 2 Call. 78.

But here, it appeared that, though W. was to be at liberty to pay the debt in the bonds of H., yet he was to be responsible, at all events, whether he could procure such bonds, or not. This important circumstance made the contract usurious. See (post) the opinion of the court.—Note in Original Edition.

had been due a considerable time, and amounted to 300l.; which bond he delivered to the said Taylor, who accepted the same as a partial satisfaction of the contract; that (at the instance of the said Taylor) the complainant, with William Mewburn as his surety, executed, to the said Harry Heth, three bonds for the sum of

300l. each, payable, on the 6th day of
425 *September, in the years 1799, 1800 and 1801; that, at the like instance of the said Taylor, he delivered to him the three last-mentioned bonds, to be delivered to the said Heth; that these bonds appear to have been in the said Heth's possession, inasmuch as he has assigned the same; that the said Taylor informed the complainant, when he executed the said three bonds, that the agreement between Heth and himself was, that they were not to be assigned away, or passed off, until they became due; which circumstance operated as an inducement of convenience in the estimation of the complainant, since it afforded him an opportunity of procuring bonds of the said Harry Heth, with which the said Thomas Taylor stipulated that his own bonds aforesaid should be redeemed; that, from some cause or other, a difference took place between the said Taylor and Heth, in consequence whereof, the said Taylor refused to receive, from the complainant, in discharge of his said three bonds, any thing but money: that two of them, to wit, those payable in the years 1799 and 1801, have been discharged by the complainant to the said Thomas Taylor, as assignee of the said Harry Heth, in actual cash; that, upon the third bond, due in the year 1800, the said Taylor brought suit, in the Richmond Hustings court, against the said Mewburn, and obtained a judgment by default; owing to the complainant's having written to an attorney to defend the same, who, contrary to his expectation, did not practise in that court; that Mewburn thereupon gave the complainant notice, and obtained a judgment against him, by motion, for the sum of 331l. 7s. 6d. including costs and sheriff's commissions.

The bill proceeded to charge that the demand of the full sum of 1,200l. of principal, for 800l. only, of principal, under the circumstances aforesaid, was usurious; and, if not usurious, unconscionable; that Mewburn had informed the complainant, that, although he had procured a receipt from Taylor, it was merely to

426 enable him *to proceed by motion against the complainant; the said Mewburn having, in fact, paid no money to the said Taylor, but having deposited in his hands merchandise to be sold for the discharge of the judgment against the said Mewburn, in case the execution sued out by the latter upon his judgment against the complainant should not produce the amount.

The prayer of the bill was, therefore, that Mewburn's judgment against the complainant be perpetually enjoined; that his merchandise be restored to him, and the judgment aforesaid against him vacated; or that the complainant might receive any further, or other relief, &c.

The injunction was awarded, on the usual terms, the 12th of November, 1802.

The answer of Thomas Taylor admitted

his purchase of a tenement, of Harry Heth, at the price mentioned in the bill, payable by instalments of 300l. each, without interest; denying that he applied to the complainant to know how much cash he would take for binding himself to pay the said interest; on the contrary, averring that the proposal came from the complainant, who repeatedly applied to him on the subject, and informed him that he had an opportunity of making an advantageous contract with the said Heth, who was willing to receive, in satisfaction of the said bonds, some tobacco, which the complainant wished to dispose of, and would allow a very high price; that this proposal was not agreed to by the respondent, until repeated applications had been made to him by the said Watkins, seconded by the said Heth, who also informed him that he and the complainant were about making an agreement concerning the said tobacco; that the respondent, accordingly paid the complainant the sum of 800l.; that there was no conversation between them relative to a loan of that sum of money; that he had, on his part, no idea of a loan, nor any expectation that

the complainant wished to become a
427 borrower *of money by means of the said agreement, but supposed his object was to make an advantageous contract with the said Heth; that the money was not raised without difficulty, and his object in raising it was not to lend it to the complainant, but to pay off a debt due from himself, payable at future periods; that he would not have lent to the complainant such a sum of money, on the terms aforesaid; indeed, a considerable part of the said sum was actually borrowed by the respondent; that, when the said contract was made, and the 800l. paid, he understood that the complainant and the said Heth had come to an agreement, and considered himself exonerated from the debt to the said Heth; that, some time afterwards, the respondent was informed that Heth and the complainant had disagreed about the price of the tobacco, and that the debt originally due from the respondent was still unpaid; and the said Heth informed him that he still looked to him for the said debt: this defendant thought himself in equity discharged therefrom, as the said Heth had urged him to make the agreement with the complainant, and he understood that Heth was to look solely to the complainant, and not to him for payment; but, in order to avoid a dispute, he thought it best to urge the complainant to fulfil his contract by paying off the debt to Heth; that the complainant lodged with this defendant a bond, due from the said Heth, (which he the complainant had purchased at a very large discount,) and the three bonds executed by the complainant, with the said Mewburn as his surety, in order that they might be given to the said Heth in satisfaction of the debt; that the said Heth was willing to take the bonds of the complainant and Mewburn, but objected to taking in his own bond, (which he did not admit to be justly due,) and, moreover, insisted on retaining the legal title to the said tenement as a security for his debt; that this defendant became justly alarmed at his situation: he had not been sufficiently careful, at the time of

428 *his contract with the complainant, with respect to the exoneration which he understood he was to have from the said Heth; and it was doubtful whether he could compel the said Heth to look to the complainant, only, for his money; and if this defendant should be obliged to pay it, the inconvenience would be a very serious one: at length, it was agreed, between him and the said Heth, that the latter should receive the said bonds, and assign them to this defendant, and that he should redeliver the said Heth possession of the tenement aforesaid, which was accordingly done; and the said Heth, some time afterward, took in his own bond. The respondent further said that, during the time that he was possessed of the said tenement, he laid out a considerable sum in improvements, part of which, to the value, he believed, of at least 100l. had been lost to him; and that he had also lost the benefit of the rise in the value of the said tenement, which was very considerable. He acknowledged having received full satisfaction of the judgment against Mewburn, and declared that he had no interest in Mewburn's judgment against the complainant, which he believed was not the property of the said Mewburn, but of a ——— Compston, or his trustee; the said Mewburn having made an assignment of his effects for the benefit of his creditors.

No answer was filed by Mewburn, and no proceedings against him appear in the record; but John Richard, agent and attorney for Thomas Compston, of Philadelphia, (though not made a defendant by the bill,) filed an answer, claiming the benefit of the judgment, against the complainant, by virtue of the assignment of Mewburn's effects.

Two depositions were taken, which did not materially affect the case; except that one witness deposed that he understood the agreement between Watkins and Taylor to be, that Watkins, in consideration of 800l.

cash, was to pay for the tenement, 429 with bonds; "but with what *bonds the witness could not certainly say; though (as well as he remembered) it was understood between them that Heth's bonds would be good in payment."

Chancellor Taylor, on the 12th of May, 1807, dismissed the bill with costs; whereupon the complainant appealed.

After argument by Peyton Randolph and Hay, for the appellant, and Wickham, for the appellees, the President (Friday, November 29th) pronounced the following opinion of the majority of the court.

The principal question in this case is, whether the contract before us be usurious or not?

Let us consider what acts of the parties to a contract constitute usury, and apply the law to the case under consideration.

The general legal principles on which questions of usury are to be decided, seem to be well settled. An agreement, by which a higher premium than legal interest for the loan of money, is directly, or indirectly, secured to the lender, or a forbearance of a debt due, in consideration of receiving, at a future day, a higher premium, or greater emolument than legal interest, is clearly usury, within the statute, unless attended with some peculiar contingent circumstance, (not existing

in the case before us,) by which the money lent, or the debt forborne, be put in evident hazard.

The forbearance of a debt due, being, in the present case, out of the question; let us see whether there was a loan of money, with a view of receiving a higher premium than legal interest? And, in my conception, we need only advert to the answer of the appellee, to establish the fact; and whether the first proposition came from the appellant, or was made by himself, seems quite immaterial. We must consider the contract as we find it stated in the record.

430 *The appellee, indeed, says, in his answer, that "there was no conversation between him and the complainant, relative to a loan of money. That he had, on his part, no idea of a loan, nor any expectations that the complainant wished to become a borrower of money by means of the said agreement; but supposed that the object of the complainant was to make an advantageous contract with Harry Heth." And what, let me ask, was to enable him to make the advantageous contract with Heth, but the 800l. advanced him by the appellee, for which he agreed to pay, and has actually paid, a most exorbitant premium?

The appellee acknowledges that he paid the appellant the sum of 800l. in consideration of his agreeing to exonerate him from a debt of 1,200l. which he owed the said Heth for a tenement purchased of him in the city of Richmond, to be paid by annual instalments. Let it be called a payment, a supply, an advance, or what it may; and whatever attempt may be made to cover, or disguise the transaction, it was, in substance and effect, according to my apprehension, a borrowing and lending of money, with a view of receiving a higher premium than legal interest for the loan; and whether that premium was to have been paid, immediately, to the appellee, or to Mr. Heth on his account, makes no difference in principle; as, in either case, it is clearly within the mischief intended to be guarded against by the statute of usury.

The original contract appearing, on the face of it, as stated by both the parties, to have been usurious, no after transactions of theirs could, I conceive, take it out of the statute; and the cancelling the contract between the appellee and Heth, respecting the purchase of the tenement in the city of Richmond, cannot affect the merits of this case. It appears, however, by an exhibit in the record, that the appellee had, in March, 1801, received from the appellant the sum of 30l. 16s. 4d. over and 431 *above the principal sum of 800l.

loaned in the year 1798, with the legal interest thereon; and he confesses in his answer, that he has also received full satisfaction of the judgment he obtained against William Mewburn in the proceedings mentioned, amounting to 300l. with interest from the 6th day of September, 1800; and that he hath no interest in the judgment, obtained by Mewburn against the complainant, as his security in the bond, on which the judgment against Mewburn was rendered, and which, by the bill before us, is sought to be enjoined.

It has been observed that the appellee,

when he advanced the money to Watkins, put it in hazard; and the extraordinary premium contracted for, was a compensation, or recompense, for the risk he ran, and therefore no usury; but it was not such a risk as the law contemplates to take the case out of the statute.

If such slight pretences were to be admitted, every usurer, who lends money at an exorbitant interest, payable at a distant day, might allege that he ran the risk of the borrower's dying insolvent before the day of payment, and thereby evade the statute, and render it nugatory, and a dead letter.

On every view I have been able to take of this case, usury appears conspicuous; and I have no hesitation in saying, that I think the appellant entitled, at least, to the relief prayed for by his bill; and am, consequently, of opinion that the decree is erroneous, and ought to be reversed; and that is the opinion of a majority of the court.

Whereupon, the following decree was entered.

"The Court is of opinion that the said decree is erroneous, the appellant having, in the opinion of the court, just grounds of relief against the appellee, Taylor, and having also a right to proceed, finally, against the appellee, Mewburn; against whom, as yet, the appellant has not so proceeded, and who, therefore, ought not

432 to "be bound by the admission of the appellee, Taylor, or by the allegation contained in the other answer filed in this cause, that the debt in question has been regularly transferred by him to John Richard; (if he ought to be bound by the decision, upon the question of usury, rendered between the now parties; as to which this court gives no opinion;) therefore, it is decreed and ordered, that the same be reversed and annulled, and that the appellees pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here; and this court proceeding to make such decree as the said superior court of chancery ought to have pronounced, it is further decreed and ordered, that the appellee, Taylor, do pay to the clerk of the said superior court of chancery, or to such other person, or persons, as the said court may order and direct, the sum of three hundred pounds, with lawful interest thereon from the 6th day of September, 1800, and also the costs of a suit, recovered by the appellee, Taylor, against the said Mewburn, in the Hustings court of the city of Richmond, in the month of May, 1802, with legal interest on such costs, until payment thereof, and also the costs incurred by the said Mewburn in obtaining a judgment against the appellant in the said court of Hustings; to be, by the said clerk, or receiver, as the case may be, paid over to John Richard, the agent in the proceedings mentioned; unless the said Mewburn shall, within ninety days after this decree shall be certified to the said court of chancery, and served upon him, satisfy the judge of the said court that the debt now in question has not been duly transferred to the said Richard, but is retained by himself, or is owned by some other person, claiming by

assignment from him: in which case, the money aforesaid shall, under the order of the said court, be paid to the said Mewburn, or other person his assignee as aforesaid; saving, however, to the said Richard, or those claiming under him, the right of appeal from such decision. And the

433 *cause is remanded to the said superior court of chancery, in order to be finally proceeded in, pursuant to the principles of this decree, and for the further purpose, after such payment shall have been made, of perpetually enjoining the judgment obtained, by the said Mewburn, against the appellant, as aforesaid. But, it being now suggested by the appellant's counsel, that, since the exhibition of the bill, in this case, the sum due by the appellant to the said Mewburn, under his judgment aforesaid, has been paid by him, the appellant, to the said Mewburn, or those claiming under him, whereby, while, on the one hand, the said Mewburn, or those claiming under him, may be more than indemnified for his undertaking as security for the appellant, the latter may be a loser by the amount of the sum aforesaid, notwithstanding the opinion of this court that the contract in the proceedings mentioned is usurious and void; it is, therefore, further decreed and ordered, that nothing herein contained shall affect the right of the appellant to resort to the said court of chancery for relief against the payment in the case aforesaid; but that he be as free to pursue the same, as if this decree had not been made."

JUDGE COALTER (dissenting from the other judges) pronounced the following opinion:

If the whole answer is to be taken as responsive to the bill, and as evidence, uncontradicted by the competent number of witnesses to destroy it, this case, on the point of usury, would, to my mind, be a very clear one.

It would be simply this; that the appellee, Taylor, being in debt to Heth, payable at a future day, the appellant applies to him to take in his debt immediately, for that he and said Heth had made an arrangement in a tobacco contract, by which it would be agreeable to both of them that the appellee should purchase in his debt; that this proposition was seconded by Heth himself, and that the appellee, in making the payment, believed he was paying off his debt to Heth, who had made

434 his arrangements *with the appellant; that, when he advanced the 800l. it was in discharge of his debt; and that a loan of money was never spoken of, or contemplated. If this was the real transaction, I presume it would not be contended that a man, paying off his debt, due at a future day, to his creditor, or to his creditor's friend and agent, and at the request and solicitation of his creditor, may not do it on terms with which all parties are satisfied.

But it is said, this part of the answer, setting up a new case, is not responsive to the bill, which charges the transaction to have been something different, and that, therefore, it must be proved by the defendant.

I shall not stop to decide this question, as I do not think it important in the final decision, according to the view I have taken of the subject; and shall, therefore, content myself by stating this case as it is made out by the bill, such parts of the answer as are responsive to the bill, and therefore evidence, and the deposition of the witness.

I will here remark, though, that, there being an express charge of usury in the bill, though it does not state in what way, or by what devices, the parties had contrived to evade the law, the general answer, stating that there was no communication for a loan of money, and that the appellee had no idea that the appellant wished to borrow money, must be taken as responsive to that general charge of usury, and, if not contradicted by evidence, will leave the case as one in which usury is to be established, when the party, to be found guilty thereof, had no idea, or expectation, that a loan was intended, but believed he was making a contract by which he was to be discharged from a debt he owed!

The case, then, made out in this way, I take to be this: Taylor being indebted to Heth, whose circumstances were somewhat embarrassed, and whose paper, to a considerable amount, was standing out
435 against him, the *appellant applied to him to know what sum he would give him to pay off said debt to Heth, in the bonds of the latter; in other words, to deliver, to Taylor, Heth's bonds, to the amount of his debt due to Heth.

After frequent applications, it was agreed that, for 800l. the appellant would pay off the debt due to Heth, in his bonds; which debt was 1,200l. payable in three annual instalments, without interest.

This agreement was not reduced to writing; but, some time after it was entered into, the appellant, having purchased up a bond of Heth's for 300l. gave it to Taylor, and, at the same time, gave his bonds, with security, payable to Heth, for the balance, payable in three annual payments, but with this understanding, that Heth was not to assign them, so as to deprive the appellant of the privilege of discharging them in Heth's paper. It was no part of the original agreement that the appellant was to give such bonds: but it took place, afterwards, in consequence of the appellant's only delivering one bond of 300l. instead of the whole amount. Heth, afterwards, assigned these bonds to the appellee, Taylor, who told the appellant that he would receive nothing but the money for them: the appellant accordingly paid him the first and last of those bonds in money; but refusing to pay the second bond, suit was brought and judgment recovered against the security, without defence; the attorney, to whom the appellant wrote to defend the suit, not practising in the court where it was brought. The security, against whom the judgment was obtained, not having paid the money to Taylor, but having obtained his receipt to enable him to make his motion, had got a judgment on motion against the appellant, who prays for an injunction, and general relief; relying, first, on the statute against usury;

and, secondly, that, if the transaction was not usurious, it was an unconscionable bargain.

The charge of usury, in the bill, is a general charge.

436 *The answer expressly states that there was no communication for, or idea of, a loan; and there is no testimony contradicting this. It appears that the security had paid the money, and that, therefore, the case, as an injunction, is at an end; and then the only question is, whether the appellant ought to have had a decree against Taylor for the excess of his payments beyond 800l. and interest; or whether the chancellor was correct in dismissing his bill.

1st. The first question, then, is, was the transaction usurious?

2d. If not, was it an unconscionable bargain?

As to the first. Before a transaction can be pronounced usurious, which is not so on the very face of the bond, or contract, several things must be made to appear.

First, it must appear that a loan was intended, and that both parties were assenting thereto: (a) the statute is highly penal and, although one of the parties may wish to raise money by the transaction, and may hold out great gain to the other, as by offering him an extravagant price for property, &c. yet, if there was no communication for a loan, or a knowledge, in the party selling, that a loan, or borrowing, was intended, it will not be usury; whatever the court might do with the case, as a hard and unconscionable bargain.

Secondly; if it was not usury at the time when the contract was entered into, no after circumstance can make it so; (b) and any argument, therefore, drawn from after circumstances, would be improper.

Thirdly; the court will not presume a contract to be usurious; but it must be proved to be so.

Fourthly; where this proof is not on the face of the bond, or contract, itself, as where A., in consideration of 100l. received, binds himself to pay 120l. at the end of a year, it must be collected from a view of all the circumstances attending the case; (c) as where there is a

437 *bargain for great gain, and this upon a previous communication for the loan of money; or where there is a bargain which, on the face of it, will authorize the party to discharge himself by repayment of the money and interest, yet, by a secret understanding, he was bound not to avail himself of this privilege, but to subject himself to the penalty; all these, and a thousand other devices, would not avail, if the real object was a loan of money.

Fifthly; it is the intent that makes the usury: but, if there was no such intent, then the sale of property for double its real

(a) Floyer v. Edwards, Cowp. 115; Skipwith v. Gibson and Jefferson, 4 H. & M. 490; Price, &c. v. Campbell, 3 Call. 110. 119. 121; McGuire v. Warder, Ex'r of Parker, 1 Wash. 309; Pollard v. Baylor's Devisees, 4 H. & M. 233; Chesterfield v. Janssens, 1 Atk. 308; Kenner v. Hord, 2 H. & M. 14.
(b) 4 H. & M. 233. 3 T. R. 539, Tate v. Willings.
(c) 1 Atk. 331, 333, 345.

value, the discounting of notes, buying in securities, purchasing annuities, &c. however advantageous the contract may be, is not usury. (a)

Let us examine the case by these principles, which I consider to be settled principles of law.

Was it a loan, and did the parties intend to evade the statute? To this it may be answered, that though the bond, in this case, is simply for the payment of money, and nothing unfair on the face of it, yet the original contract, in the very terms of it, is usurious. (b)

I admit this is the fair and proper ground to put the question on; for the subsequent execution of the bonds will neither make that usury which was not so originally, nor legalize the original transaction, if it was unlawful and void.

Suppose, then, the original contract had been reduced to writing; it would have been to this effect:

The appellant, for 800l. received, would have bound himself to procure Heth's bonds, either then due, or, at least, payable in one, two and three years, to the amount of 1,200l. so as to cover and operate a discharge of a debt, to that amount, due in one, two and three years, from the appellee to said Heth. Would such agreement, upon the very face of it, be void?

Suppose the appellant had produced Heth's bonds to the amount of 1,200l. and for which he had paid 1,000l. and had offered them to the appellee for 800l. would 438 the *purchase by him, for the express purpose of applying those bonds to the discharge of his own debt, have been an usurious transaction? Or, suppose Taylor had not been in debt to Heth, but hearing that his paper was in market, at a large discount, and wishing to procure it, as an advantageous speculation; believing Heth to be ultimately sure; and this wish being known to the appellant; he inquires what he will agree to give him for Heth's paper, payable in one, two and three years; and he says, 13s. 4d. for 20s.; a bargain is struck; 800l. is paid, and a bond given for the delivery of Heth's bonds, to the amount of 1,200l.: would such contract, necessarily, and on the face of it, be usurious? There is no doubt but such a contract, made under particular circumstances, or accompanied with particular private understandings, (as, not to purchase the bonds of Heth, &c.,) might be used as a device to cover an usurious contract: but the question now put is, whether such contract is, on the face of it, and without further averment, plainly usurious; as where the party for the consideration of 100l. received, agrees to pay 120l. at the end of the year.

Heth may, or may not, have paper in market: if he has paper out, it may, or may not, be to be had at a great discount. But, if his paper is in market, and may be purchased at 10s. or 12s. for 20s. then the appellant would have made an advantageous contract; so that, unless it be said that bonds shall not be a subject of trade and speculation, I do not see that a con-

tract, relative to them, even where they are contracted for at a considerable discount, must necessarily be usurious. (c) Where are all the contracts for the notes of Morris and Nicholson?

If it be true, then, that the contract is not necessarily, and from the very terms of it, usurious and void, the next question will be, whether this contract, although 439 it has a fair and legal exterior, is not rotten at the core, *and used merely as a cover and device to avoid the statute?

If this was the secret intent of the parties, they themselves must know it: the court will not, and cannot, presume that such was their intention: it must be proved; and, I presume, in the usual way, to wit, by an allegation to that effect, and the corresponding proof. (d)

The appellant, however, does not allege that a loan was intended; or that the paper of Heth was not in market; or that it had unexpectedly appreciated; or that there was any private agreement not to purchase it, but to subject himself to the penalty; or any other kind of shift, or device: on the contrary, he makes no other complaint in his bill, except that the appellee said he would receive nothing but the money: indeed, by the question he asks the witness, viz. "whether Heth's paper could not have been procured at a large discount," he seems to admit that he could have discharged himself by a sum equal to the 800l. and interest, but that the appellee said he would have nothing but the money. As to the usury, he seems to rest that on the ground, that the contract, in the very terms of it, was usurious.

As before stated, I think it was not so; and, as to any shift, or device, to make it so, I also think that the court cannot make out a case, for the appellant, which he has not made for himself; but that, if it was intended to show the case to be a shift to evade the statute, the appellant must have set out his case, so that the appellee could have had the benefit of his answer, and an opportunity to take depositions. No such allegation being made, the appellee, I presume, was not bound to prove that Heth's paper was in market, and could, at any time, have been procured at 13s. 4d. for 20s.; or at any other discount; (no complaint being made as to that;) or that he was not guilty of any other shift, or device. The only complaint is, that the appellee,

afterwards, refused to take any thing 440 but money. This, however, *being an after circumstance, would not make the original contract usurious. The most that could be said of it would be, that it was a breach of contract, and to be redressed, either by a court of law, or equity, as the case should appear. But on this point the party makes no case: he does not show that he procured and offered the bonds agreeably to his contract; because, if he had done that, and in proper time, so as to enable the appellee to set them off against his debt due to Heth, he might have had redress, even at law, perhaps. Nothing, however, of this kind is shown,

(a) 1 Atk. 331. 332; 2 Vez. 158, 155; 1 Atk. 321.
(b) 5 T. R. 587.

(c) 2 H. & M. 14.
(d) 3 T. R. 538.

or suggested; and if it was, this after circumstance would not make the original contract usurious.

I do not think this so strong a case as that of Price, &c. v. Campbell, 2 Call, 110, and perhaps not as much so as the case of Kenner v. Hord, 2 H. & M. 14.

But what will the court do, in this case, as to the 300l.? Suppose the appellant (as is highly probable) got that bond for 200l. If he recovers 400l. of the appellee, he then puts 100l. clear gain in his pocket. But, suppose he had purchased Heth's bonds to the amount of 1,150l. and had got them for 750l.: the appellee must have taken them at the nominal sum. The appellant would then have paid 1,150l. of the debt due Heth. He has received, though, but 800l. He must, therefore, recover 350l. from the appellee, and has already made 400l. by the speculation in the bonds; so that, in the whole, he would put a clear gain in his pocket of 750l.!

Does not this serve to show that this bargain, in the very terms of it, was not necessarily usurious, or even hard; but that it would depend on testimony aliunde, to prove either the one or the other.

Suppose the appellant, in this case, had proved, by one witness only, that, although the terms of this contract were that he was to deliver bonds of Heth, yet it was privately understood that he was not to have this privilege, but that it was merely

441 used as a cover and device *to evade the statute; would such evidence have been proper? If it would, then the party, by not stating his case, would deprive the other party of the legal weight of his answer, which would have been greater than the deposition of a single witness. This case, then, is not usurious on the face of it, and no other case is made out, or pretended.

Courts of equity may be disposed to go farther than courts of law, in deciding cases to be usurious; because they do not inflict such severe penalties; yet I am not prepared to say that a different rule of decision should obtain on the equity side, from what should obtain on the law side of this court; and this, I apprehend, would be a very naked case, at law, on which to recover the penalty.

I am also inclined to think that there must be a great difference between setting aside hard and unconscionable contracts, on the ground of hardship and undue advantage, and setting aside even such contracts, on the ground of usury. The statute is highly penal; and if the distinctions, between hard bargains and usurious ones, are done away, parties may be subject to severe penalties who never intended to violate the law. For these reasons, I apprehend, it is, that the rules which I have before stated are laid down, and, particularly, the rule that the courts will not presume, but require proof, of usury, and that it was the intention of both parties to violate the law.

2. As to the second ground, that this is an unconscionable bargain.

I can see no evidence of it.

The appellant does not pretend to say that he could not have procured Heth's

paper at a great discount; but, in fact, states the reverse.

The contract, therefore, might, originally, have been an advantageous one to him, had he purchased and delivered the bonds.

442 *He states, though, that the appellee refused to receive any thing but the money. This, though, does not prove the original contract hard.

If the appellee has broken his contract, then the appellant ought to have made out his case, to wit, that he had performed his part of the agreement, by procuring and tendering the bonds, in due time, to enable the appellee to use them as a set-off against Heth.

But he does not pretend to say this; on the contrary, says that he paid off the first and last bonds.

After this confirmation of the transaction, and in the absence of every allegation and evidence of hardship, I cannot give relief on that ground.

I therefore think, with great deference to the opinions of my more learned brethren, that there is no error in the decree of the chancellor dismissing the bill of the appellant.

Bowles v. Bingham.*

Saturday, November 26th, 1811.

Illegitimacy—Evidence—Declarations of Husband.—A husband's declarations that a child born in wedlock is not his, (1) are not sufficient evidence to prove it illegitimate: notwithstanding it was born only three months after the marriage, and a separation, between his wife and him, soon after took place, by mutual consent.

James Bingham, administrator of Harriett Bowles, (who departed this life, intestate, an infant under the age of twenty-one years, being the daughter of Sally, wife of Peter Bowles, and born in wedlock,) filed his bill in the superior court of chancery for the Richmond district, against Peter Bowles, Mary Anne Blythe, maternal grandmother of the said Harriett, and several infants, (her next of kin,) defendants, by John Woody, their guardian; setting forth the right of the said Harriett to sundry property to which the said Peter Bowles would have been legally her heir, if, in fact, he had been her father; but charging that, when his wife was delivered of the said child, (which was in 443 April, 1798, the marriage *having taken place the January preceding,) he "asserted that he was not its father, and resolved to repudiate his wife, but previously prevailed on her to designate the real father of her said child, on her oath before a justice of the peace, and, before such justice, she swore that another

*For the opinion of the court in the principal case, see Appendix to 3 Munf. 599.

†**Legitimacy—Issue Born during Wedlock.**—The issue born during wedlock will be held to be legitimate, unless it be conclusively shown that a person other than the husband must necessarily and unavoidably have been the father. *Watkins v. Carlton*, 10 Leigh 576, citing the principal case. See further, monographic note on "Parent and Child" appended to *Armstrong v. Stone*, 9 Gratt 102.

(1) Note. See Peake's Law of Evidence, p. 182, 183, and p. 1112.

mau, (1) whom she named, and not the said Peter Bowles, her husband, was its father;" after which transaction, an instrument of separation, bearing date the 13th day of May, 1798, was executed between them, and recorded in the county court of Hanover.

The bill farther stated, that Sally Bowles, having lived for several years in such state of separation from her husband, departed this life on the 8th day of February, 1802, leaving the said Harriett her only child and heiress, who died on the 12th day of September, 1805; that the plaintiff qualified according to law as her administrator, and needed the protection of a court of equity, to prevent his being injured by the interfering claims, of the defendants, upon her estate. He therefore prayed an injunction to restrain the relatives of the said Harriett, and every of them, as well as the said Peter Bowles, until the final decree in this cause, "from proceeding at law against him the said administrator, for the recovery of any estate, late of the said Sally, before her intermarriage with the said Peter, and also from interrupting his administration in the recovery of what were then her rights, in his character of administrator of all and singular the goods, &c. whereunto the said Sally was entitled at the time of her death, which are considered by her relatives to have then been cast upon the said Harriett, as her daughter, heiress, and distributee, and from the said Harriett, upon them, as her heirs and distributees;" which injunction was accordingly granted.

The defendant, Peter Bowles, in his 444 answer, "admitted *that he always insisted that the said Harriett, though born in wedlock, was not his child: but as, by the law of the land, the said Harriett would have been entitled to claim as his heir, if she had survived him, he thinks that he hath right to insist that the property, which belonged to her mother, and afterwards to her, shall be considered as vesting in him." He therefore prayed a decree for the said property.

The joint and several answer of the other defendants contained a statement of the grounds of their claim analogous to that set forth in the bill.

The indenture of separation (among the exhibits) did not expressly mention the circumstance which induced the parties to sign it, but only that "the most convincing cause had taken place which rendered it impossible that they the said Peter and Sally should live in happiness together as becomes man and wife."

By the terms of that instrument, the parties agreed that "all the property, of whatsoever denomination, which she the said Sally Bowles brought, by virtue of the said marriage, to the said Peter Bowles, should be restored, and put into the hands of Mary Anne Blythe, for the use of the said Sally Bowles; that she should be considered as acting as a feme sole, and

no longer as a feme covert, and he as no longer her husband; that he should not be liable for any debts hereafter contracted by her, nor for her maintenance, or support, under any circumstances whatsoever; and that she should never claim, or demand any part of his estate, in right of dower, distribution, or otherwise."

No depositions were taken in the cause. Chancellor Taylor, on the 19th of March, 1807, "being of opinion that the illegitimacy of the said Harriett was fully proved; that she, if living, could not, in the event of the death of the said Peter Bowles, succeed to any part of his estate as heir; and that he, therefore, in the event which has happened, cannot, as such, suc- 445 ceed to any *part of the estate of the said Harriett; and, more especially, as it would be against the true intent and meaning of the articles of separation, in the bill mentioned, which are considered as binding in equity; therefore decreed that the injunction be made perpetual as to the said Peter Bowles and those claiming under him; that the plaintiff, as administrator of the said Harriett, make distribution of her estate among her next of kin on the part of her mother; and liberty is reserved to the said administrator, or any one, or all, of the parties, except the said Peter Bowles, to resort to the court for any further directions in the settlement, or division of the said estate; and that the defendant Peter Bowles pay the costs."

From this decree Peter Bowles appealed; and James Bingham having afterwards departed this life, the appeal was revived against John Woody, administrator de bonis non of Harriett Bowles.

Wickham, for the appellant, laid it down as an invariable rule that a child born in lawful wedlock is legitimate; unless a physical impossibility of procreation, or of access be proved, or there be strong evidence of non-access. In support of this, he quoted Com. Dig. tit. Bastard, (B.) and 2 Bl. Com. 446, and as to the evidence of access, or non-access, he observed that declarations, or admissions of the parties, are not to be received after marriage, (a) to prove that they had had no connexion, and that the offspring was spurious. The marginal note to Goodright v. Saul, 3 T. R. 356, (which states that "the child of a married woman may be proved to be a bastard by other evidence than that of the husband's non-access,") is wholly unsupported by the case itself. The decision was, only, that the question of access, or non-access, ought to have been left to the jury. (b)

In 2 Burn's Ecc. Law, 431, it is said, 446 the sole confession *of the parties is not admissible to prove adultery. There is a difference, however, between the question of adultery, and that of illegitimacy; for the mother may be convicted of adultery, and yet the child be legitimate. If the husband might have had access to the wife, he is not permitted to disavow the child, unless it was naturally impossible for him to be its father. Such is the

(1) Note. Of this allegation in the bill no proof was exhibited. But, it seems, if it had been proved, it would not have altered the case. See Cowp. 502, and 504.—Note in Original Edition.

(a) Goodright v. Moss, Cowp. 504.

(b) 2 Peake's Ev. 368.

doctrine, I believe, in every civilized nation. (1)

The consequences of a contrary rule would be pernicious indeed. Declarations of this sort, by a husband, may be occasioned by unfounded jealousy; and since they are not to be used against him, in case he chooses to retract them afterwards, (which he may do, upon discovering his error,) the rule must be reciprocal.

I cannot discover any authority showing a difference in relation to this point, between a child begotten before marriage, and born afterwards, and a child begotten and born in wedlock.

Warden, contra. The husband, by his answer, declared the child not his; and though he swore to this, and the child was born only three months after the marriage, he claims the estate as heir of that child!

All Mr. Wickham's cases, except that from Com. Dig. relate to circumstances occurring during the marriage, whereas, in this case, the child was begotten before. Is not the evidence of the husband and wife, both declaring there was no access, as conclusive as any other proof of non-access can be? Besides, the deed bars him from claiming any of the property of Sally Bowles. There never was a case in which law would be made more clearly consonant to reason than by affirming this decree.

Wickham, in reply. The defendant has not sworn in his answer that the child was not his. He only says
447 *that he always insisted so; without averring that those assertions of his were true. If the question, whether the child was actually his, had been put to him by the bill, he would not have been obliged to answer it, but might have demurred. He might, perhaps, have refused to answer concerning his own former declarations.

The deed of separation says nothing about the legitimacy or illegitimacy of the child. Peter Bowles does not claim against the deed; nor any thing inconsistent with it: he claims the property, not as that of Sally Bowles, but as that of Harriett. Whether the title of the child was derived from the mother, or not, is unimportant; the property is admitted on all hands to have belonged to the child at the time of her death; and he claims as her heir.

If every allegation in the bill were established by testimony, the whole would be inadmissible to prove illegitimacy. The law will rather permit a particular injury, than encourage a general inconvenience. If this man should get by inheritance what he is not entitled to, (the child, in reality, not being his,) he will have been poorly compensated for his sufferings of body and mind, occasioned by the infidelity of his wife.

Wednesday, December 4th. The President pronounced the opinion of the court that the decree be reversed, and the injunction made perpetual against all the defendants, except the appellant; and "it was decreed that the appellee, John Woody, administrator de bonis non of Harriett

Bowles, deceased, deliver over to the appellant the estate of the said Harriett, upon his entering into bond, payable to the appellee, Woody, with security to be approved of by the said court of chancery, in such penalty as that court may direct, conditioned to refund the said estate, or such part thereof as may be necessary, towards payment of such debts as the said Woody may hereafter be compelled to pay for the estate of the said
448 *Harriett; and that William Barker,"

(executor of Mary Anne Blythe, one of the appellees, as to whom the appeal, which had abated by her death, had been revived,) "out of the estate of the said Mary Anne Blythe, deceased, in his hands to be administered, (if so much thereof he hath,) and the appellees, (except John Woody,) pay to the appellant his costs by him expended in the said court of chancery. And liberty is reserved to the appellant, and the appellee, Woody, to resort to the said court of chancery for any further directions in the settlement of the said estate."

Carter v. Cockrill and Rogers.

Tuesday, November 19th. 1811.

Equitable Relief—Appearance Bail—Failure to Defend at Law.—In debt upon a bill penal, if, through a mistake of the clerk, the writ be issued for dollars when it should be pounds; and (the plaintiff's declaration being filed, conformably with the bill penal) judgment by default be entered against the defendant and his appearance bail, for so many pounds: the bail being informed of the mistake before he signed the bail bond, and having made no defence at law, is not entitled to relief in equity.

See the case of Chisholm v. Anthony, 2 H. & M. 13, decided on similar principles.

In an action of debt, upon a bill penal, in the county court of Northumberland, John Carter v. George Morrison, the clerk by mistake issued the writ for the sum of two hundred dollars, when it ought to have been, according to the attorney's direction, and the tenor of the obligation, two hundred pounds. John Cockrill and Joseph Rogers, being fully apprized of the mistake, from information given them by the sheriff who served the writ, and from Morrison's acknowledging, in their presence and hearing, that the debt he owed Carter was one hundred pounds, became, nevertheless, his appearance bail, and gave their bond (in the usual form) for dollars instead of pounds. On the evening of the same day, the sheriff informed Cockrill that the clerk had issued another writ, but that Morrison had gone off, and would not suffer it to be served. The plaintiff's attorney filed his declaration conformably with the bill penal; and no defence being made, judgment was entered against the defendant and bail for two hundred pounds, (the penal sum,) to be discharged by the payment of one hundred pounds, with interest and costs.

449 *Cockrill and Rogers, then applied to the county court, sitting in chan-

*See generally, monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425; monographic note on "Jurisdiction" appended to Phippen v. Durham, 8 Gratt. 457.

The principal case was cited in Mann v. Drewry, 5 Leigh 296.

(1) Note. See a remarkable case, in France, also referred to by Mr. Wickham. Causes Celebres, v. 44, p. 372.—Note in Original Edition.

cery, for an injunction to stay proceedings on so much of the judgment as exceeded one hundred dollars, with interest thereupon, and the costs at law; alleging in their bill that they were not informed that the claim was for more than that sum until the judgment had been obtained.

The county court granted the injunction, and, afterwards, made it perpetual; notwithstanding the circumstances above mentioned were averred in the answer, and proved by the affidavit of the sheriff, which was read (by consent of parties) as a deposition.

Upon an appeal to the superior court of chancery, holden at Williamsburg, this decree being affirmed, an appeal was taken to this court.

Wickham, for the appellant. The appellees are not entitled to relief in equity, having neglected to make defence at law. They might have moved the court to correct the error committed in the clerk's office; or they might have been relieved upon an appeal or writ of error; for, the judgment having been entered by default, the capias and the bail bond were part of the record. (a) Besides, it does not appear that the plaintiff, or his attorney, knew of the error. It is in evidence that the defendant and the bail knew of it. If the objection had been made, the plaintiff might have had the mistake corrected, and the defendant held to other bail; or he might have made the clerk responsible in the first instance. The appellees were guilty of bad faith in not informing the plaintiff or his attorney. At any rate, they were guilty of gross neglect, and ought to have been left to their remedy at law.

Wirt, contra. There was no neglect on the part of the bail. They were willing to pay the amount of their 450 *bond, and could not anticipate a judgment against them for more. Morrison was insolvent. The bail looked forward to a certain responsibility, to the extent of their bond. They thought it unnecessary, therefore, to make defence, supposing that no more was claimed of them. If there was any fraud, the plaintiff was guilty of it, in stealing a judgment for two hundred pounds, on a writ for two hundred dollars.

Wickham, in reply. The insolvency of Morrison does not appear in the record; but would make no difference in the case. The plaintiff was guilty of no fraud; for he knew nothing of the mistake; but there is direct evidence that the appellees knew of it before they signed the bond as bail.

Thursday, November 21, (in the absence of the president,) JUDGE ROANE pronounced the opinion of the court, "that the remedy of the appellees (if it existed) might have been asserted in a court of law; and this court not being satisfied, if this were not the case, that a court of equity ought to afford them relief, against the effect of an engagement entered into with a full knowledge of all the circumstances, reverses the decrees of both courts, dissolves the injunction, and dismisses the bill."

(a) Shelton v. Pollock, 1 H. & M. 422.

451

*Defarges v. Lipscomb.

Thursday, November 31st, 1811.

Appellate Practice—Error Prejudicial to Appellee.—When a decree, by which an injunction is made perpetual in part, is considered erroneous, (to the injury of the appellee,) in not having made it perpetual in toto: the court of appeals will affirm so much as allows him his costs, in the court of chancery; and, reversing the residue, and making such decree as that court should have made, will also allow him his costs in this court. (1)

Upon an appeal from a decree of the superior court of chancery for the district of Williamsburg, by which an injunction, to stay proceedings on a judgment, was in part perpetuated. The appeal was taken by the defendant in equity, who was plaintiff at law.

The record being submitted (without argument) by Wirt, for the appellant, and Wickham, for the appellee, the following opinion of this court was pronounced by JUDGE ROANE.

"The court is of opinion that the said decree is erroneous in not perpetuating the injunction for the whole sum recovered by the judgment enjoined; it appearing to the court that the appellee was entitled to a credit for forty-five bushels of wheat, at five shillings per bushel, with interest thereon from the year 1787, which sum, added to that allowed him by the decree, would more than have extinguished the judgment. Therefore it is decreed and ordered, that so much of the said decree as gives to the appellee his costs in the superior court of chancery be affirmed; that the residue thereof be reversed and annulled; and that the appellant pay to the appellee, as the party substantially prevailing, his costs by him about his defence in this behalf expended. And this court proceeding to make such decree as the said court of chancery ought to have pronounced in lieu of that part which is reversed, it is further decreed and ordered, that the injunction aforesaid be perpetuated as to the whole sum recovered by the judgment enjoined as aforesaid."

452 *Temple's Executor v. Ellett's Executrix.

Friday, November 22d, 1811.

Evidence—Witness—Legatee.—It seems, that a specific legatee is not a competent witness to disprove the claim of a creditor against the estate of the testator. (2)

In an action of assumpsit in King William county court, on behalf of Robert Temple, executor of Benjamin Temple.

***Appellate Practice—Error Prejudicial to Appellee.**—See foot-note to Day v. Murdoch, 1 Munf. 460, where the cases citing the principal case are collected.

(1) Note. See the General Rule, 1 Munf. 460.—Note in Original Edition.

*See monographic note on "Witnesses" appended to Claiborne v. Parrish, 2 Wash. 146.

(2) Note. Quære whether there may not be some exceptions to this rule? In this case it was not proved that the residuary estate was sufficient to pay the debts of the testator: neither did it appear that the executor had assented to the legacy, and delivered it to the legatee. If these circumstances had been proved, would the witness have been incompetent? or would the possibility of his being ultimately liable to pay the debt (in case of a devastavit, insolvency of the executor, and his securities, and of all the residuary legatees) be an objection to his competency, or to his credibility only?

See Baring v. Reeder, 1 H. & M. 154-160, and Peake on Ev. 144.—Note in Original Edition.

against Sarah Ellett, executrix of William Ellett, issue was joined on the plea of "non assumpsit by her testator;" and, at the trial of the cause, the defendant introduced as a witness, John P. Ellett, "one of the said testator's sons, to whom he by his last will had devised a legacy of a negro named Granville, and no other part of his estate; whereupon the counsel for the plaintiff moved the court to reject his testimony, upon the ground of his being interested in the cause; which the court refused to do, and delivered an opinion that the said witness was competent; and, before the jury retired, three of the magistrates, who gave the said opinion, said, they gave that opinion because they supposed that the said William Ellett's residuary estate was fully sufficient to pay the debts owing from his estate;" to which opinion a bill of exceptions was tendered, &c.

The jury found a verdict for the plaintiff, for only 51. 7s. 6d. damages; whereupon it was considered by the court that he be nonsuited; (a) which judgment being affirmed by the district court, he appealed to this court.

Friday, November 22, the appellee appeared by counsel, and the appellant, being solemnly called, came not. The court took the record without argument; and the

453 *following opinion was pronounced:

"There is error in this, that the court admitted the witness, mentioned in the bill of exceptions, to give evidence to the jury; he being, in the opinion of this court, an incompetent witness." Both judgments, therefore, were reversed; and the cause was remanded, for a new trial to be had in the county court; "in which the witness aforesaid is not to be admitted to give evidence to the jury."

Mooberry and Others v. Marye.

Argued March 14th, 15th, & 18th, and reargued April 11th, 12th, & 13th, 1811.

1. **Devise*—No Words of Perpetuity—Effect of General Charge.**—A devise of lands, (before the 1st of January, 1787,) without words of perpetuity, will not be enlarged to a fee simple, on the ground of a general charge, arising from a direction, that all the testator's debts be first paid; especially, if other funds be appropriated for payment of the debts.
2. **Wills—Construction—Transposing Expressions.**—Where a will is systematically composed, and the meaning plain, the court will not, for the purpose of enlarging the estates of devisees, or creating limitations in their favour, transpose expressions occurring in other clauses, and obviously relating to other subjects.
3. **Ejectment—Death of Lessor Pending Suit—Judgment.**—Where the lessor of the plaintiff, in eject-

(a) See 1 Rev. Code, p. 90, c. 67, s. 87, 88.

***Devise—Estate Undefined—Direction to Devisee to Pay Debt—Effect.**—It has long been settled that where a devise, whose estate is undefined, is directed to pay the testator's debts, or legacies, or a specific sum in gross, he takes an estate in fee, on the ground that, if he took an estate for life only he might be damaged by the determination of his interest before reimbursement of his expenditure. It is only in cases where the estate of the devisee is doubtful or undefined by the terms of the will that the rule can be invoked. Couch v. Eastham, 29 W. Va. 792, 8 S. E. Rep. 23, citing principal case.

See further, monographic note on "Legacies and Devises" appended to Early v. Early, Gilm. 124.

†**Wills—Construction—Transposing Expressions.**—See principal case cited in Barksdale v. White, 28 Gratt. 228, 229.

‡**Ejectment.**—See monographic note on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 173.

§**Same—Appeal—Abatement.**—An appeal from a

ment, dies pending the suit, judgment is to be rendered as if he were still living; and possession is to be given under control of the court.

4. **Same—Case Agreed—Proof of Possession of Land.**—A case agreed in ejectment, finding the lease, entry and ouster in the declaration mentioned, sufficiently admits that all the defendants, who agreed the case, are in possession of the land in controversy; unless there be an express finding to the contrary.

This was an ejectment brought by the appellee against the appellants in the district court holden at Fredericksburg. The parties agreed the following case, to have the effect of a special verdict.

We agree that James Marye, the father of the lessor of the plaintiff, was, on the 21st day of June, 1774, seised and possessed of the lands and premises in the declaration mentioned, and, being so seised, duly made and published his testament in writing; that, on the 3d day of October, 1780, he added a codicil thereto, and some time in that year, departed this life, so seised of the said lands, without altering or revoking either; that the testator left James Marye, the lessor of the plaintiff, his eldest son and heir at law, and six daughters; only three of whom, to wit, Lucy, Susanna and Sally, are named in the will; the other three being mentioned in the codicil as his three younger children; that the said Lucy, Susanna and Sally survived the testator; that Lucy intermarried with James

454 *Weir, and is now living; that Susanna departed this life, some time in the year 1782, under age, and without having been married; and that Sally, after having attained the age of 21 years, died, in 1786, unmarried and intestate.

We agree that James Marye, the lessor of the plaintiff, is the brother of the whole blood, and heir at law, to his two sisters Susanna and Sally; that after the death of Sally, the said James Weir entered into the lands in the declaration mentioned, (they being the lands which were devised in the will to Sally,) and was thereof possessed; and being so possessed, leased a part thereof to Andrew Mooberry, one of the defendants, for a term not yet expired; that the testator did, two days before he made his will, execute to his daughters Lucy, Susanna and Sally, three separate deeds poll, for sundry negroes; which deeds were duly recorded.

We agree the lease, entry and ouster in the declaration mentioned. And if upon the whole matter, &c. &c.

The will, the codicil and deeds were agreed, and set out, in hæc verba.

The first clause in the will (after the preamble which contained nothing to influence the disposing clauses) directed all of the testator's debts and funeral charges to be first paid. In the 2d clause he gave to his son James Marye two tracts of land; and in case of his death before his arriving at the age of twenty-one years, then he gave those tracts, in parcels, severally, to his daughters, Lucy, Susanna and Sally. In the 3d, he gave a tract of land, known by

judgment in ejectment does not abate by the death of the lessor of the plaintiff, notwithstanding such lessor claimed the land for life only. Medley v. Medley, 8 Munf. 191, citing principal case.

‡**Same—Proof of Possession of Land.**—See, citing principal case, Southgate v. Walker, 2 W. Va. 480; Beckwith v. Thompson, 18 W. Va. 134.

the name of Motts's, to his daughters, viz. the lower plantation, to run a straight line from the river to the back line, including the mill, to Sally; the remainder to be equally divided between Susanna and Lucy, in a specified manner.

No words of perpetuity were annexed to any of those devises. In the 4th clause, he gave to his son James sundry slaves, by name, describing them as the same 455 which *he had before given him by a deed of gift, or settlement, recorded in Spottsylvania court. In the 5th, 6th, & 7th clauses, he gave, in like manner, to his daughters Lucy, Susanna and Sally, certain slaves, before given to them by deeds recorded in the same court.

The 8th clause was as follows:—"Item. In case of either of my daughters' death before they marry, that then, their parts to be equally divided among the surviving sisters. In case any of my negroes should be sold, it is my desire that it may not be those that I have given my son James, or any of my daughters, as by deed aforementioned given them."

The 9th clause was:—"Item, I give also to my son James all the rest or remainder of my negroes, to him and his heirs; and in case of his death, then his part to be equally divided among his sisters."

The 10th clause related to the collection of certain money due him, and its application of the payment of his debts. The 11th directed a negro woman to be sold for the same purpose. The 12th, 13th, & 14th provided for the care and guardianship of his children.

The 15th was as follows:—"Item, in case any of my land should be sold, I desire that it may be the part of the tract whereon I live, which lies on the east side of the old mine road, which I rather should be sold than any of my negroes." The 16th appointed executors, and concluded the will.

In the codicil, he revoked so much of the will as directed part of the land he lived on to be sold;—"there being no necessity;" he gave to his daughter Sarah, her heirs, and assigns forever, three negroes by name; and to his son James, his heirs and assigns for ever, all the rest of his slaves, not theretofore given or devised to his daughters. He also directed that the money due by bond from Colonel William Grayson, and the money due from his brother Peter Marye, be equally divided among his three youngest children, or the survivor of them.

456 *The three deeds to the daughters were in the usual form of deeds of gift, conveying the slaves to them, their heirs and assigns for ever, with warranty.

The lessor of the plaintiff having died after the agreement of the case, security for the costs was entered. (1) The court gave judgment for the plaintiff, and awarded to him a writ of possession; from which judgment the defendants appealed.

Botts and Wirt, for the appellants.

Williams and Wickham, for the appellees.

On the part of the appellants, it was contended,

1. That the daughters Lucy, Susanna and

Sally, took each a fee simple estate, (notwithstanding the absence of words of perpetuity,) in their respective portions of the tract called Motts's, with cross remainders, upon the contingency of either of them dying unmarried; and that, upon the death of Sally unmarried, a fee-simple, in her part, accrued to her only surviving sister Lucy.

2. That if such fee-simple estate did not accrue to the surviving sister, a life estate did, so as to postpone the title of the heir at law until her death.

3. That, as the case agreed did not find either Stevenson or Slaughter to have ever been in possession of the premises; and as it finds that Mooberry was in possession of part only of the lands in the declaration mentioned, leaving Weir in possession of the balance, the judgment ought not to have been against Mooberry for the whole; and the two defendants, not in possession, should have judgment for them; or a venire de novo should be awarded. *Clay v. White*, 1 Munf. 162.

The case was twice argued at great length, upon the probable intention of the testator to be collected from the 457 *will in question; and many authorities upon the construction of wills were discussed.

The chief grounds relied upon, to prove that the daughters took a fee-simple, were, that the clause in the will, directing the debts of the testator to be first paid, created a general charge upon the lands; and that such charge was sufficient to make the several devisees take in fee; in support of which positions, the counsel cited 2 Vern. 708; *Trott v. Vernon*, 1 Eq. Cases Abr. 198; *Beachcroft v. Beachcroft*, 3 Term Rep. 358; *Doe v. Richards, Wiles*, 140; *Moone v. Heaseman*, 1 Wm. Bl. Rep. 539; *Fugmorton v. Holliday*, S. C., 3 Burr. 1618.

In answer to this, it was insisted that a general charge for payment of debts could not have the effect of converting the devises in a will into estates in fee; the only cases where charges made by the will, on lands devised, had that effect, being "where a particular devisee is directed to pay an annual rent charge, or a solid sum, out of the estate devised; in which cases it has been properly decided, that the devisee should take a fee; because he might be a loser unless the estate in his hands were, at all events, sufficient to enable him to bear those charges." *Denn, Lessee of Moor, v. Mellor*, 5 Term Rep. 562; *Goodtitle v. Edmonds*, 7 Term Rep. 640.

To show that the daughters took cross remainders, the counsel for the appellant relied on the eighth clause, as applying to the lands as well as the slaves.

But, on the other side, this was denied. The words "their parts," in that clause, must, according to grammatical construction, refer to the immediate antecedent, the slaves, and cannot be transposed, so as to affect the disposal of the lands, with which they have no connexion. *Right, Lessee of Compton, v. Compton*, 9 East, 267; *Doe, Lessee of Child, v. Wright*, 8 Term Rep. 64; *Camfield v. Gilbert*, 3 East, 516. It was obvious that the testator did not intend to give his daughters cross remainders

(1) Note. See *Kinney v. Beverley*, 1 H. & M. 581; and *Carter v. Washington*, 2 H. & M. 81.

(or, more properly, executory devises) in the lands.

458 *The rest of the argument is omitted; being sufficiently noticed (so far as relates to points decided by the court,) in the following opinions of the judges, pronounced on Friday, May 17th.

JUDGE CABELL. James Marye having, by the third clause of his will, devised certain lands to his three daughters, and by subsequent parts of his will, bequeathed to them certain slaves, declares in the eighth clause, that in case of the death of either of his daughters before marriage, "their parts" are to be equally divided among the surviving sisters. The important question, growing out of the facts agreed by the parties is, whether the term "parts," in the eighth clause, was intended by the testator to apply only to slaves, the subject of the immediately preceding clauses, or to the lands, which were the subject of the third article. If the term, as here used, be applicable to slaves only, then it is admitted that the appellants can have no title to the land in controversy. Whether it is to be so applied or not, depends on no rule of law, but on the intention of the testator, as discoverable by the principles of fair and reasonable interpretation.

I am of opinion that he intended slaves only. Much was said, in the argument, of the rude and inartificial structure of this will. It is certainly defective in the use and application of technical terms, and, sometimes, betrays a want of grammatical accuracy; but it is the offspring of a well organized mind that perceived its subject clearly, and that understood enough of language to make it subserve its most important end, to impart that perception to the minds of others. The method with which it proceeds is really remarkable, and affords a clew to the intention of the testator on the point under consideration. In some wills, the only method to be found is that which results from a wish to throw into one clause, or into one view, all the devises or bequests that relate to the same individual, without regard to

459 the *subject of those devises or bequests. In this will, the intention of the testator, as to method, is confined to the subject of his devises. He first disposes of his lands, and then of his slaves, subjecting the dispositions in both cases to such limitations, and to such only, as his opinion of propriety, or his fancy, dictated. It is no objection to the character of this will, for method, that the testator has introduced, almost at the close of it, a clause declaring that part of his lands which he wished to be first subjected to the payment of his debts. It is far separated from the disposing parts of the will, and is evidently the effect of an afterthought. In a will thus regularly and methodically constructed, we should naturally expect that if the testator intended to annex a limitation or restriction to any particular disposition, the limitation or restriction would quickly follow the disposition, or would not be so remote as to leave its application altogether doubtful. We accordingly find that the clause devising lands to his son is

immediately followed by a declaration that, in case of his death before he attains the age of twenty-one years, the land is to be divided among his sisters. The clauses giving certain slaves to his daughters are followed by the declaration that, in case of the death of any of them before marriage, their parts are to be divided among the surviving sisters; and the clause giving the residue of the slaves to his son is immediately followed by a limitation over to his sisters in case of his death. In every case, then, we find a limitation over expressly and indisputably annexed to the devise, except in the case of the devise of lands to the daughters. How can its absence in this case be accounted for? Upon no other principle than that the testator did not intend it should exist. What were his motives for placing the devise of lands to his daughters, on a ground so different from that which prevailed with respect to his other property, is not necessary, and might be difficult, for us to deter-

460 mine. *It is sufficient that such was his will. It is contended, however, that the term "parts," in the eighth clause, is extensive enough to embrace and to control every thing that had been given to the daughters, both lands and slaves. There can be no doubt but that the testator might have made it so. The question is has he intended to make it so? As used in the clause under consideration, it is a relative term; and, as such, must, according to the most obvious and reasonable construction, be confined to the distinct and particular subject the testator was then disposing of; unless extended to other matters by clear and express declarations. The testator had previously disposed of his lands, beginning with his son, and ending with his daughters. He had entered on a new and distinct subject, the apportionment of his slaves among his children, beginning as before with his son; and after having given such of them as he thought proper to his daughters, we find, immediately following, the clause in controversy—that if any of his daughters should die before marriage, their part should be divided among the surviving sisters. This mere statement would seem to make it almost impossible not to believe that slaves only were, at that moment, in the mind of the testator. But if the previous expressions would have left it doubtful, the doubt must be removed by observing that all the subsequent parts of the same clause, and also the whole of the next, relate exclusively to slaves; and that there are no expressions extending the term "parts" to other matters than those which the testator was then disposing of. The devise of lands to the daughters, therefore, is, in my opinion, uninfluenced by the limitation over, in the eighth clause, on either of them dying before marriage. It is, then, unnecessary to follow the counsel through their extensive investigations on the effect of the clause in the will concerning the payment of debts; nor is it material to inquire whether Sally Marye took, by the 461 *devise to her, a fee-simple, or only a life estate in the lands in controversy. If she took a fee-simple, James

Marye (the appellee) will be entitled as her heir at law; she having died without child and intestate. If she took only a life estate, the fee, being undisposed of by the will, descended to the said James Marye, as heir to his father. On the merits, therefore, I have no hesitation in affirming the judgment.

It was attempted to assimilate this case to that of *Clay v. White*. But I can perceive no kind of resemblance. In *Clay v. White*, the verdict showed that the plaintiff was entitled to recover only part of the land in controversy; but, that part not being so described as that possession could be taken of it, the verdict was set aside on that ground. Here the title of James Marye to the whole is established; and the defendants admit, in the case agreed, the lease, entry and ouster; which admission, at that time, and in that form, is equivalent to the finding of a jury in a special verdict. It cannot now be disputed. It goes to prove the possession of the whole land by the appellees, and completely does away every effect which might otherwise have resulted from the previous possession and lease by Weir, in the record mentioned. As to the death of the lessor of the plaintiff, I had not expected that such an objection would be seriously urged after the case of *Kinney v. Beverley*.

On every point, then, whether as to form or as to the merits, I am for affirming the judgment.

JUDGE ROANE. This case has been ably and elaborately argued, and several questions have been raised upon it, which it is unnecessary to decide, under the very plain and simple view I have taken of the subject.

The general propriety of the court's omitting to take too wide a range in giving its decisions is increased in the instance before us, by considerations arising as well from the actual state of the docket of the court, as from the reflection that every case of the construction of a will depends, in a great measure, upon its own particular circumstances.

In the will before us, the testator, in the three first clauses thereof, takes up the subject of the distribution of his land among his children; he then dismisses the subject, and never again resumes it, unless (which is contended) a part of the 8th clause relates to the land of the daughters as well as their negroes.

The 6 next clauses, from the 4th to the 9th inclusive, relate only to his negroes, unless the before mentioned part of the 8th clause should be adjudged to form an exception.

The 10th & 11th clauses relate to the raising and appropriating money to pay his debts; and after some necessary provisions touching the appointment of guardians for his children, &c.

The 15th clause designates and subjects a part of his land to be sold, in preference to his negroes, for the payment of his debts. It returns back, indeed, to the subject of his land, but that only for the purpose aforesaid, and not

quoad a distribution of it among his children.

This will, thus judiciously and systematically arranged, and adapted to the several subjects aforesaid, each of which is taken up in its due order and finally disposed of, it is admitted, in every instance, (except it be part of the 8th clause as aforesaid,) bespeaks a regular system of distribution on the part of the testator; it is incompatible with the idea that the testator would pass, by fits and starts, from one subject to another, notwithstanding he or his scrivener (for it is not shown that the will was written by himself) may in a few instances have sinned in point of grammar.

In a will of this character, it would at least be necessary, in order to affect one class of property, by means of clauses relating regularly, if not exclusively, to another, that there should be an adequate expression to that effect: "otherwise, the general character of the will, as aforesaid, would turn the scale."

In the case before us, the 8th clause follows immediately after four several clauses relating only to negroes, and is immediately succeeded by the ninth section, relating also exclusively to the same subject. The 8th section itself will also be taken to relate to that description of property only, unless there be clear or imperious expressions to the contrary; or unless, from a general view of the will itself, this shall appear to have been the manifest intention of the testator.

Besides, that 8th section is compounded of two sentences, the last of which relates expressly to negroes; and by transposing these sentences (a liberty often taken by the courts in construing both wills and statutes) the last sentence, when thus transposed, would be affected and controlled by the first.

This, then, at most, is not a question whether a clause of a will shall be differed in construction from those which immediately precede and follow it; but whether a single sentence of such a clause shall be construed (to complete the climax) so as to derange the clause itself of which it is a member. Such a construction would scarcely be justified in any will, however irregular or incoherent in its other parts; but certainly not in one of the systematical and regular character of that before us.

In a will of this cast, it was necessary for the testator to point explicitly at the other class of property; or he will be taken to mean only such as he was disposing of by the general tenor of the clause in question: after having dismissed one subject, and taken up another, he will not be construed to have resumed the former, unless his expressions to that effect be clear or unequivocal.

The word "parts," however, has been clutched at to carry the 8th clause into real property also, because the same word had been before used in relation to the lands.

There is about as much force in this argument, as there is in that founded upon the word "give," which is used in all the clauses, or upon the word "have," as quoted (ad captandum) from

the case of *Guthrie v. Guthrie*. (a) While I am not sure that too much stress was not placed upon the word "have," in that case, it is certain that that word did not afford the governing principle of the decision: it was only an ingredient or circumstance in the case: the principal ground of the decision seems to have been, that a fee was inferred, from the testator's having legalized a power in the devisee to sell; and besides, that testator appears to have been extremely ignorant and illiterate.

As for any arguments derived from consequences resulting, either way, from the construction of the 8th clause, we have no data to go by. For example, the value of the lands devised to the son not being found or agreed in this case, it does not follow that the construction contended for on the part of the appellant would not enrich the surviving daughter or daughters far beyond the eldest son and heir, which would be undoubtedly to contravene the received maxims of the time when the will was executed; whereas a construction giving all the interest in the negroes to the daughters, and suffering the son and heir to take such interests in the land, as were not expressly devised away from him, would both accord with the maxim which protected the heir from being disinherited, without express words, or a clear intention in the testator to that effect, conform to the then almost universal practice of the country which gave the lands to the sons and personal property to the daughters, and, in the actual case before us, would, perhaps, yield a liberal provision to the surviving daughter or daughters: I repeat, however, that we have only probabilities to go by in this case; and they would seem to be justified by the construction arising out of the will itself.

It is said that a construction of the 8th clause limited to slaves is not natural, 465 as the same slaves had before *been given away to the legatees by the deed of gift. The answers to this idea are, 1st. That that objection would equally apply to the four preceding clauses, which relate exclusively and expressly to the same slaves; 2dly. That the testator can as well have intended to limit these slaves, in the second instance, as to give them in the first; and, 3dly. That the appellants themselves admit that that clause clearly relates to the slaves; but contend, at the same time, that it relates also to lands.

These are the principal (for I omit the minuter) reasons which induce me to conclude, very clearly, that the 8th section relates only to negroes and not to the lands; and that if the female appellant took a fee in the lands in question, it was merely under the third clause, or at least without deriving any aid from the 8th.

If the 8th clause be rejected, it is entirely immaterial in the case before us, whether the deceased daughter took a fee or not; and therefore I shall not go into that question. If she took a fee, the lessor of the plaintiff is entitled, as he is agreed to be "the heir at law to his two sisters Susanna and Sally;" and, on that ground, is also entitled to recover. On this point it is

said by Mr. Botts, that we are not to presume that James Marye the son (who is dead) left issue, or a will; that, if not, Mrs. Weir is his heir, and that it would be improper and absurd to take the land from her, in order to give it to her, without stopping to inquire whether, in that case, she would be his sole heir, or only in common with the remaining sisters of the half blood, who would also, probably, be entitled to part; the answer is, on the authority of *Kinney v. Beverley*, 1 H. & M. 531, that the judgment is to be rendered in the same manner as if the lessor had not died; and that the inconvenience of the sheriff's not knowing to whom to give possession does not alter the case as he always acts under the control of the court.

With respect to the objection, that the case does not find either Slaughter or Stevenson to have been in possession 466 *of the premises, and that finding

Mooberry to have been in possession of part only, leaving Weir in possession of the balance, judgment ought not to have been rendered against Mooberry therefor; there is nothing in it. The defendants confessed lease, entry and ouster for the whole premises; and the case finds a lease, entry and ouster for the whole. If there had been nothing else in the case, it is presumed that the finding would have been sufficient to justify a recovery. This ouster by the defendants, and their consequent possession, would be construed to be continued, unless the contrary were shown, upon the authority of *Birch v. Alexander*, 1 Wash. 37. In the case before us, that possession is not shown to have been disturbed or interrupted, even as to a part of the premises. It is true, it is agreed, in another part of the case, that Weir leased a part of the premises to Mooberry; but it is not found that he entered thereupon. He therefore got no possession under this finding; and the case stands upon the possession agreed to be in all the defendants under the general finding of lease, entry and ouster as to the whole premises. Upon the whole, I am for affirming the judgment.

JUDGE FLEMING. There are certain well established general rules respecting the construction of wills, though it is sometimes difficult to apply them to particular cases; as the phraseologies of wills are almost as variant as the tempers and understandings of the testators. One leading principle in construing wills of doubtful meaning is, to take and consider the whole together, and thereby, if possible, to discover the intention of the testator; and, when discovered, it is to govern, unless repugnant to some settled rule of law, and even there, perhaps, in particular cases, if the intention appears strong and clear; otherwise, the rule of law must prevail; and it has been often remarked, as well by the judges in England as in this court, that adjudged cases are more frequently 467 introduced to obacure *and confound, than to elucidate questions of this kind, and tend rather to frustrate and defeat, than to explain and support, the intention of the testator.

In the case before us, there being no words of limitation or inheritance i-

(a) 1 Call, 7.

devises to the daughters; and no expression, throughout the will, manifesting or inducing a belief that he intended them a fee, it seems to me that they took an estate for life only. The appellant's counsel, however, contended that, as the testator, in the first clause of his will, directed that all his just debts, and funeral charges, should be first paid; his whole estate, both real and personal, was charged with the payment of his debts; and, therefore, the daughters took a fee in the lands devised to them. But I take the rule to be, that, where the debts of the testator are charged upon a particular devisee, or where the whole estate is expressly so charged, in either case, perhaps, a fee passes without words of limitation, or inheritance; the reason of which is obvious, (being laid down in all the books on the subject,) and need not be here repeated. In the present case, the testator appropriated other ample funds for the payment of his debts in exclusion of the lands devised to his daughters, and therefore the rule cannot apply to them.

But admitting they took a fee in those lands, it seems that, upon the deaths of Susanna and Sally Marye, intestate, and without issue, the lands devised to them respectively descended to James Marye, their brother and heir at law; as it appears clearly to me that the eighth clause of the will, directing that "in case of either of his daughters' deaths before they marry, that then their parts to be equally divided among the surviving sisters," (immediately following the four preceding clauses, in which slaves only are mentioned,) must be confined to the slaves; and cannot, by fair construction, have reference to the third clause of the will, in which the lands are devised to the daughters; and this idea seems strengthened by the next succeeding clause in the will, 468 wherein he "uses the same expression.

After giving to his son James all the rest, or remainder of his negroes, he adds, "and in case of his death, then his part to be equally divided among his sisters." His part of what? of the negroes just mentioned in the preceding part of the clause. But, by construing it to have reference to the land, it would disinherit, in favor of the daughters, any issue his son James might leave behind him at the time of his death; which never could have been the intention of the testator.

With respect to the suggested irregularity of the proceedings in the cause, a satisfactory explanation has been already given by a judge who preceded me, and need not be repeated: and I shall only add my concurrence that the judgment be affirmed.

Unanimous affirmance.

Trueheart v. Price.

Saturday, October 5th, 1811.

1. Sale of Land—Verbal Assurances—Equitable Enforcement.—If the vendor of land, in a town, assure the vendee, (though not in writing,) that a piece of ground, adjoining thereto, is always to be kept open as an alley: by which assurance the vendee is induced to make the purchase, or to give a higher price for the property, a court of equity will perpetually enjoin the vendor from shutting up such alley.

2. Same—Same—Evidence—Witnesses—Vendee.—Quære, in such case, whether the vendee, who has afterwards conveyed the premises (with their appurtenances, but without warranty) to a third person, be a competent witness to prove that such verbal assurance was given to himself by the original vendor?

This was a controversy about a right of way, upon an application by William Price, (purchaser of a tenement in the city of Richmond, which William Duval had bought of Daniel Trueheart,) to the late high court of chancery, for an injunction to prohibit Trueheart from stopping up a twelve feet alley adjoining said tenement.

The written agreement between Duval and Trueheart, dated July 29, 1789, was, that the latter sold to the former "a piece of ground extending on the north side of the main street of Richmond, beginning twelve feet below Mr. Galt's store, and running westwardly, and bounded by the main street forty-four feet, running 469 back "as far as Mr. Galt's pales next the warehouse." "It was also agreed that the lower wall intended to be built on the above ground should be in common for the mutual benefit of both; the said Trueheart allowing nine inches of ground; the said Duval to be at all the other expense."

The deed from Trueheart and wife to Duval, (which bears date the 25th of December, 1794, and was not executed until after the latter had built a brick house on the ground,) said nothing about the twelve feet, but conveyed "a lot or piece of ground, with its appurtenances, lying on the main street in the city of Richmond, it being a part of the tenement called or known by the name of Buchanan's, forty-four feet in front, and running back ninety-six feet, preserving the breadth of forty-four feet all the way." A memorandum was subjoined, "that Trueheart should have the liberty, without coat or hindrance, of joining walls to the house which Duval had built on the above conveyed lot; it being part of the original contract."

The bill charged that, at the time when the agreement was made, the said Trueheart owned the ground, on the main street, immediately above and below the tenement in question, but had leased the tenement held by William Galt, and called Galt's store, for a term of years; that the interval of twelve feet, between Galt's store and the upper line of the ground agreed to be sold to Duval, was understood by Duval to have been some time before laid off by the said Trueheart, and established as a lane to be in common between the two tenements; that Trueheart had agreed with the said Galt that, during the continuance of his term, the said vacant space of twelve feet should be used by him as a lane; "and the said Trueheart, at the time of the said agreement, actually informed the said Duval that he had laid off the said space of twelve feet in breadth for a lane, to be always kept open as it then was."

470 *The answer admitted that, during Galt's lease the twelve feet alley was to be kept open, but positively denied the last-mentioned allegation; insisting that if such a stipulation had existed, it would have been inserted in the written agreement.

The bill stated farther, that the brick house, erected by Duval, extended the whole length of forty-four feet on the main street, with a separate back building for a kitchen and other offices, and a communication from the said offices to the said lane; there being no other way from the offices to the street, except through the apartment of the mansion-house, which, in general, would be inconvenient, and in some instances impossible to be used; that the said Trueheart knew that the said Duval intended to build his house in this way, and frequently saw it while building; that, during this period, he never set up any claim to a separate property in the lane, or made any objection to the said Duval's having a way through it; and he must have known that the said Duval would not have built in the manner he did, but in full confidence that the said lane was always to be kept open. The truth of these allegations was, in a great measure, supported by testimony.

The deposition of William Duval was taken, and proved the parol agreement of Trueheart that the alley in question should be always kept open: but this deposition was objected to by the defendant on the ground of his being an interested witness. (1)

It was proved, however, by the deposition of Isham Bethel, a subscribing witness to the original agreement, that, when he was called upon to attest it, "the said 471 *Trueheart and Duval were in conversation, respecting the ground and its situation, which the said Duval had bought of the said Trueheart; that he, the said Trueheart, observed to said Duval, the alley, running from the main street to Byrd's warehouse, between William Galt's store and said Duval's ground which he had bought of said Trueheart, was to be kept open; and that he, the said Trueheart, did not in any manner intimate to said Duval that the said alley was ever to be shut up, but gave said Duval every reason to believe the said alley was always to be kept open." Duval, in his deposition, said that the written agreement was drawn by Trueheart; and that he signed it, without a clause expressing the stipulation that the alley should be kept open, because Trueheart assured him that he was bound already to leave the alley, between Galt's and the deponent's ground, twelve feet wide.

From other depositions it appeared that the house occupied by William Galt, which was built by the defendant's direction, probably cost upwards of 700l.; that it was not probable that the defendant, when he had it built, could have intended removing it from its present situation, not only considering its size and cost, but the particular manner in which it was built, having two doors and two windows on the side next

the alley; that the warehouse called Byrd's was the property of the defendant; that the alley in question was more generally used by foot passengers to the said warehouse than the street, and much the driest and best way.

The cause came on to be heard the 7th of October, 1806, by Chancellor Taylor, who, ("being of opinion that William Duval purchased the ground in the proceedings mentioned, under an express declaration by the defendant, that an alley twelve feet wide was established, and to be always kept open, between the tenement of William Galt and the ground purchased by the said William

Duval of the defendant,) adjudged 472 and decreed, *that the defendant be perpetually enjoined from obstructing the way between the tenement occupied by the said Galt and that of the plaintiff; and that the alley, as laid down in a survey among the proceedings, be established.

From this decree the defendant appealed.

Call, for the appellant. There was no agreement between Duval and Trueheart that the alley should be kept open. There was no stipulation to that effect in the written agreement. On the contrary, there is a stipulation that Trueheart might join his houses to the walls of Duval's house. Is not this conclusive that Duval was to be excluded from the use of the lane?

In opposition to this, parol evidence is offered! to prove a title in Duval to part of Trueheart's land! (a)

Duval's own testimony, if admissible, (though I contend it is wholly inadmissible,) operates in our favour. It shows that the very point about the alley was controverted at the time; yet he took a verbal promise, and accepted the deed from the man who refused to commit that promise to writing! The story is so strange and improbable, that Mr. Duval must be mistaken in his recollection.

But his evidence is not admissible. His deed to Price conveys the tenement, with its appurtenances, with warranty. He is, of course, interested; for the privilege of this alley is one of the appurtenances. It is a very dangerous precedent to admit a vendor to be a witness. If he did not convey the alley by his deed, Price has no title to it; if he did, he is an interested witness.

Williams, for the appellee. The agreement itself shows that the parties had it not in contemplation that Trueheart should join his wall to Duval's house on the upper part. It follows, that neither of them had it in contemplation that Trueheart should build on these twelve feet of ground. We

do not contend that Duval was to 473 have *the property in the ground of the alley; but that it was always to be kept open. To prove this, there is enough in the written agreement itself. If the word "appurtenances," in the deed from Duval to Price, would convey the alley, surely that word must have the same effect in the deed from Trueheart to Duval.

Whether we resort to Duval's testimony, or not, is unimportant: but he is not an interested witness: he warrants only the quantity of ground which he had bought,

(1) Note. The deed from Duval to Price did not mention the alley in question, but conveyed and warranted to Price and his heirs, "the upper tenement and lot, being a moiety of the said Duval's purchase from Daniel Trueheart by deed now of record." &c. to have and to hold "the said lot or parcel of land with the appurtenances." Duval averred, as he never warranted the alley, that he had no interest in the dispute.—Note in Original Edition.

(a) Vance v. Walker, 3 H. & M. 288. Walker's Ex'r v. Aicklin, ante; Meres v. Ansel, 3 Wils. 276.

a good witness to prove that these feet were always to be a public way. I suppose it unquestionable that for, not warranting a title, is a competent witness: the objection goes only to edibility, not the competency.

cases cited by Mr. Call do not apply. arol evidence does not go to vary the n agreement, but to fortify its obvianing.

kham, on the same side. Mr. Call ot paid that attention to fact which nerally pays to law.

attempt is only to prove a representa- made at the time of the contract, re- to the situation of the property.

did not buy the alley, but only the rty adjoining. He had every reason, h, to believe that the alley was to be open: if not, it was a deception to his r. He had only a right to use the in common with every body else.

Trueheart had contemplated building e upper side of the lot, would he not stipulated for a right to join walls to pper side, in the same manner as he ated with respect to the lower?

stipulation as to the lower side, and sence of any stipulation as to the up- where the lane was,) shows the clear standing of the parties that the lane ot to be shut up. Would any man re- twelve feet of ground for the purpose lding a house? Common sense repels the supposition.

*Mr. Call contends that the word "walls," being in the plural number, s to both sides of the lot. But surely vord is satisfied by joining the wall ueheart's house, intended to be built, e wall of Duval's house, though on de only; for this, in common par- and very properly, is called "joining ." As to this point, too, the deed re- to the "original contract," which t that the parties did not intend to go d that. In all such cases, the deed is olled by the articles.

only object of Trueheart is to levy utions upon Price; not to build; but it up the lane by a fence. This is t from all the circumstances appear- evidence.

vidence is always admissible to representations made about the state property. The representation here hat the ground was adjoining a lane; circumstance added to the value of roperty. If Trueheart had not been ndor, but a third person, who mis- ented the situation of the ground, ges would have been recoverable of

As he is the vendor, we have a bet- medy, viz. to compel him to permit enjoy the use of the lane.

statute of frauds does not apply here is part performance: or where arty, by fraud, prevents the other having a circumstance inserted in the ig.(a)

s is what is called in equity construct- aud.

this case Duval prevented by eart's fraud from having the reserva-

tion concerning the alley inserted. He had a right to confide in his words when he assured him he was already bound to keep it open. In this respect, his testi- mony is corroborated by Bethell's. But he clearly is a competent witness.(b) Neither, indeed, is he at all interested; for the word "appurtenances" conveys only such peculiar privileges as are annexed

the property; not a general privilege 475 which all the citizens *of the com- monwealth have a right to enjoy; such as a public highway. Our applica- tion to the court of equity is merely to stop a public nuisance. No action could be framed so as to make Duval responsible to Price.

Hay, in reply, relied on the case of Moon v. Campbell, 1 Munf. 600, as conclu- sive to show that Duval, being the vendor of the land, could not be examined as a witness to support the title conveyed by himself.

It is said, however, that if his testimony be left out, there is still one witness, aided by circumstances.

But Bethell's deposition does not com- pletely support the bill. It proves merely a reference to a known fact, the existence of an alley, which was to be kept open; but does not ascertain how long. The agreement which he attested was in July, 1789. At that time the alley was to be kept open (under Galt's contract) until the 1st of October, 1797; that is, more than eight years. Trueheart, therefore, might well have said that it was to be kept open; mean- ing during the lease to Galt; but not for ever. The stipulation for the privilege of joining to the lower wall, was inserted, ob- viously, because he wanted to build immedi- ately at that place; but he conceived it not important to stipulate for the privilege of joining to the upper wall, because he could not avail himself of that for eight years to come. There was another reason for omit- ting the last-mentioned stipulation. Galt's house had not long been built. The twelve feet alley could not be built upon, unless that house was taken down. Trueheart could hardly calculate on such an increase of the value of property, as to make him suppose it his interest to take down that house, and build a new one. But in De- cember, 1794, the case was altered. In two years and nine months Galt's interest would expire. New and valuable buildings were daily erected. Trueheart might well

calculate, then, that the privilege of 476 joining *to the upper wall would be important. The memorandum an- nexed to the deed was therefore worded so as to give him the privilege of "join- ing walls," plainly meaning to join his buildings to both the upper and lower walls of Duval's house. Why was this new agreement made if it was not intended to vary the old one?

The circumstance, that Duval built his house without leaving an alley, is much relied upon. But this was an act of Duval, which cannot affect Trueheart. Besides, houses are often built in this city with no passage to the back yard, but through the

Bac. Abr. 117. 1 Fonb. 173. c. 3, s. 8; 2 Bro. Ch. 1. Whitchurch v. Bevis.

(b) Bent v. Baker, 3 T. R. 27; Baring v. Reeder, 1 H. & M. 165.

cellar. He might have built in that manner, knowing that the alley would be open for eight years, and supposing it would remain so afterwards, unless Trueheart should pull down Galt's house for the purpose of building a larger one. The communication, too, by the alley was not so very important; since Duval built stores, and not dwelling-houses. But does the mode of his building show that he had the idea of a permanent alley? Is it proved that his house has a door into the alley? or even a window? Of this there is no proof; neither is it the fact.

Bethell's deposition is, therefore, not supported by any circumstance; while those to contradict it are numerous and conclusive. Particularly, if it was distinctly understood that the alley was to be always kept open; why not say so in the agreement or the deed? If the fact was so, Trueheart had no motive for excluding it; and Duval had a strong motive to insist upon its being inserted; to prevent disputes. Yet he says, himself, that Trueheart refused to sign the agreement first written, which contained a stipulation that the alley should be kept open! He says, too, the existence of the alley enhanced the value of the ground ten dollars per foot; yet he suffered its continuance to depend on chance, and signed the agreement, without any provision binding Trueheart to leave it open.

But if the fact were proved, the evidence (however *satisfactory) must be rejected; for a writing was necessary, under the statute of frauds: and, even at common law, parol testimony is not admissible to prove the contract to be different from what it appears to be in the writing. (a) An attempt is made to repel both of these objections, by saying there was no contract that the alley should be kept open; but a mere representation: which, of course, is not equivalent to a contract. This is, truly, an ingenious device; according to which the statute will operate on an actual, formal contract, but not on a representation. But the plaintiff's bill charges a contract; his own witness says there was an express promise; and, if there was not, upon what ground can he claim that the alley should be kept open? Trueheart is the exclusive proprietor of the ground; and if he did not bind himself by a contract to part with it, he cannot be compelled to do so.

Mr. Wickham, in the next place, (rather inconsistently,) contends there was an agreement, and that, in consequence of a fraud committed by Trueheart, it was not inserted in the writing. But of this pretended fraud there is no proof; and circumstances show that, when the writing was signed, Duval relinquished his claim to the alley, by consenting to the omission of the stipulation which had been inserted in the writing first prepared, and disapproved by Trueheart. The actual agreement, and nothing else, was reduced to writing.

Friday, October 11. The president delivered the opinion of the court, that the decree be affirmed.

(a) 5 H. & M. 288, Vance v. Walker.

478 *Shanks & M'Rae v. Fenwick.

Tuesday, November 26th, 1811.

1. Appellate Practice—Reversal of Judgment—Refusal of Lower Court to Sign Exceptions.—The court of appeals will not reverse a judgment, on the ground that the court below refused to sign and seal a bill of exceptions to its opinion overruling a motion for a new trial; if the weight of evidence exhibited supports the verdict.
2. Evidence—Contradictory.*—In trials at law, where the evidence exhibited is legally admissible, but contradictory, it is most proper to be left to the consideration of the jury.
3. Court of Appeals—Jurisdiction.—Quære, has the court of appeals the power of coercing the judge of an inferior court to seal and allow a bill of exceptions, regularly tendered, and containing the whole truth of the case?

In an action of covenant, in the district court holden at Richmond, the jury found a verdict for the plaintiff for 15l. 11s. 7d. damages; whereupon the defendants immediately after the said verdict was rendered, moved the court for a new trial, on the ground that the verdict was contrary to the evidence and the law of the case: but the court overruled the motion, and refused the new trial. The defendants then tendered a bill of exceptions to the court's opinion, (setting forth, as they alleged, all the evidence in the cause,) "which the court refused to sign, because the witnesses had left the court, and the testimony not being accurately stated, nor taken down at the trial, when the full examination on both sides was had, they therefore thought it improper to certify the same."

Judgment according to the verdict; whereupon the defendants appealed. After argument by Hay, Call and Wickham, for the appellants, and Williams, for the appellee, the following opinion of this court was pronounced by the president, Saturday, November 30th.

The court (not deciding on its power to coerce the judge of an inferior court to seal and allow a bill of exceptions regularly tendered, and containing the whole truth of the case, and admitting, but not deciding, that the bill of exceptions in this case ought to have been sealed and allowed by the judge of the district court, and is now part of the record) is of opinion that the weight of evidence, exhibited in the said bill of exceptions, supports the verdict; and that the said evidence, being contradictory, was most proper for the consideration of the jury. The judgment of the district court is therefore affirmed.

479 *John Royall v. Richard Eppes, Administrator of Lucy Royall.†

Argued March 27th, 28th and 29th, 1811.

1. Wills—Executory Devise;—What Constitutes—Case at Bar.—In a will, dated in 1788, and recorded in 1784, the following clause occurred: "It is my will and desire, that in case my son John should die without heir of his body lawfully begotten, that then, and in that case, I give to my wife Lucy, and to her heirs for ever, all the negroes which I had by her." This was determined to be a good executory devise in favour of Lucy: not on the

*The principal case was cited in Tallaferro v. Franklin, 1 Gratt. 340.

Bills of Exception.—See monographic note on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 867.

†For sequel of principal case, see Royall v. Royall, 5 Munf. 83.

‡Wills—Executory Devises.—See principal case cited in Griffith v. Thomson, 1 Leigh 335.

ground that the word "then" was used; or the word "heir," in the singular number; but because the bequest was of the negroes which the testator had by her; (saying nothing of their issue:) and this was considered as evincing that he did not intend a return of them, or their posterity, to his wife, at any remote period of time.

2. **Same-Same-Same-Same.**—And though Lucy died in the lifetime of John, who was her only son and heir, her contingent interest did not thereby accrue to him, but to her administrator; so that the latter became entitled to recover the slaves upon John's dying without issue living at the time of his death.

3. **Administrator—Appointment and Qualification—Effect.**—It seems, that an administrator, appointed and qualified by a court of competent authority, is the lawful representative of the personal estate: (until his appointment be rescinded:) notwithstanding another had the better right to be the administrator.

4. **Case Agreed.**—By a case agreed, the parties may rest the decision of the cause upon certain specified points of law, to the exclusion of all extraneous facts, or circumstances.

5. **Same—Assumptions by Court.**—If the plaintiff and defendant claim under the same executory bequest: and a case be agreed, submitting the right, to be adjudged, according to the legal construction of the will, without saying any thing about the executor's assent to the legacy, the court will assume that, as a fact, between the present parties.

6. **Executor—Detinue against—Personalty in Which Testator Had Interest for Life.**—An executor, or administrator, holding slaves in which his testator or intestate had only an estate for life, terminable upon his dying without issue living at the time of his death, (which event actually took place,) may be charged, in detinue, personally, and not as executor, or administrator.

7. **Detinue—Declaration—Judgment.**—It seems, that, if a declaration in detinue demand a negro woman, by name, and her three children, without mentioning their names, and a case be agreed, submitting that, if the law be for the plaintiff upon certain other points, judgment may be entered in his favour, for the slaves in the declaration mentioned: the court may insert the names of the negro children in the judgment.

In the last will and testament of Joseph Royall, dated April 13, 1783, and admitted to record in September, 1784, the testator bequeathed to Lucy his wife, one half of all his negroes, for and during the term of her natural life. He also gave her a third part of all his stock and other personal estate, and directed that she should keep possession of his houses during her widowhood, and also have the use of one third of his land, adjoining to the houses, after his son John should come of age.

The following clause next occurred: "It is my will and desire, that, in case my son John should die without heir of his body lawfully begotten, that then, and in that case, I give to my wife Lucy, and to her heirs for ever, all the negroes which I had by her; and the remainder part of my estate, after the death of my wife, I give to be equally divided between my two brothers, Littlebury and John, to them and their heirs for ever."

There was no express devise or bequest

[**Case Agreed.**—The principal case is cited on this subject in *Roach v. Gardner*, 9 Gratt. 91; *Stockton v. Copeland*, 23 W. Va. 701.]

[**Executor—Detinue against.**—When an executor takes possession of the property of a third person of which his testator died in possession, he is liable to an action of detinue at the suit of the true owner, either in his individual character, or as executor, at the election of the plaintiff. That he is liable in his individual character seems not only to be established by the case of *Royall v. Eppes*, 2 Munf. 479, but by ancient cases, and by the reason of the thing. *Catlett v. Russell*, 6 Leigh 364.]

See further monographic note on "Detinue and Replevin" appended to *Hunt v. Martin*, 8 Gratt. 578; monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

to John Royall, the testator's son. The will concluded with the appointment of executors.

After the death of the testator, Lucy his widow entered into, and was possessed of, the real and personal estate devised to her in possession. She departed this life, intestate, in the year 1795, and during the life of the said John Royall, who, immediately after her death, paid all her debts and funeral expenses. No administration of her estate was taken until December, 1803, when Richard Eppes qualified as her administrator. John Royall departed this life, intestate, in the year 1802, possessed of all the slaves of which his father and his mother had died possessed, (except those whom he had sold,) and without leaving any lawfully begotten child.

An action of detinue was then brought, in the Petersburg district court, by the administrator of Lucy Royall, against John Royall, who was one of the lawfully co-heirs and distributees of the said John Royall, deceased, and also administrator, (but not charged as such in the declaration,) to recover the slaves contingently devised, as above mentioned, to the said Lucy and her heirs.

The parties agreed a case, setting forth the will in *hæc verba*; the death of the testator and qualification of his executors, (one of whom, William Royall, is still living,) and the other facts aforesaid. It was also agreed that the defendant was the legal representative of John Royall, but not the legal representative or distributee of Lucy Royall; and that the slaves in question were part of those described in the will, as "the negroes the testator had by his wife."

The case concluded with an agreement that judgment should be entered for the plaintiff for the slaves in the declaration mentioned, and one penny damages, if the court should be of opinion, first, that the limitation, to his wife, of the slaves which the testator had by her, on 481 *the event of John's dying without heir of his body was a legal and valid limitation; and, secondly, that (notwithstanding the death of the said Lucy in the lifetime of John, who was her only child and heir) the slaves, so limited to her on the death of John as aforesaid, became vested in the plaintiff as her administrator: but if the court should think otherwise, on either of these two points, judgment should be entered for the defendant.

The declaration demanded "the following negro slaves, to wit, Isbell and her three children, of the value of thirty pounds each;" without mentioning the names of the children.

The district court, being of opinion that the law was for the plaintiff, entered judgment that he recover against the defendant "the slaves Isbell, Tabb, Fanny and Chenor, in the declaration mentioned, and one penny damages, and the costs;" from which judgment the defendant appealed.

Hay and Wickham, for the appellant.

George K. Taylor and Call, for the appellee.

The first point made by the counsel for the appellant was, that the limitation to

Lucy Royall was too remote, and therefore void; depending, not upon the event of John's dying without issue at the time of his death, but upon an indefinite failure of his issue.

In support of this position they took a general view of the authorities; relying chiefly on *Beauclerk v. Dormer*, 2 Atk. 308, (in which all the previous cases were examined and commented upon by Lord Hardwicke.) and *Bigge v. Bensley*, 1 Bro. Ch. Rep. 187, which differs from the present case only in this, that no bequest is made, in the will now in question, to John. In that case, too, as in this, the remainder over, in case of the death of the

482 *first taker without issue, was given to a person in esse at the time when the will was written; which circumstance seemed to show that the testator could not have intended a failure of issue indefinitely, but only at the death of the first taker. Yet it was determined that the contingency was too remote, and the remainder over could not take effect, being to the remainder-man and his heirs. It is, indeed, settled that a devise for life to one in esse, to take place after a dying without issue, may be good; because in such case, the future limitation being only for life, it must necessarily take place during that life, or not at all; and therefore the failure of issue is confined to the compass of a life in being: (a) but that case is not like this; for here the limitation is to Lucy Royall and her heirs.

On the other side, it was contended, that the rule, by which a distinction is made between an indefinite failure of issue and a failure at the death of the first taker, is contrary to common sense; arising from a strained construction of wills, originally introduced in England, to carry into effect, but now operating constantly to defeat, the intention of testators. It is generally agreed that the will must have effect where it conflicts with no positive legal rules; (1) that where the courts decide against the plain meaning of the will, they universally express regret; and that, therefore, to get ("in favor of common sense") around this difficulty, "the most trifling circumstance is sufficient." (b) Will it, therefore, be deemed unpardonable, if every effort be used, in this case, to give common sense a liberation from the fetters in which pendency and law jargon, two hundred years ago, bound her?

The cases in England on this point are contradictory. In some of them, a limitation, after a dying without issue generally, is considered as identified with a limitation after a dying without issue at the time 483 of the death of the *first taker. (c) In others a different doctrine is laid down; not admitting this construction *ex vi termini*; but intending an indefinite failure of issue, unless the contrary inten-

tion be inferred from other expressions in the will. (d) The general result from all these authorities is, that any expression which can indicate the testator's intention to take the case out of the old rule is to be effectual for that purpose.

But in this will there are not only trifling, but strong circumstances to show the intention.

The words "then and in that case," are equivalent to the words, "then after her decease," in *Pinbury v. Elkin*, 1 P. Wms. 563, which is recognised as authority in 2 Fearn, 191, and 1 Call, 344, *Dunn v. Bray*. It is said that the case of *Pinbury v. Elkin* was overruled by 11 Bro. 188, *Bigge v. Bensley*. But surely the court of appeals of Virginia had a right to take the authority supported by common sense, in preference to later decisions which are opposed to it; unless a maxim be resorted to that our judges have no right to decide until permission be wafted over to them from the other side of the Atlantic!

Again, the expression "without heir of his body" (in the singular number) is important: for although, with respect to devises of lands, the cases of *Tilbury v. Barbut*, 3 Atk. 583, and *Hill v. Burrow*, 3 Call, 342, are against us, there is no such decision in the case of bequests of personal property; and *Forth v. Chapman*, 1 P. Wms. 667, shows, that even where the realty and personalty are devised in the same clause, a different construction, as to each, will take place.

In addition to all this, the terms of the will are, that if John (the son) should die without issue, the widow should have all the negroes the testator had by her; and the brothers Littlebury and John should have the remaining part of the estate after the death of the widow. Hence it appears

conclusively, that the testator could 484 not *have contemplated an indefinite failure of issue, but only a failure at the death of his son John; because the negroes he had by his wife were living at the time of making the will; and it might have been impossible to trace their pedigrees at the end of, perhaps, one hundred years thereafter, which might have elapsed before an indefinite failure of issue; (2) and because the bequest to the brothers, after the "death of the widow," being good, (as not too remote,) the bequest to the widow herself must be good also; taking effect prior in point of time to that of the brothers. (e)

In reply to these arguments it was said, that the rule established in England, that where real estate is devised to A. and his heirs, and, if he die without issue, remainder over, it shall be considered an estate tail for the benefit of the issue, never was applicable to personal estate; with respect to which, originally, there could be no limitation over; it being the old maxim

(a) 2 Fearn, 279; 1 T. R. 598, *Lyde v. Lyde*.

(1) Note. See 1 Wash. p. 102, *Kennon v. M'Roberts and Wife*.

(b) 1 T. R. 597; 2 Fearn, 245.

(c) 1 P. Wms. 190, *Nichols v. Hooper*; Id. 482, *Target v. Gaunt*; Id. 584, *Hughes v. Sayer*; Id. 568, *Pinbury v. Elkin*; Id. 667, *Forth v. Chapman*; Id. 748, *Pleydell v. Pleydell*; 6 Br. Parl. Cas., *Kelly v. Fowler*; 3 P. Wms. 256, *Atkinson v. Hutchinson*; Cowp. 410, *Denn v. Shenton*.

(d) 2 Fearn, 259; 2 Atk. 308, *Beauclerk v. Dormer*; Id. 373, *Saltern v. Saltern*; 2 Ves. sen. *Stafford v. Bulkeley*; 1 Bro. 170, *Attorney-General v. Hird*; Id. 188, *Bigge v. Bensley*; 2 Bro. 38, *Glover v. Strothoff*; 3 Atk. 882, *Sheffield v. Lord Orrery*; 2 T. R. 720, *Goodtitle v. Pegden*; 3 Bro. 558, *Attorney-General v. Bailey*.

(2) Note. See *Kelly v. Fowler*, 2 Fearn, 286-289.

(e) 2 Fearn, 266; Ambli. 122, *Sheppard v. Lessingham*.

that a bequest of a chattel, for a day, was good for ever. This rigour was relaxed in *Matthew Manning's Case*, (a) and by subsequent authorities, (b) it is now settled that limitations over, in bequests of chattels, may take place; but with this restriction, (to prevent perpetuities,) that the event, upon which the absolute right of property is to be vested in the last taker, must happen within a life or lives in being. (1) It is settled in England, that "failure of issue" must be considered indefinite failure, unless there be some other words to tie down the failure within such period. (c) The position, that "dying without issue" (in general terms) means "dying without issue living at the time of the death," is not supported by any authority. In *Nichols v. Hooper*, (d) the legacy was payable "within six months after the death of the survivor," &c. In *Tar-*

485 *get v. Gaunt*, (e) the words were, "for his life and no longer, and, after his decease, to such of his issue as he by his will should appoint; and in case he should die without issue, then," &c.

In *Hughes v. Sayer*, (f) the bequest was to two persons, and if either should die without children, then to the survivor. In *Pinbury v. Elkin*, (g) the testator gave his wife all his goods and chattels; provided, that if she shall die without issue by the said testator, then, after her decease, 80l. should remain to his brother I. S." In *Forth v. Chapman*, (h) the devise was "to William and Walter, and if either of them should depart this life, and leave no issue of their respective bodies, then," &c. The operative word there was leave, which was construed to confine the failure of issue to the time of their deaths, which was also the case in *Atkinson v. Hutchinson*, 3 P. Wms. 258. In *Pleydell v. Pleydell*, (i) the ground of the decision was, that the former limitations being to sons, the dying without "issue" must mean "such issue," i. e. "sons." (k)

None of these cases are in opposition to *Beauclerk v. Dormer*, (l) and *Bigge v. Bensley*, (m) in the former of which all the authorities were reviewed by Lord Hardwicke, and in the latter, by Lord Thurlow, and the doctrine then laid down has never been departed from in any subsequent decision.

The act of 1776, docking entails, gave an opportunity to this court of introducing a new rule which might have been founded upon the spirit of that act; but this it failed to do, (declaring that the act had not the effect of altering the law in this respect,) and adopted all the English authorities. In *Dunn v. Bray*, (n) the limita-

tion was held to be good; the words being, "in case my son William should die, and leave no lawful issue, then," &c. The dictum of Judge Pendleton, concerning the effect of the word "then," (o) was not the point decided. The word "then," has never been considered as sufficient to vary the construction. It is, in such cases, 486 merely a word of relation, not an adverb of time: (p) but whether it be understood as one or the other, its effect is the same: for, in either case, it refers to the failure of issue, without ascertaining when.

Neither does the word "heir" (in the singular number) make any difference. That word occurred in *Hill v. Burrow*, (q) *Tate v. Tally*, (r) and *Eldridge v. Fisher* (s) yet, in every instance, was considered by this court as equivalent to the word "heirs;" since "heir" is nomen collectivum, comprehending not only immediate but future inheritors.

In *Higgenbotham v. Rucker*, (t) the limitation was not too remote; the gift being "to the daughter of the plaintiff and the heirs of her body, and in case she died without issue, that is, children of her body, the said slaves to return to the grantor." The meaning intended to be affixed to the word issue was there explained by the grantor himself, and very properly confined to issue living at the time of the daughter's death. But this case is not like that.

The circumstance that a particular family of negroes are the subject of the bequest cannot vary the construction. If the devise had been of a negro man, the limitation over would have been good, since it must have taken effect in his life, or not at all. But the case is otherwise with a woman and children devised over upon an indefinite failure of issue.

The counsel for the appellant farther contended, that, if the testator did not mean an indefinite failure of issue, but intended the limitation to take effect on the death of John in the lifetime of the widow, the limitation is void: not as being too remote, but because the contingency never happened; for she died in the lifetime of John. If it be contended that the limitation over after the death of John fixes the time of failure to that epoch, whether John should die in her lifetime or not; the manifest intention of the testator was otherwise; 487 for the property was not "to go to her until the death of John, and there is another limitation over after her death." (2)

In the next place they contended, that admitting the limitation to the widow was good, the slaves went to her son John, as her legal representative, who, according to

(a) 8 Co. 94. b.

(b) *Hyde v. Parratt*, 1 P. Wms. 1; *Tissen v. Tissen*, id. 500; *Upwell v. Halsey*, id. 661, and other cases.

(1) Note. See *Fearne*, 320, and *Christian's* note to 2 Bl. 175.

(c) 2 *Fearne*, 269.

(d) 1 P. Wms. 198.

(e) 1 P. Wms. 483.

(f) 1 P. Wms. 594.

(g) Id. 508.

(h) Id. 608.

(i) Id. 748.

(k) See 2 *Fearne*, 488; Note (1) to 1 P. Wms. 750, *Cox's* ed. and *Amb.* 125. *Sheppard v. Lessingham*.

(l) 2 Atk. 306.

(m) 1 Bro. 187.

(n) 1 Call. 388.

(o) *Ibid.* 344.

(p) 2 Atk. 311; 1 Bro. 190.

(q) 3 Call. 342.

(r) Id. 354.

(s) 1 H. & M. 569.

(t) 2 Call. 313.

(2) Note. This seems to be a mistake of the counsel: for it does not appear that, in this case, there was any limitation, to the brothers *Littlebury* and *John*, after the death of the widow, of the slaves devised to her and heirs for ever in the event of *John's* (the son) death without issue; the words "remaining part of my estate," obviously applying to other property devised to the widow for life only. —Note in Original Edition.

Cutchin v. Wilkinson, 1 Call, 6, was entitled to the administration of her estate; and to all her property real and personal, (including this contingent interest,) by virtue of the acts of descents and distributions, since she died in 1795. The defendant, therefore, is entitled, as legal representative of John Royall.

In answer to this, it was said to be clear law, that, upon the death of Lucy Royall, her contingent interest in the slaves, which was a personal and not a real interest, belonged not to her heir, but to her executor or administrator. (a)

In reply, it was said that the administration was surreptitiously granted to Eppes, the present plaintiff; that the beneficial interest was in John Royall, who should have been the administrator of his mother, whose debts and funeral expenses he paid; that the true meaning and intention of the case agreed, was to submit the question who had the substantial, beneficial interest? not as to the mere formal right: but if strict law was to be insisted upon, the plaintiff had no right to recover, it not being stated that the executors of Joseph Royall ever assented to the legacy. (b)

To repel this objection, the counsel for the appellee *observed, that in *Hairston v. Hall*, the point, whether the assent of the executor was necessary, was expressly made in the case agreed; and there was no ground for inferring assent; but in this case there are strong circumstances in favor of such inference; it being agreed that John Royall the son held the property during his life, and that the defendant (his administrator) is in possession: the court, then, will not permit him to raise the objection that the executors have not assented to the legacy. Besides, he has expressly waived it, by agreeing that judgment shall be entered for the plaintiff, in case the court shall determine two specified points in his favour. This was a relinquishment of all technical objections, not involved in the points stated, on which he agreed to rest his cause.

On the other side, it was urged that matter of inference is not sufficient to prove the assent of the executor; for this is not a finding of the fact. Such facts as are necessary to decide the points submitted must be expressly found. (1) The case agreed is therefore imperfect; but a venire de novo is not necessary, the merits being against the plaintiff.

But in answer to this argument, it was said that a case agreed, of the character of that now in question, is not like a special verdict. The plaintiff might have gone on to prove assent; if the defendant had not agreed to submit to the court's opinion upon two points of law.

Two other objections were taken by the appellant's counsel; 1st. That the evidence stated in the case agreed, showing a pos-

session by the defendant as administrator *of John Royall, did not support the declaration, which was against him in his own right: and, 2dly. That the declaration failing to mention the names of Isbell's children, judgment could not be entered for them.

The first of these objections was opposed, on the other side, by observing that John Royall had only an estate for life in the slaves. The defendant, therefore, is himself a wrongdoer, and personally responsible; for he is not justified in holding as administrator. The second objection ought not to be regarded, because, according to the maxim "*partus sequitur ventrem*," if the court shall decide that the plaintiff is entitled to the mother, his right to the children will be unquestionable.

In reply to this, it was insisted that the court had no right to enter judgment, without something to warrant it. A child in its mother's arms may be described as such, (c) without specifying a name; but the rule is otherwise as to negroes that may be presumed to have names. If the plaintiff knew not their names, he might have brought a suit in chancery for a discovery.

Thursday, November 7th. The president pronounced the following opinion of the court:

"This court is of opinion that, although the case agreed in this cause has not expressly admitted the assent of the surviving executor of Joseph Royall to the legacies bequeathed by his will, and now in question, yet such assent is to be assumed, as between the present parties; as well from the facts agreed in the case, that the widow and son of the testator were respectively possessed of the slaves severally bequeathed to them, (which will be intended as a lawful, and not tortious possession,) as because the case aforesaid has rested the cause upon the decision of two questions which exclude the necessity of the assent aforesaid; and because, while,

490 *on the one hand, it is an unnatural presumption that parties litigant would have reference to a circumstance equally affecting, and, in one view, equally destructive of the title of them both; it is, on the other hand, equally reasonable, and usual, for parties to adjust their claims, in subordination to the ulterior claims of others not parties to the controversy.

"The court is further of opinion, that the inquiry before us is also narrowed by the case aforesaid, so as to exclude the question, whether the appellant is entitled to retain the slaves now in controversy, or any part of them, by reason of being one of the co-heirs or distributees of John the son, and his having paid the debts and funeral expenses of his mother, the intestate of the appellee; that case, in submitting it to the court to say, whether the limitation over to Lucy, the wife, was a legal and valid limitation or not, being supposed to have submitted the point upon the true construction of the will of Joseph Royall only; and not as being influenced by these, or other, extraneous facts or circumstances.

"With respect to the second question

(a) 2 Fearn. 445-448, 2 Atk. 621.

(b) *Hairston v. Hall*, 3 Call. 218.

(1) Note. That this is the law as to special verdicts. see *Tunnell and Wife v. Watson*, ante, and *Henderson v. Allens*, 1 H. & M. 235. See also 1 Wils. 66: Hob. 202: 7 Bac. tit. Verdict, letter (D). And that, in general, special verdicts and cases agreed are on the same footing, see *Palmer v. Johnson*, 2 Wils. 168; *Tidd's Pr.* 800, 810, and 1 Burr. 617, cited by Hay in argument.—Note in Original Edition.

(c) *Bass v. Bass*, 4 H. & M. 478.

submitted, namely, whether (notwithstanding the death of Lucy, the mother, in the lifetime of John the son) the slaves limited to her by the will (supposing the limitation to be good) became vested in the appellee as her administrator? the court adopts the affirmative opinion; in support of which, the case of *Pinbury v. Elkin*, 1 P. Wms. 564, is supposed to be a decisive authority.

"As to the point submitted, which involves the validity of the limitation aforesaid, it requires rather more consideration. While the court is clearly of opinion that, in relation to land, there is nothing in the will which would restrict the limitation aforesaid, so as to make it valid; and while, even in relation to personal estate, (as to which a more liberal rule of construction has prevailed,) the court does not see that either the terms 'then

and in that case,' or the word 'heir,' used in the singular 'number, would justify them in adopting the restrictive construction, (under the decisions on this subject, either in this country, or in England,) the court is inclined to think that the testator could not have contemplated a vesting in his wife and her heirs, at a remote point of time, of the negroes in question; and, consequently, that the restrictive construction should be adopted in relation to them. This opinion is induced by his mentioning in the will the 'negroes he had by his wife,' omitting to say any thing about their issue: which negroes, thus specifically limited to her, were in esse at the time; and, consequently, the idea of a return of them, or their posterity, to the heirs of the wife, at a remote distance of time, seems to be reprobated.

"The court adopts this construction, by analogy to the principle of the case of *Pleasants v. Pleasants*, in this court, (a) and to that of the numerous class of cases in which a remainder over to a person, who is in esse for life, has been held to restrict words, otherwise purporting an indefinite failure of issue.

"On these grounds, the court is of opinion that the judgment of the district court should be affirmed."

Crews and Higginbotham v. Garland.

Tuesday, November 19th, 1811.

1. **Writ-Execution of.**—A writ cannot legally be executed after the term to which it was returnable.
2. **Same—Same—Judgment Entered before.**—A judgment entered, in the clerk's office, before the execution and return of the writ is erroneous, and cannot be supported by the writ's being returned executed to the term when the judgment is made final.
3. **Same—Same—Same—Effect.**—In such case, the bail bond should be quashed by the court of error; all the proceedings back to the common order (inclusive) set aside, and the cause remanded for farther proceedings.

This was a writ of supersedeas to a judgment of the district court of Charlottesville, in an action of debt on behalf of David S. Garland against Pleasant Crews. The writ was returnable the 15th of April, but executed the 15th of June, 1807; and a bail bond was then taken, conditioned as usual,

to be void in case the said Pleasant *should make his appearance on the first day of the term ensuing its date. At rules, held in the clerk's office in April, 1807, a common order was entered, and in May confirmed 'against the defendant and bail;' though no bail had then been taken; and, at September term, the office judgment was made final.

Wirt, for the plaintiffs in error, and Nicholas, for the defendants, submitted the case without argument.

Saturday, November 23d, the court's opinion was pronounced that "the execution of the writ after the return day(1) thereof was illegal and void;" and that the judgment taken in the office before the execution and return of the writ was erroneous. "It is therefore considered by the court that the bail bond taken in this case be quashed; and that the judgment and proceedings of the said district court be reversed, with costs, as far back as the proceedings held at the rules in the month of April, 1807, including those proceedings; and that the cause be sent back to the superior court of law to be held for Amherst county, for further proceedings to be had therein."

Page, Administrator of Nelson, v. Taylor and Thornton.

Thursday, November 21st, 1811.

1. **Guardian's Bond*—Taking Thereof a Judicial Act.**—The taking a guardian's bond is not a ministerial, but a judicial act, imposed by law on the court, which (and not its clerk) is to judge of the sufficiency, or insufficiency, of the security offered.
2. **Same—Execution—Where.**—A guardian's bond is to be executed, by him and his securities, in open court, and not in the clerk's office.

The appellees, survivors of James Taylor, Anthony Thornton, Peyton Stern, and James Sutton, late justices of 493 *Caroline county, brought an action upon the case against William Nelson, clerk of the said county; in which they declared "that they and their said associates, sitting as a court, appointed a certain Roy Griffin as guardian of three infants of the name of Alsop, and directed Thomas Jones (whom the defendant had appointed his deputy, and who was then acting as such) to take the bond of the said Roy Griffin, with good and sufficient security, in the penalty of , and conditioned for the faithful discharge and performance of his office as guardian; which the said Thomas Jones then failed and neglected to do; in consequence whereof, a suit was instituted in the district court of Fredericksburg, and judgment recovered, against the said Taylor and Thornton, survivors as aforesaid, for 117l. 16s. with 42 dollars and 43 cents costs:(2) by reason of which premises, the said Nelson became bound and liable to pay the said sums; and, being so bound, he, in consideration thereof, as-

(1) Note. See the case of *Dunbar and Vass v. Long's Administrator*, 4 H. & M. 212, and *Payne and Fairfax v. Grim*, ante. See also *Waugh v. Carter*, ante. In this case the time when the declaration was filed does not appear in the record; neither was it material.—Note in Original Edition.

*See monographic note on "Guardian and Ward" appended to *Barnum v. Frost*, 17 Gratt. 386; monographic note on "Official Bonds" appended to *Sangster v. Com.*, 17 Gratt. 124.

(2) Note. See 1 Rev. Code. c. 95, s. 2.

assumed and promised to pay the same. The declaration concluded with assigning a breach of promise, in the usual form.

Issue was joined on the plea of "not guilty;" and a verdict was found for the plaintiff for 150l. 2s. damages.

The defendant moved in arrest of judgment; and assigned the following reasons:

1. "The declaration made out no cause of action against the defendant."

2. "The defendant was not responsible for the neglect of his deputy to take a bond, with sufficient security, of a guardian appointed by the court, upon the direction of the court."

3. "The declaration contains no averment of damage, sustained by the plaintiffs, by a judgment rendered against them; which is not such a damage as entitles *them to an action if even the clerk were liable for the neglect imputed to his deputy;" and

4. "The declaration is in special indebitatus assumpsit, which is not the proper form of action for a nonfeasance of an official duty."

Judgment was given by the county court in favour of the plaintiffs; and upon an appeal to the district court, was affirmed. From that affirmance, an appeal was taken which (having abated by the death of the appellant) was revived on behalf of his administrator.

Wickham, for the appellant. A promise to make compensation, in general terms, for a trespass or neglect, is not founded on sufficient consideration to support an action of assumpsit; for it only puts the party on the footing of the legal liability. If the party was legally liable, the promise is a mere nullity, being unnecessary, and not increasing his obligation; and if he was not, the promise founded on the supposed liability is not obligatory; for the consideration must be coextensive with the promise. (a)

But Nelson was not legally liable for the neglect charged. It was not the duty of the clerk to take the bond; but of the justices themselves, under whose immediate direction he acted. When they intrust this to the clerk, it is a personal confidence, for which he is not responsible as clerk. Otherwise the law would have given the party injured his election, to sue the clerk, or the justices. The clerk had no right to judge of the sufficiency of the securities.

The defect of consideration for the promise is manifest in another respect. It is nowhere stated that the plaintiffs have paid the amount of the judgment against them, or that they are able to pay it. Indeed it is possible they may never pay it; and so may get something for nothing. In this case, as in that of a security suing his principal, it must be shown that the money has been *paid. It may be said that the verdict cures this defect.

But according to *Rushton v. Aspinall*, 2 Doug. 679, and *Chichester v. Vass*, 1 Call, 83, no material omission in the declaration can be supplied by verdict.

Botts, for the appellees. Mr. Wickham contends that this is an effort of the jus-

tices to charge their own delinquency on their clerk. To judge of the relative duties of the court and the clerk, the practice of the country ought to be considered. The common practice, on allowing appeals, is to permit the bonds to be given in the clerk's office; and, even when the court is in session, the clerk receives the security, upon affidavit that he is worth the requisite sum; and upon such affidavit alone. This practice leads to no inconvenience; but to depart from it would be excessively inconvenient: if a contrary rule be established the courts must hereafter read all the affidavits, and see to the sealing and delivery of all the bonds. The necessity of the clerk's performing these duties, in the inferior courts, is very strong. The justices are continually shifting from the bench. It cannot, therefore, be expected that they should attend to the entering of every qualification, and the administering of every oath. The general practice, that the clerk shall do this, is equivalent to a rule of court; and when the court confides to its minister a duty which he fails to perform, he must be liable. If two parties agree on damages to be paid for an assault and battery, and the assailant promise payment of the sum agreed to the injured party, assumpsit will lie upon that promise. Admit that the tort or misfeasance would not raise a promise to be sued on; yet, in favour of the judgment, an express promise will, after verdict, be presumed to have been proved at the trial; (1) for whether the prom-

ise was express or implied, the declaration would charge it as of *the former character; and, in the latter case, the law presumes an implied promise, and therefore raises it, if the case proved be a fit one; if not, the plaintiff must fail without proof of an express promise. (b) The promise, in this case, being to pay the amount of a certain judgment, in consideration of a previous legal liability, is therefore sufficient to support the action.

But even if the defendant were not originally responsible, his express promise would bind him, being founded upon a moral, though not a legal obligation; as in the case of a bankrupt who has obtained his certificate, his promise to pay a previous debt is obligatory; because he is morally bound.

If the declaration be defective, it is, at most, only a perfect case imperfectly set out. The case of *Murrell v. Johnson's Adm'r*, 1 H. & M. 450, is decisive that the recovery against the justices is sufficient to raise the consideration, without averring payment, or ability to pay. The cases cited there by Judge Tucker go the whole length of this. It is a strange idea that the vexation and expenses of a suit, and the subjection of their bodies to imprisonment under the judgment, are no injuries to them.

Wickham, in reply. The affidavit of the security is not sufficient to justify the clerk, if he know him to be insolvent. But in this case, of a guardian's bond, that point is unimportant. This bond must be taken in open court, to the justices then

(a) *Rann v. Hughes*, 7 T. R. 350; *Forth v. Stanton*, 1 Saund. 210, 1 Chitty, 206.

(1) Note. See 1 Cranch, 333, accordant.
(b) 3 L. 150.

sitting: and, according to the case of *Stuart v. Lee*, 3 Call, 421, a bond taken under a statute must be strictly conformable to it. The justices had no right to delegate their authority to the clerk: a judicial authority cannot be delegated. But, admit it to be a ministerial act, and that it could be delegated, it was intrusted to this man as their agent or representative only; not to him as part of his official duty. They are responsible for the act of their own agent.

I have never known an instance of
497 a clerk's judging of *the sufficiency of a guardian's bond; between which and bonds taken upon appeals, writs of error, supersedeas, or injunctions, there is a plain distinction in this respect.

Murrell v. Johnson's Adm'r was a case of an indemnifying bond. In such case, suit may be brought as soon as the plaintiff is damnified; even as soon as suit is brought against him. A judgment, I admit, does damnify. But the declaration in this case does not charge that Nelson was bound to indemnify the plaintiffs. He is not bound to pay them the money. If he be responsible at all, it must be on the ground that he was originally liable. If so, he might now be compelled to pay the money again, if they should fail to pay it to the party who obtained the judgment against them.

This is not like the case of a promise by a certificated bankrupt. In that case the declaration does not charge the defendant with being legally liable, and therefore promising, as the declaration here does. If the clerk was not legally liable, the consideration upon which the plaintiffs have thought proper to rest their case sinks under them.

If A. should sue B., charging that B. had beaten him, and in consideration thereof, became legally bound to pay him a certain sum of money, and therefore promised to pay that sum; the action would not lie. But in case of a compromise, if the plaintiff agree not to bring his action of assault and battery, upon the defendant's promising to pay a certain sum; an action lies upon the promise.

Thursday, November 28th, Stanard, on the same side, to show that the action of assumpsit would not lie in cases like this in principle, referred to 1 Cranch, 332, *Marine Insurance Company of Alexandria v. Young*, and to 2 Wils. 141, *Marriott v. Lister*.

Saturday, November 30th. The judges pronounced their opinions, seriatim.

498 *JUDGE COALTER. The bond of a guardian must be taken in open court; not only because the court, and the court alone, must approve of the security, but because, in case of the inability, or refusal of the guardian to give such security, the court is to appoint either another guardian, or a curator.

The clerk, then, has nothing more to do in the business than to prepare the bond and insert the penalty directed by the court, and if executed by the party with security, to see that the bond be duly filed and preserved.

If he neglect or refuse to perform these duties, or any of them, he is answerable.

For instance, if he refuse to prepare the bond for signature, the court will immediately punish him for such contempt; or, if the bond, after it is legally executed, be lost by the negligence of the clerk, not the court, (who did their duty,) but the clerk, will be answerable to the party injured.

I cannot, therefore, well see how the clerk can be made liable to damages for the non-execution of the bond; inasmuch as the law directs the justices to take it; prescribes a remedy against them for neglect, and shows how they may secure themselves against this penalty, if bond be not given, to wit, by appointing a curator, &c. But, as there may, perhaps, be cases in which the clerk will be answerable for the non-execution of a bond of this kind, I am not prepared to say that neither the justices, nor the parties, shall, in any event, have recourse to him for indemnity. Before such recourse, however, shall be had, I am of opinion it must at least appear that the clerk had it in his power to take a legal and proper bond.

If we consider the order of the court in this case, as stated in the declaration, to mean that the clerk was to take the bond in the office, I think the clerk would not be responsible; because this would impose on him the doing an illegal act; and, if he did it not, especially as the order appointing the guardian is absolute, (not conditional, "on his giving bond in the office,") the clerk ought not to be responsible for
499 the consequences of such *order; since he could not compel the party to give bond, and could not indemnify himself by the appointment of a curator, in case of failure.

If we consider the order as directing him to take the bond in court, it does not appear that he had it in his power to do so; for, admitting that the order was not blank, as to the penalty, as stated in the declaration, but that the court, after verdict, would presume a penalty had been fixed; yet it does not appear that the party was either able or willing to give security, or that such security was approved by the court: on the contrary, it appears that they had not approved of any one as security, but directed the clerk to take good security. The order was not conditional; the clerk could not compel the party to give security, or appoint a curator in case of failure: and it nowhere appears that he could have taken bond, even if he had power to judge of the sufficiency of the security; he was, therefore, not responsible for the non-execution of the bond.

There are other circumstances, too, in this case, which have great weight on my mind, but on which I forbear to give any absolute opinion.

It is not stated in the declaration that the suit against the justices was brought by the wards generally; by any one of them in particular; or by whom it was brought; or that the suit was for such damages as had been assessed against the guardian in a suit by the orphan, or orphans, against him, and which he was unable to pay; (for which amount only, by

the third section of the law, were they liable;) nor is it stated that they had paid those damages, or any part of them.

Nor am I prepared to say whether, after verdict, this is to be considered an express or implied assumption; or if the former, how far an action of that kind, for malfeasance in office, can be maintained; or how far such action, arising ex delicto, would be lost by the death of the officer.

Upon the whole, I think there is 500 nothing in this declaration *to support either an express or implied assumption;(a) and that both judgments are erroneous.

JUDGE ROANE. Not deeming it necessary to consider, or decide upon, the other objections made to the judgment and declaration in this case, I am of opinion to reverse both judgments, and enter judgments for the appellant, on this ground, that no sufficient cause of action is stated in the declaration: for, while the promise stated in the declaration is predicated upon the alleged neglect of the deputy of the appellant's intestate to take the bond and surety, in and by the said declaration supposed to be necessary, it is not averred that the appellees and their associates designated the said sureties, and admitted their sufficiency; without which the deputy aforesaid was not bound to complete the bond aforesaid; and, consequently, the promise erected thereupon was without an adequate consideration to support it.

JUDGE FLEMING. Not doubting but every clerk of a court of record is responsible for the malfeasance, or neglect of the official duties, of his deputy, I am yet of opinion that neither the principal nor deputy is to be mulcted for failing to perform a service not required of them by law.

The ground of the present action is, that the deputy clerk of the defendant neglected to take a bond, with sufficient security, of a guardian appointed by the court. From the plaintiffs' own showing, they had no cause of action against the defendant; the taking a guardian's bond being not a ministerial, but a judicial duty; which the law imposes on every court appointing a guardian. The clerks generally provide blank bonds, which are, or ought to be, always filled up, and executed, in open court, which is to judge of the sufficiency, or insufficiency, of the security offered, and to order accordingly; which order (among others 501 of the day) is to be read by the clerk, and signed by the presiding member before the adjournment of the court.

It seems to me, therefore, that the defendant was not chargeable, either on an express or an implied assumpsit; and, consequently, that the judgment of both courts ought to be reversed, and judgment entered for the appellant; which is the unanimous opinion of the court.

McCargo, Executor of James Callicott, v. Susanna Callicott.

Tuesday, October 15th, 1811.

Husband and Wife-Dower by Former Marriage—

(a) 7 Tr. 350.

Rights of Husband in.—When a widow marries again, the slaves which she held for the term of her life, as part of the estate of her first husband, belong to her second husband, and his representatives, until her death.

The question debated in this case was, whether a widow, holding slaves in right of dower, and marrying again, thereby vests them in her second husband, so that, upon his death, they shall go to his representatives; or whether she shall have them for the residue of her life?

Littlejohn McCargo, executor of James Callicott, deceased, declared in detinue for several slaves, against Susanna Callicott, his widow; charging that "the said James Callicott, in his lifetime, to wit, &c. was possessed of said slaves, of the value aforesaid, as of his own proper slaves, to hold, to him and his executors or administrators, for and during the life of the said defendant Susanna Callicott; and that afterwards, to wit, &c. the interest of said James Callicott and his executors in the slaves aforesaid being unexpired, the said defendant, by finding, or other means, without right, possessed herself of the said slaves, and the same to the plaintiff doth refuse to deliver, though often required," &c. Plea, non detinet, and issue.

The jury found a special verdict, stating that, in the year 1795, the defendant was entitled to the slaves, in the declaration mentioned, for the term of her life, as her thirds of the slaves of George Brooke, her first husband, who died intestate; that the testator of the plaintiff then intermarried with the defendant, and, by virtue 502 thereof, *was possessed of the slaves aforesaid until his death in the year 1807; that he made his will on the 21st day of December, 1806, which they found in hæc verba; that the defendant was in possession of the slaves, in the declaration mentioned, at the period of the commencement of this action, and still retains possession of them, &c. The will contained a devise to the defendant of the plantation the testator lived on with six negroes, (by name,) being different from those now in question, two feather beds and furniture, two horses, twelve head of cattle, twelve head of sheep, and fifteen head of hogs, also the use of his table and kitchen furniture, during her life, and at her death to be equally divided among his daughters. All the residue of his estate, real and personal, (in general terms,) was directed to be equally divided between his two sons.

The county court gave judgment, for the plaintiff, for the slaves in the declaration mentioned, if to be had; if not, for their respective values, found by the jury. Upon an appeal, that judgment was reversed by the district court; whereupon the plaintiff appealed.

Call, for the appellant. Before the revolution, it was argued by some gentlemen, from a supposed similitude between slaves and chattels real, that if the husband did not, during the coverture, sell his wife's dower slaves, they survived to her. But now slaves are personal estate; and all the wife's interest in them belongs to the hus-

*See monographic note on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

band and his representatives. Besides, in this case, the widow has a provision under the will, and therefore cannot claim against it. (a)

Wickham, for the appellee. The uniform practice before the revolution was for the widow to hold her dower slaves for life, notwithstanding her second marriage. The act of 1727, c. 4, s. 4, (b) applied only to slaves conveyed, given, bequeathed, 503 or descended to a feme covert; *but not to dower slaves, in which the widow holds an estate of a peculiar character, vesting by act of law only. The words of the last section of that act expressly gave her an estate for life in such slaves. They were not vested in her, in her own right, but only in a qualified manner, for the support and maintenance of children, in case the other estate of the decedent should be insufficient for that purpose; and she was not permitted to carry them out of the colony.

Neither is the law altered in that respect. The act of 1792, c. 103, s. 44, 45, (c) prohibits the widow, and, in like manner, her second husband, from carrying her dower slaves out of the state. This circumstance is conclusive.

Mr. Call's second point does not occur in the case. There is no evidence that James Callicott, the second husband, ever claimed the slaves now in question. They are not mentioned in the will. She does not claim dower out of his estate, but only endeavours to retain her dower of the estate of her first husband. There is, therefore, no repugnancy between her doing this and her holding under the will.

Call. Mr. Wickham's argument is a perfect *felo de se*; because it proves too much. The full effect of the word "convey" takes in every species of acquisition. Was it ever doubted, if the husband sold his wife's dower slaves, that the purchaser had a good right? Mr. Wickham's argument amounts to this; that the husband has no right to such slaves. If so, he has no right to sell them; neither can his creditors take them by execution; which is done every day. Can there be any reason for the life's losing to the husband an absolute estate in personals, and yet not an estate for life? Choses in action do, indeed, according to Wallace v. Taliaferro, 2 Call, 447, survive to the wife. But the evident intention of the law is to give to the husband all her personal property in possession. 504

*It does not follow, from the prohibition to carry the slaves out of the state, that the wife shall have them at his death. That provision is only for the benefit of those in remainder. The husband has either his wife's right, or none at all; and if he has her right, it must be an estate for her life.

Wickham. I do consider dower in slaves as a very anomalous property; slaves, in some respects, resembling real, and, in others, personal estate. Dower slaves are of the nature of real estate. The husband is entitled to their profits during the coverture. They may be sold, under execution,

for the joint lives of the wife and husband; but not for a longer time. Her dower is a continuation of her first husband's estate. Of what use would her dower lands (which, it is admitted, survive to her on her second husband's death) be, without slaves to work them? If the legislature had considered the slaves as belonging to the husband for the wife's life, it would have made the forfeiture imposed upon him for carrying them out of the state coextensive with her life; but it is extended only to his death. This shows plainly the sense of the legislature. The wife has not the property in the slaves, but only the use for her life. (d)

Call. Since the act declaring slaves to be personal estate, (e) they are not, properly speaking, held as dower. The legislature has cautiously avoided using that word; instead of which its language is, that the wife shall have "the use, for her life, of such slave as shall be in her share." This does not prevent her disposing of such use to her second husband; which she does by the marriage.

The words of the law, imposing the forfeiture on the husband for carrying the slaves out of the state, (f) are, not merely that he "shall forfeit them for his life," but "all the estate which he holds in right of his wife's dower for and during the life of the said husband."

505 *No conclusion, therefore, in favour of the point contended for by Mr. Wickham, can be drawn from this clause.

Monday, February 3d, 1812, the president delivered the opinion of the court, consisting of JUDGES FLEMING, ROANE, CABELL, and COALTER, that the judgment of the district court be reversed, and that of the county court affirmed.

Snickers v. Dorsey.

Saturday, November 23d, 1811.

1. *Commissioners in Chancery—Report—Motion for Recommitment.*—On a motion to recommit the report of a commissioner in chancery, if the previous neglect, or contumacy, of the party render it proper to overrule his motion, so far as it goes to open the accounts anew: he may, nevertheless, be permitted to show himself entitled to credits not considered by the commissioner. If it appear probable, from the evidence in support of the motion, that he is entitled to such credits.

2. *Chancery Practice—Interest.*—In general, since the 1st of May, 1804, when interest is allowed in equity, it should not stop at the time when the balance of account is struck, nor at the date of the decree, but should run to the payment of such balance.

See Anderson v. Anderson and others, 1 H. & M. 18; Commonwealth v. Newton, Executor of Tucker, id. 90; Deans v. Scriba, 2 Call, 415; Dillard v. Tomlinson, 1 Munf. 188. And 2 Rev. Code, 80.

Michael Dorsey filed his bill against William Snickers and David Castleman, jun. in the superior court of chancery, holden at Staunton, and obtained an injunction to stay proceedings on a judgment of the county court of Frederick, upon which ex-

(d) 1 Rev. Code, c. 92, s. 27, p. 14.

(e) Ibid. c. 103, s. 43, p. 191.

(f) Ibid. s. 45.

*See monographic note on "Commissioners in Chancery" appended to Whitehead v. Whitehead, 28 Gratt. 376.

The principal case is cited in Grantham v. Lucas, 24 W. Va. 223.

(a) Ambler and Wife v. Norton, 4 H. & M. 23.

(b) Virginia Laws, (edit. of 1709.) p. 81.

(c) 1 Rev. Code, p. 191.

ecution was issued, in behalf of Snickers, endorsed "for the benefit of Castleman."

The judgment was rendered, upon motion in a summary way, for 63l. 11s. 3d. with interest and costs, being so much paid by the plaintiff Snickers, as surety for the defendant Dorsey, in a forthcoming bond.

The equity stated in the bill was, that sickness had prevented the complainant from opposing the motion, and that Snickers being indebted to him a much larger sum, upon an unsettled account, for repairs of a mill, &c. (the items of which were particularly set forth,) had made that payment, in pursuance of a previous promise to do so, and in part satisfaction of his debt to the complainant.

The answer of Snickers (among 506 other circumstances) *stated that, long after he had satisfied the execution upon the forthcoming bond, "the complainant insisted upon his executing his bond for ninety pounds, as a full and complete satisfaction of all his demands; which this respondent expressly refused to do; because the complainant had not accounted to him for a considerable quantity of flour, perhaps 40 or 50 barrels, manufactured from wheat he had at several times delivered into the mill occupied by the complainant; and also because this respondent considered himself responsible for considerable quantities of wheat, (which had been delivered into the mill, while the complainant was in his employ as miller, by several persons,) unaccounted for, and converted by the complainant to his own use; and this respondent expressly avers that he does not believe, upon that account, he owes the complainant one cent."

The defendant Castleman, by his answer, denied any knowledge of the transactions, as stated in the bill, between the parties, except that, shortly after a bond for sixty pounds (mentioned in the bill) was executed by Snickers to the complainant, (which bond had been assigned to this defendant,) "the complainant informed this defendant that he had offered Snickers that, if he would execute his bond for ninety, instead of the sixty pounds, it should be a complete settlement of the accounts between them relating to the mill business.

The chancellor overruled a motion to dissolve the injunction, and referred the accounts between the parties to a commissioner, who made a report, setting forth that Snickers, though duly notified, had refused to attend, or render any account; that sundry witnesses on behalf of the complainant (whose testimony was stated) had been examined before him; (a) and that a balance appeared due, from Snickers to Dorsey, of 40l. 13s. 1d. March 3, 1806. The items of debit and credit were specially stated in the report, but no evidence was

507 exhibited before the commissioner, in relation to the wheat and flour, *for which credits were claimed by Snickers in his answer: of course, no such credits were allowed by him; except a credit, "January 1, 1799, cash for flour, 17l. 6s."

A motion was made to recommit the re-

port, upon affidavits of the defendant Snickers, and of Thomas Stribling and Joseph Tidball, witnesses in his favour. His own affidavit stated, "that he now has it completely in his power to establish that he is not actually indebted to said Dorsey to the amount of one hundred dollars; that he can prove that Dorsey acknowledged he (Snickers) did not owe him more, and offered to take that sum, and give him a receipt in full; that he was prevented from offering said testimony to the commissioner, because he did not consider himself interested in the suit against Dorsey at law, inasmuch as David Castleman had only used this affiant's name, and was actually the person interested himself; that he always laboured under that impression until said Castleman's attorney informed him otherwise, which was after the account had been made up and transmitted to court; that he never had counsel in court; and that, when he answered Dorsey's bill, he considered that he was only making a statement of facts for the use and benefit of Castleman."

Thomas Stribling made oath that, some time in January or February, 1806, he sold his crop of wheat to Dorsey, to be delivered on a certain day; and that Dorsey did not come for it until three days after, and gave for a reason, that he had been engaged in settling his accounts with Snickers, which, at last, he had effected, and that Snickers had given him his bond for the amount due him; which bond he had assigned to David Castleman. The witness did not recollect the amount of the bond, but thought it was three or four hundred dollars.

Joseph Tidball's testimony was, that some time in the summer of 1806, Dorsey applied to him to be his security in the injunction bond, and said, at the time of making said application, that Snickers owed him 508 between *two and three hundred dollars, which he said would fully pay the amount of the execution which the said Snickers had against him. The witness did not recollect whether Dorsey said the money was owing to him, by a settlement made with Snickers, or that there would be the above sum due him, when he could obtain a settlement.

The chancellor, Brown, pronounced the following opinion and decree:

"The only question in this cause, which now comes on upon the bill, answers and report of the commissioner, (not excepted to,) is whether the court, upon the motion of the defendant Snickers, founded on his affidavit, and the affidavits of Joseph Tidball and Thomas Stribling, will recommit the report. If this question was confined to the case before the court, there would be less difficulty; but, when the question involves a principle of the utmost importance to suitors in this court, we ought to pause. Owing to the situation of this chancery district, it is a well known fact that causes remain on the docket for years, in many instances, before a report of any kind can be had. Shall we, then, for the sake of an individual, who has discovered so much negligence, and such absolute contempt of the orders of this court, as the defendant Snickers appears, from the commissioner's

(a) See 2 Rev. Code, 94.

report, to have done, introduce a precedent, of which all subsequent suitors will have a right to avail themselves, which will tend to such a delay as will be equal to a denial of justice? This court will not, unless compelled by superior authority, establish such a precedent.

"This much is observed, on a presumption that Snickers is not indebted to the plaintiff. But the court cannot suppose that this is the fact. Snickers's answer and affidavit evidence the reverse: the affidavit of Tidball proves the reverse; and the affidavit of Stribling does not establish the fact that Snickers is not indebted. That

part of Snickers's affidavit, which 509 states that he did not consider *himself interested, ought not, upon any principle, to be regarded. Can it be presumed that he was ignorant of the contents of a bill which he has answered? That bill prays for an account and decree against Snickers. The order of court is founded upon that prayer. If ignorance in such a case be admitted as an apology, I know not when it could be denied; and if a recommitment be, in this case, directed, I should consider myself always bound, at the request of either party, to make such a direction.

"It is therefore adjudged, ordered, and decreed, that the defendant's motion be overruled; that the injunction awarded the plaintiff to stay execution of a judgment of the court of Frederick county in the bill mentioned, be perpetual; and that the defendant Snickers do pay unto the plaintiff the sum of 404l. 13s. 1d. current money of Virginia, and his costs."

From which decree the defendant Snickers appealed.

Thursday, November 28th. The president pronounced the following opinion of this court.

"The court, considering it better to permit individual suitors to abide by the effects of their own negligence, or contumacy, than to establish principles leading to the prostration of those rules which have been wisely established for the furtherance of proceedings in courts of equity, approves the decision of the chancellor, so far as it refuses to open the accounts anew; but, inasmuch as the sum reported in favour of the appellee greatly exceeds that which he seemed to think was due to him from the appellant; and which may probably have arisen from his opinion respecting the credits now claimed against him by the appellant, for wheat, delivered into the mill and unaccounted for, (for which he (the appellant) alleges himself to be responsible,) and for flour manufactured by the appellee, from his (the appellant's) wheat; the court is inclined to depart from the decree of the chancellor, so far 510 *as to let in the appellant to show himself entitled, if he can, to credits, on these accounts, or either of them.

"Decree reversed, and appellant directed to pay to the appellee, as the party substantially prevailing, his costs by him about his defence in this behalf expended. And it is ordered, that the cause be remanded to the said court of chancery to be proceeded in upon the principles, and for the purpose

aforesaid, and also for the purpose of allowing the appellee interest on the principal sum, which may be found due to him, to the time of payment."

Whitlock v. Ramsey's Administratrix.

Thursday, November 28th, 1811.

Bonds—Action on—Variance between Declaration and Bond.—If a bond be payable to James Whitlow, jun. and the declaration describe it as payable to the plaintiff, after naming him as "James Whitlow, jun. alias James Whitlock;" this is not such a variance as should prevent it from being received as evidence. In support of the declaration, on the plea of payment.

This was an action of debt on a bill penal, in the county court of Campbell. The declaration was in behalf of "James Whitlow, jun. alias James Whitlock," and stated the obligation as executed to the said plaintiff, without specifying whether it was to the plaintiff by the name of James Whitlow, jun. or by the name of James Whitlock. The bond produced was to James Whitlow, jun. In other respects it corresponded exactly with the description given in the declaration. At the trial, which took place on the plea of "payment," the defendant objected to the admission of the bond as evidence; it being, as he contended, different from that described in the declaration; but the court overruled the objection; to which opinion a bill of exceptions was filed. Verdict and judgment was entered for the plaintiff, but afterwards reversed by the district court holden at Franklin court-house, on the ground of a supposed variance between the declaration and bond.

The plaintiff appealed to this court: and, after argument by the counsel for the 511 appellant, (the appellee being *called and not appearing,) the president, on Friday, November 29th, pronounced the court's opinion, that the judgment of the district court be reversed, and that of the county court affirmed.

Callis v. Waddy.

Thursday, December 5th, 1811.

1. **Statute of Limitations—Suspensions—Legal Proceedings.**—It is no answer to the bar set up by the plea of the act of limitations, that the plaintiff sued out a writ for the same cause of action within the time prescribed by the act, which writ was executed and returned, and went off the docket for want of formality. See 2 Salk. 430. Budd v. Berkenhead.

2. **Same—Decelt.**—In an action on the case for a deceit, if the defendant plead that the cause of action did not accrue within five years next before suing out the writ, a replication that the fraud came to the plaintiff's knowledge within that time is not good; and issue joined upon it should be set

*See monographic note on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

†**Statute of Limitations.**—See monographic note on "Limitation of Actions" appended to Herrington v. Harkins, 1 Rob. 561.

‡**Same—Suspension—Legal Proceedings.**—See principal case cited in Callett v. Russell, 6 Leigh 372.

§**Same—Fraud.**—In Thompson v. Whitaker Iron Co., 41 W. Va. 574, 23 S. E. Rep. 796, it was held that when a cause of action arises out of fraud, the statute of limitations runs from its perpetration, but that this rule did not apply to fraudulent conveyances. In delivering the opinion of the court, BRANNON, J., said: "*Callis v. Waddy*, 2 Munf. 511; Rice v. White, 4 Leigh 474; Cook v. Darby, 4 Munf. 444; Fant v. Fant, 17 Gratt. 14, say that the statute runs from the act of fraud."

To the same point, see the principal case cited in

aside, by the court, as immaterial. See 3 H. & M. p. 120, note (1) as to the difference between an informal and an immaterial issue. See also Kerr v. Dixon, 2 Call. 579; Kirtley v. Deck, 8 H. & M. 388, and Baird & Co. v. Mattox, 1 Call. 367-370.

To an action on the case for a deceit, the defendant Callis pleaded, "not guilty," and, for further plea, "that the cause of action, if any, did not accrue within five years next before suing out the *capias ad respondendum* in this cause." The plaintiff joined issue to the first plea; and, to the second replied that the plaintiff ought not to be precluded from his said action "by any thing by the defendant above in pleading alleged; because the plaintiff sued out his writ in the said court, against the said defendant for the same cause of action, within the time prescribed by the act of limitations, which was executed and returned by the sheriff of said county, and which went off the docket for want of formality; also because his cause of action, as alleged in his declaration aforesaid, is founded on a fraud, and the plaintiff avers that the same came to his knowledge within the time prescribed by law for the bringing of this kind of actions, (to wit,) within five years previous to his suing out his writ in this cause; and this he is ready to verify," &c.

The defendant filed a rejoinder, "that the plaintiff his action ought not to have, &c. for any thing by him in his replication aforesaid alleged, because the defendant says there is no such record in the said court, of a suit by the same plaintiff against the defendant for the same cause of action; and this he prays may be inquired of by the court, &c. also because

the fraud in this cause, if any
512 "there was, did not first come to the knowledge of the plaintiff within five years prior to the suing out of the writ in this cause," &c.

Issues being so joined, a jury was empanelled; and at the trial, the defendant tendered a demurrer to evidence; but the court being of opinion that the case was clear in the plaintiff's favour, refused to compel him to join in demurrer: whereupon, a bill of exceptions was signed and sealed. A verdict was found for the plaintiff, for 266l. 6s. damages; and judgment entered accordingly; which being affirmed by the district court, the defendant obtained a writ of *supersedeas* from a judge of the court of appeals.

After argument, by Wirt, for the plaintiff in error, and Peyton Randolph, contra, the following was delivered as the opinion of this court.

"This court, not deeming it necessary to decide upon the point made by the bill of exceptions in this case, is of opinion that the judgment of the said county court is erroneous, in this, that the said court proceeded to render judgment for the defend-

ant in error, upon immaterial issues joined upon the plea of the act of limitations; the same issues being immaterial, in this, that the matter contained in the replications to the said plea, if admitted, or proved to be true, afforded no answer to the bar set up by the plea aforesaid. Both judgments are therefore reversed with costs. And it is ordered that the jurors' verdict, and all the proceedings subsequent to the plea of the act of limitations, be set aside, and that the cause be sent to the superior court of law, directed to be held in Louisa county, that the defendant in error may reply thereto anew, in order to a final trial upon the pleas aforesaid.

513 *Claughton and Others v. Macnaughton.

Saturday, November 23d, 1811.

1. *Glebe Land—Vacancy—Statute—Construction.*—According to the spirit of the act, "concerning the glebe lands and churches within this commonwealth," passed the 12th day of January, 1802, no glebe land was to be considered vacant, and as such liable to be sold, if there was any minister, who, in behalf of the protestant episcopal church, had been put into possession, and was the incumbent thereof, on that day; whether the persons acting as a vestry, by whom he was inducted, had been canonically elected or not.

2. *Same—Delivery of Possession—Sufficiency of.*—The vestry's order that the minister "be inducted into the parish as incumbent," is a sufficient delivery of possession of the glebes thereto attached, to prevent a sale of the same as vacant.

Duncan Macnaughton filed his bill (January 20th, 1803) in the superior court of chancery for the Williamsburg district, setting forth that, on the 11th day of January, 1802, he was by the vestry of Saint Stephen's parish, in the county of Northumberland, inducted as clergyman of the said parish, as would more fully appear by reference to a copy (annexed to the bill) of their proceedings, attested by their clerk; that, by virtue of such appointment, he proceeded to discharge the various duties of the said clerical office, and had continued to execute all the functions thereof to the present day; that William Claughton, George Barrett, William Norris, Samuel Downing and Peter C. Rice, known as the overseers of the poor for the said county, had nevertheless, by a certain notification in writing, advertised for sale two glebes belonging to St. Stephen's parish, (to wit, a glebe in Fairfields, and one other called Cherry Point glebe,) of which the complainant was the incumbent, inducted with all the requisites usually observed upon such occasions: which procedure of the said overseers of the poor he charged to be illegal and unjustifiable, founded on an assumed and pretended authority derived to them under the act "concerning the glebe lands and churches within this commonwealth," passed the 12th of January, 1802. (a) The complainant, moreover, contended, that the said glebes were both private donations; as would more fully appear, reference being had to a deed to the bill annexed, relative to Cherry Point. For these reasons he prayed an injunction, to inhibit the sale of the said glebe lands; which was awarded by Chancellor Wirt.

*The principal case is cited in *Selden v. Overseers of Poor*, 11 Leigh 132.

(a) 1 Rev. Code, 421.

Rowe v. Bentley, 20 Gratt. 760; Vanbibber v. Beirne, 6 W. Va. 179; *foot-note* to Rice v. White, 4 Leigh 474; *monographic note* on "Fraud" appended to Montgomery v. Rose, 1 Pat. & H. 5.

In *Amy City of Watertown*, 22 Fed. Rep. 420, it is said: "Courts cannot ingraft on statutes of limitations exceptions not clearly expressed; and when the language of the statute is perfectly clear, it is the duty of the court to enforce the law as it finds it."

The defendant, Samuel Downing, by his answer, declared his own opinion to 514 have been that the glebes in "question were not vacant, and, therefore, not saleable under the act of assembly. He had, therefore, at first, voted against the sale; but the majority of the overseers having decided otherwise, he had acquiesced, (considering the question as determined by their vote,) and had finally voted for proceeding to advertise the lands for sale.

The other defendants denied the plaintiff's induction; admitting that certain persons, who had been called by him, and who, perhaps, called themselves, the Vestry of St. Stephen's parish aforesaid, had attempted to induct him into said parish or glebe, or rather endeavoured to persuade other persons (particularly some of the overseers of the poor) that they had performed such induction; but stating their own belief that said pretended ceremony took place at the distance of five miles, or more, from either of the said glebes or glebe houses, and that the complainant was never in the actual possession or occupancy of either of said glebes, or either of said houses, prior to the passage of the act of assembly aforesaid.

The defendants proceeded to state the cause of the election of said pretended vestry, and the manner in which they were elected, as follows: In the year 1799, prior to the triennial election, there was an order made in vestry, directing the elections of vestrymen, on Easter Monday in 1799, to succeed those then in office. The parish is divided into two districts; Fairfield's district, and Cherry Point district. Six vestrymen were to be elected in one district, and six in the other. The churchwardens were directed to superintend the elections in their respective districts. No election took place in either of the districts on that day, owing, in the Cherry Point district, to the thinness of the meeting. The churchwarden superintending the said last-mentioned district, in consequence thereof, postponed the election for that district to a day, as well as these defendants recollect, three weeks thereafter, at which time an election did take place 515 in that district, "and these defendants, with others, were duly elected vestrymen. In Fairfield's district, it is believed, no attempt was made to elect vestrymen (in the year 1799 or 1800) after said Easter Monday. The vestrymen, elected as aforesaid in Cherry Point district, were frequently called on by the then incumbent, the Rev. Mr. John Seward, to act in local matters in said district; which was customary for district vestrymen; and which they did, and their acts were recognised as proper until the year 1801; in which year they gave an invitation to reputable ministers of the gospel of any denomination to preach in the said Cherry Point church, in the absence of the then incumbent; at which the said incumbent took great offence, and procured another election to be holden on the day of , 1801, declaring that the election of the six vestrymen as aforesaid was void. On which

last-mentioned day, the vestry, who it is said inducted the complainant, were elected (if it can be said they were elected at all) by a general election; at which time these defendants believe that no general election could have been holden; it not being the third year from 1799, or the sixth from 1796; which would more fully appear by reference to a canon of their's concerning vestries and trustees.

In addition to this irregularity, the defendants relied on the act of assembly, passed the 24th of January, 1799, entitled "an act to repeal certain acts, and to declare the construction of the bill of rights and constitution concerning religion" (a) and to such parts of the acts, therein referred to, as relate to this subject; conceiving the effect thereof to be, that no person inducted into any glebe, by vestrymen, or trustees, elected subsequent to the 24th of January, 1799, could, with propriety, be considered as an incumbent, within the true meaning and intention of the act passed the 12th of January, 1802, so as to prevent the sale 516 thereof under the said act. "As to the Fairfield's' glebe, the defendants believed it was a private donation. But as to the Cherry Point glebe, they had understood that the office of Northumberland county, in which, it is supposed, were the records relative to the title thereof, was burnt; and therefore it is not certainly known how the church became originally possessed of that. It seems, however, that the persons, who are said to have been the donors thereof, acted only in the capacity of agents for the church, and not as donors, as would more fully appear, reference being had to a deed of release executed by them in the year 1713, and duly recorded in Northumberland county court. The defendants, however, were at a loss to know the reason why the complainant had stated the glebes in question to be private donations; unless he pretended to be not only the incumbent thereof, but also the heir of the donors: which pretensions they believed to be alike unfounded.

Sundry depositions were taken, on both sides, to support, or impugn, the several elections of vestrymen in the years 1799 and 1801; the general purport of which, in a great measure, proved that neither of those elections were canonically regular. An extract from the proceedings of the last-mentioned vestry, signed by Charles Fallin, their clerk, showed that, at a meeting thereof, held at Northumberland courthouse, the 11th of January, 1802, "it was agreed unanimously, that the Rev. Duncan Macnaughton be inducted into this parish as incumbent, upon agreement with the vestry that he have leave to reside in Wicco parish during the present year."

Chancellor Tyler, on the 10th of July, 1807, decreed, "that the defendants be restrained from making sale of the two glebes in the bill mentioned, so long as the plaintiff remains the incumbent thereof; 517 and that each *party pay his own

costs;" (1) from which decree the defendants appealed to this court.

518 *The counsel on both sides submitted the case without argument; and, on Thursday, November 28th, 1811, the president pronounced the court's opinion, that the decree be affirmed.

Green v. Dulany.

Tuesday, December 24, 1811.

1. **Assigned Bond—Action on—Declaration—Sufficiency of.**—In an action upon an assigned bond, a declaration charging "that the defendant has not paid the debt to the plaintiff," but containing no averment "that he did not pay it to the assignor before notice of the assignment," is radically defective, and not cured by verdict.

2. **Pleading and Practice—Issue of Fact—Demurrer.**—If the defendant plead several pleas, on which

(1) Note. The chancellor's reasons for this decree were understood to have been expressed in his opinion pronounced April 8th, 1806. In a similar case between George Young, the incumbent minister, and pastor of the parish of Portsmouth, in the county of Norfolk, plaintiff, and John Pollock and others, overseers of the poor of that county, defendants; which opinion was as follows:

"Upon a motion made this day, to dissolve the injunction awarded the plaintiff, to restrain the overseers of the poor of the said county of Norfolk from making sale of a tract or parcel of land, lying and being in the said county attached to the church of the parish of Portsmouth, as a glebe; the court, after hearing counsel in opposition to the said motion, understanding that the court of appeals have in their affirmation of a decree of the superior court of chancery held in Richmond, decided that the acts of assembly relative to glebes were constitutional; this court considers itself bound by that decision. The true construction of these acts is then, only, to decide the present question. However otherwise the act of 1799 may operate, it gives no right to the overseers of the poor to sell the glebe in dispute; indeed, that act is studiously silent on the right of property, except so far as it may affect that object by its general operation. There is no proof that any department of the government, or any agent thereof, exercised any right of ownership, over any glebe, in consequence of the passage of that law; its chief object appearing to have been to abolish ecclesiastical corporations, and to prevent the prospect of a national church. It seems, then, that the question chiefly turns on the true construction of the act of 1802. It being doubtful who were intended by the words, present incumbents, in that act, to explore the true meaning two rules were resorted to; the context of the law was examined; and, next, its reason and spirit, connecting the saying in the preamble with the proviso in the body, and these with other expressions in the law. It is believed that the plaintiff, who was elected and inducted by seven men, who acted, in some character for themselves and others, and in behalf of the church, became the incumbent, within the reason and equitable meaning of that act; the object of the law being not to dispossess any protestant episcopalian minister who, in behalf of the church, had been put into possession of a glebe prior to that act; it nowhere prescribing an anterior date. The act intended to have sold only such glebes as were actually vacant; content to wait the sale of the residue until they should become vacant by death or removal. The spirit of the law proposes to reconcile all the good people of this commonwealth; and this construction promotes that spirit. In addition, the plaintiff being in possession, are not the defendants, who seek to divest him, bound to show their title? In which, it is thought, they have failed.

"For these reasons, the court doth reject the motion to dissolve the injunction aforesaid."—Note in Original Edition.

***Assigned Bond—Action on—Declaration—Sufficiency of.**—On this subject, see *foot-note* to *Braxton v. Lipscomb*, 2 Munf. 282, and other notes in this series of reports there cited.

The principal case was cited on the subject in *Mitchell v. Thomson*, 2 Pat. & H. 429; *Simmons v. Trumbo*, 9 W. Va. 303; *Reynolds v. Hurst*, 18 W. Va. 661; *Nicholson v. Dixon*, 5 Munf. 198.

†**Pleading and Practice—Issue of Fact—Demurrer.**—Where there is a general demurrer to the declaration, and also an issue of fact, the regular course is to decide the demurrer first: because if the demurrer to the whole declaration be sustained, there would be no utility in trying the issue: for, whatever might be the verdict of the jury, the

issues in fact are joined; and, moreover, demur to a replication by the plaintiff who joins in demurrer, a jury ought not to be sworn to try the facts: but the court should decide upon the issue in law, in the first place that, if the demurrer be adjudged insufficient, an issue in fact may be made up upon the said replication, to be tried by a jury.

See Co. Litt. 72, a.; Tidd's Pr. 684, 685.

In an action of debt on a bond, in the county court of Culpeper, between Braxton Dulany, assignee of Zachariah Dulany, plaintiff, and William Blackwell and Moses Green, defendants, the declaration charged the defendants as having failed to pay the debt to the plaintiff, but did not also state that they had failed to pay it to the assignor of the bond, before notice of the assignment. The defendant Green, on whom alone the process was executed, pleaded "payment;" and issue was joined; and at a subsequent term (the plaintiff assenting thereto) he filed two other pleas; one of which was, in substance, that the defendant Green was only a security for William Blackwell the other obligor; and that, according to the act of assembly (a) in that case made and provided, he had required the plaintiff to bring suit against the said Blackwell which he neglected to do; wherefore, he the said Green was exonerated from the said writing obligatory. To this the plaintiff replied that the said defendant did not give notice to, or require, the said plaintiff, in writing, to institute such suit: and issue thereupon was joined.

The third plea was as follows: "And the said defendant, for further plea in this behalf, &c. says, that the plaintiff his action aforesaid thereof against him ought not to have or maintain, because he says that, after executing the said writing obligatory in the declaration mentioned, 519 "to wit, on the day of , in the year 18 , at the county aforesaid, he the said defendant, according to the act of assembly, &c. (he being then and there only a security in the said bond, for the said William Blackwell in the said writing obligatory mentioned,) did then and there require the said plaintiff to institute a suit on the said writing obligatory in the said declaration mentioned, and prosecute the same to judgment; and the said plaintiff, afterwards, to wit, on the day of , 18 , in the county court of Fauquier, according to the said notice, did institute a suit against the said William Blackwell, but, afterwards, to wit, on the day of , 18 , did dismiss the said suit, without prosecuting the same to judgment; whereby, according to the act of assembly, &c. the said defendant is exonerated and discharged from the said writing obligatory; and this he is ready to verify," &c.

The plaintiff replied as follows: "And the said plaintiff, further, for answer,

defendant would be entitled to a judgment in his favor. *Cooke v. Thornton*, 6 Rand. 14, citing principal case.

To the point that when there is an issue of fact and also a demurrer, the demurrer ought first to be decided, the principal case is cited in *Jones v. Stevenson*, 5 Munf. 7; *Cree v. Brown*, 1 Rob. 266; *Reed v. Hanna*, 8 Rand. 60.

See generally, monographic note on "Demurrers" appended to *Com. v. Jackson*, 3 Va. Cas. 501.

(a) See 1 Rev. Code, 323.

saith, to the said plea of the defendant last above pleaded, that he ought not, by any thing therein contained, to be barred of his action aforesaid; because he saith that the said defendant did not, at any time after executing the writing obligatory aforesaid, give notice to, or require, the said plaintiff, in writing, to institute a suit thereon; and the said plaintiff saith, that he did not institute any suit on said bond, in pursuance of any notice given by the said defendant according to the act of assembly, &c. and this he is ready to verify, wherefore he prays judgment," &c.

To this replication the defendant demurred; setting forth as causes of demurrer; "1st. That the plaintiff hath stated two replications to the same plea;—2d. Because the said replication is a departure;—3d. Because the said replication is insufficient, double, and wants form." In which demurrex the plaintiff joined; and thereupon came a jury, &c. whose verdict was, "We of the jury find for the plaintiff on the issue of payment; and we find 520 for *the defendant on the other issue." The demurrer was next argued and determined for the defendant; in whose favour judgment was accordingly entered.

Upon an appeal to the district court holden at Fredericksburg, the judgment was reversed; and it was ordered that the pleadings, and all other proceedings, in the said county court subsequent to the declaration, be set aside, and that the parties plead anew; and the cause was remanded to be proceeded in accordingly; whereupon the defendant Green appealed to the court of appeals.

Wednesday, December 11th. The following opinion of this court was pronounced.

The court (not deeming it necessary to decide whether the replication is liable to the objection taken to it by the demurrer) is yet of opinion that that demurrer ought to have been sustained, on the ground that the declaration contained no cause of action; in this, that there is no averment therein that the money was not paid, to the original obligee, before notice of the assignment of the bond in the declaration mentioned, and that the obligor in the bond aforesaid had not paid the said debt; the court is also of opinion that the said county court erred in not deciding upon the said demurrer, before swearing the jury to try the other issues, in order that, if the demurrer aforesaid had been deemed insufficient, and issue might have been made up, upon the replication to the third plea, to be tried in like manner before a jury; and that the said judgments are erroneous."

Both judgments were therefore reversed; "and, the declaration being too defective to maintain the action," judgment was entered, "that the appellee take nothing by his bill, but for his false clamour be in mercy," &c.

521 *Williamson, Executor of Mayes, v. Ledbetter and Others.

December, 1811.

Will—Construction—Limitation after Indefinite Fail-

ure of Issue.*—A testator "lent to his granddaughter, A. S. P., a negro woman, and one bed and furniture, for her, her heirs, executors and administrators forever, but if she should die without lawful heir of her body, then to return to his son, and his heirs forever." This limitation over was adjudged to be upon an indefinite failure of issue, and therefore void.

On the 12th day of September, 1807, Charles Williamson, executor of Anne Smith Mayes, exhibited a bill to the superior court of chancery for the Richmond district, setting forth that the said Anne in her lifetime brought a suit, in the said court, against the executors of Joel Mayes (her deceased husband) and a certain Joshua Smith, to recover a moiety of the property of the said Joel Mayes, remaining after payment of his debts; which moiety was devised to her by his will; that the only difficulty in the said suit arose from the following clause in the last will and testament of her grandfather George Smith, dated in the year 1771; viz. Item, I lend to my granddaughter, Anne Smith Poythress, one negro named Judith, and one good bed and furniture, for her and her heirs, executors and administrators, forever; but if she should die without lawful heir of her body, then to return to my son Joshua, and his heirs forever;" that the said executors of Joel Mayes filed their answer acknowledging the facts set forth in her bill, and the cause coming on to be heard by the late Chancellor Wythe, at March term 1799, he decreed that so much of the bill as claimed a title to the offspring of Judith should be dismissed; and, afterwards, at May term, 1802, he dismissed the residue of the said bill; (as would more fully appear by the proceedings in the said suit, which were referred to and exhibited;) that the said Anne departed this life soon after the said decree was rendered, and the complainant, as her representative, was devised that there is error, apparent on the face of the said decree, in this, that, by the decree dismissing the suit so far as

related to the offspring of Judith, the 522 limitation of that slave to *Joshua Smith, after a dying by the said Anne, without lawful heir of her body, is considered a good executory devise, whereas the same, being after an unlimited failure of issue, is too remote to be valid in law. The complainant therefore prayed that the defendants in the original suit be considered as such in the present; that the court may review and correct the said decree, and grant such other relief in the premises as equity may dictate.

Chancellor Taylor, "being of opinion that there is no error in the decree sought by the said bill to be reviewed," rejected the motion for leave to file the bill; from which order the said Charles Williamson appealed.

The following was the opinion of this court.

"This court is of opinion that the limitation of the slaves in the bill and proceedings mentioned, being after an indefinite failure of issue, was void; that the decree of the said court of chancery,

*See principal case cited in Deane v. Hansford, 9 Leigh 256; Callis v. Kemp, 11 Gratt. 55; Ambrose v. Keller, 23 Gratt. 774; Connolly v. Connolly, 32 Gratt. 660.

adjudging it to be good, is erroneous; and that, consequently, the order aforesaid of the said court rejecting the motion of the appellant for leave to file a bill for the purpose of reviewing the same, is also erroneous: therefore it is decreed and ordered, that the said order be reversed and annulled; and that the appellees, who are executors, out of the estate of their testator in their hands to be administered, if so much thereof they have, but if not, then out of their own estates, and the other appellee in his own right, pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And it is ordered that the cause be remanded to the said court of chancery, with directions to that court to receive the said bill of review, and proceed thereupon, according to the principles now stated, in order to a final decree."

523 *Eppes's Executors v. Colley.

Thursday, December 18th, 1811.

Forthcoming Bond—Necessity of Filing.—If a forthcoming bond be delivered, by the sheriff, to the plaintiff, before notice thereupon be given to the defendants, execution may be awarded upon it, though it has not been filed in the clerk's office. See 1 Rev. Code, p. 298, s. 18, and p. 325, s. 2.

In this case the president pronounced the following opinion of this court.

"This is an appeal from a judgment of the district court of Petersburg, reversing a judgment of the county court of Prince George, rendered on motion on a forthcoming bond. The only exception taken by the defendant's counsel, in the county court, was, that the forthcoming bond, on which the plaintiffs applied for an award of execution, never had been filed in the clerk's office, as it ought to have been; but the court overruled the exception, ('because the said forthcoming bond, before notice of the motion had been written, or given to the defendant, was delivered to the plaintiffs, by deputy of the sheriff who took the bond,') and gave judgment accordingly; which judgment has been reversed by the district court of Petersburg. I am directed to report the opinion of this court, that the judgment of the district court is erroneous, and therefore reversed, and that of the county court affirmed.

Mackey, Executor of Fuqua, v. Bell, Survivor Partner of James Byrne and Co.

Thursday, December 18th, 1811.

1. Decrees—When Interlocutory.†—A decree, though

***Forthcoming Bond—Necessity of Filing.**—The statute of executions provides that the officer taking a forthcoming bond shall return it to the clerk's office, to be there safely kept, and to have the force of a judgment; but the filing previous to a motion on it is not essential to the motion. *Lipscomb v. Davis*, 4 Leigh 305; *Cabell v. Given*, 30 W. Va. 770, 5 S. E. Rep. 442, both citing the principal case. See the principal case also cited in *Booth v. Kinsey*, 8 Gratt. 576.

See further, monographic note on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107.

†**Decrees—When Interlocutory.**—On this subject, see foot-note to *Goodwin v. Miller*, 2 Munf. 42, and other notes in this series of reports there cited.

The principal case was cited on the subject in *Alexander v. Coleman*, 6 Munf. 388; *Cocke v. Gilpin*, 1 Rob. 85, 52; *Manion v. Fahy*, 11 W. Va. 493; foot-note

deciding the right to the property in controversy, and awarding the costs of suit, is still only interlocutory, if commissioners be appointed to carry it into effect, and the court have yet to act upon their report. Neither does it cease to be interlocutory, in consequence of an order that the defendant be attached for failing to comply with it.

See *McCall v. Peachy*, 1 Call. 55; *President, &c. of William and Mary College v. Lee's Executors*, 2 H. & M. 557, and *Goodwin v. Miller*, ante, 42.

2. **Bill of Review.**†—A bill of review lies only to a final decree.

See *Bowyer, &c. v. Lewis*, 1 H. & M. 553; *Banks v. Anderson, &c.*, 2 H. & M. 20, and *Ellzey v. Lane's Executrix*, id. 589.

This was a suit in chancery in the county court of Charlotte on behalf of James Mc'Clellan and James Byrne, & Co. against Thomas Mackey, executor of Samuel Fuqua.

524 *The plaintiffs, being creditors of a certain Christopher Irvine, of Halifax county, obtained of him a bill of sale for sundry slaves and personal property, dated the 8th of May, 1792, and admitted to record the 24th day of December, in the same year. The terms of the bill of sale purported an absolute conveyance of the property, whereof the grantor, nevertheless, retained possession. Irvine having attempted to run away from his creditors, Mackey, to whom, as executor of Fuqua, he was indebted, pursued him, and obtained a bill of sale for part of the same property, dated December 18th, 1792; to set aside which was the object of this suit.

On the 9th of November, 1796, the county court decreed that the defendant deliver up to the plaintiffs the property mentioned in the last bill of sale; appointed commissioners to ascertain the value thereof since the same had been in the possession of the defendant; directed the defendant to pay such value to the plaintiffs; and that the commissioners, after giving thirty days' public notice, do sell the said property at public auction, for ready money, and out of the sales and the said hire or value, pay to the plaintiffs, James Byrne & Co. and James Mc'Clellan, the amount of their claims, respectively, with interest till payment "and the costs of suit," and the residue, if any, pay the defendant, towards the discharge of his claim against the said Irvine; "and make report thereof to the court, and state any matter specially that may be offered by the parties, in order that a final decree may be made in this cause."

On the 6th of May, 1805, the commissioners reported that the defendant refused to deliver the property mentioned in the decree; whereupon the defendant was summoned to show cause for such refusal; and, in August following, no cause being shown, "it was ordered that he be attached for the said contempt until he comply with the said decree."

525 *In November, 1805, Mackey was permitted to file a bill of review, which afterwards (viz. December 2d, 1806) was ordered to be dismissed; and that order being affirmed by the superior court of

to *Fleming v. Bolling*, 8 Gratt. 293, containing excerpt from *Manion v. Fahy*, 11 W. Va. 493; *State v. Hays*, 30 W. Va. 120, 5 S. E. Rep. 184.

†**Bill of Review.**—See monographic note on "Bills of Review" appended to *Campbell v. Campbell*, 23 Gratt. 649. The principal case was cited in *Miller v. Cook*, 77 Va. 819.

chancery, he again appealed to this court; where the following opinion was pronounced the 12th of December, 1811.

"The court (although of opinion, that the decree of the county court, sought to be reviewed, being founded upon an absolute bill of sale of slaves, and other personal estate, the possession whereof remained with the grantor, (1) was erroneous upon the merits) is yet of opinion, that a bill of review did not lie in the case; the said decree being interlocutory only. On this ground, the court approves the decree of the said county court, dismissing the bill of review; as well as that of the superior court of chancery, affirming the same; although both the said decrees may have resulted from a consideration of the merits of the bill of review, instead of being predicated on the ground now taken by this court."

Decree affirmed, and cause remanded to the said court of chancery, and from thence to the county court, to be proceeded in to a final decree.

Hill v. Harvey.

Wednesday, December 18th, 1811.

Appellate Practice—Reversal of Office Judgment—Declaration Defective.—It seems that where an office judgment is reversed on the ground that the declaration is radically defective, the appellate court, if the writ be correct, will not enter judgment for the defendant, but send the cause back to be proceeded in from the writ.

Upon a writ of supersedeas to a judgment entered and confirmed in the clerk's office of the Fredericksburg district court, in an action of debt on a bond, in which Benjamin Hazlegrove and Stephen Winchester were co-obligors. The writ was served on Hazlegrove only, for *whom

Hill (the plaintiff in error) became appearance bail. The declaration charged that the defendant Hazlegrove had not paid the debt; but there was no averment that Winchester the co-obligor had not paid it.

This court, for that error, reversed the judgment; and, "proceeding to give such judgment as the district court ought to have given, directed all the proceedings, subsequent to the writ, to be set aside; and the cause to be sent to the superior court of law directed to be held in Spotsylvania county, to be by that court sent to the rules, to be proceeded in from the writ. (2)

(1) Note. See *Alexander v. Deneale*, ante; and *Hardaway v. Manson*, ante, p. 283.

***Appellate Practice—Reversal of Office Judgment—Declaration Defective.**—The principal case is cited in *Brown v. M'Rae*, 4 Munf. 441.

For further information, see monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268; monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

Joint Bonds—Action on—Declaration—Allegations.—If two obligors execute a bond and only one is sued thereon, the declaration must negative the payment by either obligor. *Douglass v. Central Land Co.*, 12 W. Va. 511, citing the principal case. See monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

Action of Debt—Nonpayment Must Be Averred.—See principal case cited in *Reynolds v. Hurst*, 18 W. Va. 651; foot-note to *Strange v. Floyd*, 9 Gratt. 474, containing extract from *Reynolds v. Hurst*, 18 W. Va. 651.

(2) Note. In *Smith v. Walker*, 1 Wash. 135; *Hord's Executrix v. Dishman*, 2 H. & M. 608; *Braxton's Administratrix v. Hilyard*, ante, p. 49; *Braxton's Ad-*

527

**Davison v. Waite*.

Thursday, December 19th, 1811.

- Equitable Relief—Judgment in Ejectment—Decree.**—If a purchaser of land, subject to encumbrance by mortgage, apply to equity for relief against a judgment in ejectment, the decree ought not to be "that the injunction be dissolved, unless the complainant pay the sum due to the mortgagee;" but "that the mortgage premises be sold, unless, &c. and that, out of the proceeds of the sale, the sum due be paid to the mortgagee, and the surplus, if any, to the complainant."
- Same—Same.**—In such case, if the dower interest of the mortgagor's wife has been relinquished to the complainant, but not to the mortgagee; the court, in directing the sale, ought to guard the complainant's right to such dower interest.
- Sale of Encumbered Land—Liability of Purchaser with Notice.**—Land encumbered by mortgage is liable (in possession of a purchaser with notice) for the sum intended to be secured by the mortgage, but not for other claims of the mortgagee against the mortgagor; especially, if the purchaser has had no notice of such claims. It is, therefore, not liable for a deficiency of quantity, in another tract of land, for the title of which the mortgage is a collateral security; there having been no stipulation, known to the purchaser, that the mortgaged premises should be liable for such deficiency.

George Kiger, of the town of Winchester, having sold to Obed Waite seventy acres of land, part of a larger tract which he had purchased of Joseph Tidball, administrator with the will annexed of William Grayson, deceased, who had not made him a title, (the power of the said administrator to make such title being disputed by the heirs of William Grayson, and a suit pending on their behalf,) a mortgage was executed by Kiger (bearing date July 30th, and recorded December 3d, 1802,) conveying to Waite part of lot No. 15 in the said town, as a collateral security for making a good and sufficient title to the said seventy acres of land. The wife of Kiger, though named as a party in the mortgage, failed to sign

ministratrix v. Lipscomb, ante, p. 282; *Buckner & Wife v. Blair*, ante, p. 286; *Green v. Dulany*, ante, p. 518, and other cases, in which the defendants pleaded to the action, and the declaration was radically defective, the court of appeals reversed the judgments in toto, and entered judgments for the defendants; the writ, in such cases, being no part of the record, except for the purpose of amending by it unimportant defects in the declaration.

See, also, *Payne & Fairfax v. Grim*, ante. It was, therefore, considered, that, since there was nothing in the record "upon which to erect future pleadings," (*Smith v. Walker*, 1 Wash. 136) the judgment must be reversed in toto. But, in this case, the writ was an essential part of the record; because, without it, the judgment, by default, in the clerk's office, could not be supported. It followed, then, the writ being correct, and "a good foundation upon which to erect future pleadings," that nothing need be set aside but the erroneous declaration and judgment; and farther proceedings were permitted from the writ. See *Glascok v. Dawson*, 1 Munf. 609, where, in like manner, the writ of fieri facias was considered part of the record of a judgment, by default, on a forthcoming bond.

This court, in *Shelton v. Follock*, 1 H. & M. 426, appears to have gone farther than in any other case; reversing, in toto, an office judgment on the ground of a defect in the declaration; probably the authority of *Smith v. Walker*, 1 Wash. 135, was relied upon, without adverting to the distinction above mentioned.—Note in Original Edition.

Deeds—Registration—Effect.—Our law unquestionably in its present state, avoids deeds and conveyances, if unregistered, to the prejudice of subsequent purchasers and incumbrancers in good faith; and when duly registered, makes them effectual as notice to all the world. But the notice is of the contents of the instrument and of nothing more, not of any secret condition, or trust, or equity, between the parties. *McClanachan v. Siter*, Price & Co., 2 Gratt. 309, citing the principal case. To the same effect, the principal case was cited in *Houston v. McCluney*, 8 W. Va. 150, quoting from *McClanachan v. Siter*, Price & Co., 2 Gratt. 309.

it, and did not relinquish her right of dower. Waite, afterwards, bought, by parcels, at several times, the residue of the said tract, and thereupon, as a further security for the title, took a deed of trust, dated September 28th, 1803, and recorded December 7th, by which the said Kiger conveyed other real and personal property, therein mentioned, to Hugh Holmes, as trustee, with power to sell such property for the purpose of repaying to Waite (in case the suit should be determined in favour of Grayson's heirs) the several sums of money he had paid, with lawful interest from the respective times of payment.

The following clause was also inserted: "Provided that such sale shall not be made, until the time and place of making thereof shall be previously advertised, &c. and not more of said property shall be sold than sufficient for the objects above mentioned; and if said property shall be insufficient, such deficiency shall be made
528 "up by a sale of the house and lot, mortgaged by the said George Kiger to the said Obed Waite, (on the 30th day of July, 1802,) by proceeding to foreclosure of the equity of redemption, and making sale thereof."

The whole tract was described in the said deed as containing, or as "supposed to contain," two hundred and thirty acres, and nothing was suggested about a deficiency of quantity.

After this, viz. on the 6th of November, 1804, George Kiger and Amelia his wife, for and in consideration of the sum of six hundred dollars, conveyed the part aforesaid of lot No. 15, to William Davison and his heirs forever; the deed to whom was recorded, together with a privy examination and acknowledgment of the said Amelia, May 5th, 1805. Before this deed was executed, Davison had full notice of the contents of the mortgage and deed of trust. Waite, (also before that event,) under a supposition that the part of the lot in Winchester, conveyed in the mortgage, would be sufficient for his indemnification, had permitted some of the personal property conveyed in the deed of trust to be sold, to satisfy other creditors of Kiger; and himself had bought, and afterwards emancipated, a negro man, named Nat, who was one of the negroes mentioned in the said deed. But after the purchase of the same part of lot No. 15, by Davison, (Kiger having failed to pay to Tidball, administrator of Grayson, part of the money he owed him for the land, though Tidball's power to make him a title was established; a deficiency being discovered in the quantity of the land, which proved to be only 203, instead of 230 acres; and Kiger having become insolvent,) Waite proceeded to collect the remaining slaves, and other personal property, conveyed by the deed of trust, and caused them to be sold by the trustee. The net proceeds of the sale (amounting to 343 dollars and 20 cents) being not sufficient to satisfy his claim, he instituted an action of ejectment, upon the mortgage,
529 "judgment; whereupon the latter filed a bill in the superior court of chancery for the Staunton district, and obtained

an injunction to stay proceedings until the matters in controversy should be heard and determined in equity.

The substance of the bill, answer and testimony is, for the most part, expressed in the following opinion, delivered by Chancellor Brown, the 16th of April, 1808.

"It cannot be denied that the mortgage and deed of trust, executed by Kiger, gave to Waite the lien which he now contends for. It is equally clear, from those words in the deeds of trust, "and if said property shall be insufficient, such deficiency shall be made up by a sale of the house and lot mortgaged," &c.—and from the preceding words, "not more of said property, shall be sold than sufficient for the objects above mentioned," &c. that it was the intention of the parties that the trust property should be applied to relieve the mortgaged property, though not absolutely to discharge it. But does it follow, as a necessary consequence, that Kiger, with the consent of Waite, might not dispose of any part of the property, included in the trust deed, for his own benefit; and that if he did, the mortgage-lien would be discharged, contrary to the express agreement and understanding of the parties?

"The true state of the case appears to be this. When Waite took the mortgage, his purchases were inconsiderable; and the mortgage was considered a sufficient security. After he had purchased the whole property, additional security was thought necessary, as part of the purchase-money had not been paid to Tidball, and the title to the whole land was still in controversy. But, after the dispute about the title was decided, and Tidball's right to sell and convey established, Waite (considering himself sufficiently protected by the mortgage against any claim for the purchase-money which Kiger
530 "might owe) was willing to permit Kiger to appropriate such parts of the trust property as he chose, to his own use. Indeed, he might have considered it iniquitous, as it respected Kiger's other creditors, to insist upon his trust-lien, when his mortgage-lien was fully sufficient to indemnify him; or to have compelled those creditors to resort to a court of equity to set aside the trust. It is manifest, that, acting under those impressions, some of the property of Kiger, included in the deed of trust, was sold to satisfy creditors. Negro Nat was purchased by Waite himself, with the consent of Kiger, and the money applied to the payment of Kiger's debts. Nor can it be material that no execution was actually levied on Nat. If one had been levied, it could not have been safely enforced without Waite's consent, or the aid of a court of equity. The purchase of this property, by Waite from Kiger, was an absolute discharge of Waite's trust-lien upon that property, and an implied consent, on the part of Kiger, that the mortgage-lien, if necessary, should stand charged with Nat's value.

"I have been considering the case as it would stand between Waite and Kiger himself. Let us now inquire how far Davison ought to be placed in a different situation from what Kiger would have stood in?

Davison's purchase was made the 24th of October, 1804. Nat was purchased by Waite in June preceding. Davison charges, in his bill, that he was deceived by Waite's concealment of facts, when consulted, at, or before, the time of the purchase from Kiger; and that Waite, after his (Davison's) purchase, has misapplied the trust-property, which, with proper management, would have released the mortgaged property. If either of those charges were admitted, or proved, they would certainly entitle him to relief against Waite. But both are denied; and there is no proof to establish the charges. On the contrary, the answer is established, so far as relates to the management and application of the

trust property after the plaintiff's
531 *purchase, and after his interest in the application of it accrued. But it is said that the records of the mortgage and deed of trust proved that the trust property was to be first applied; and it may be contended that the records were evidence that no different arrangement had taken place between the parties; or that any subsequent or private arrangement would have been fraudulent. But this argument is not sound. And I think it has been already shown that the arrangement, between Kiger and Waite, respecting certain parts of the trust property, was both fair and honest. Besides, Davison himself cannot be supposed to have been governed solely by the information afforded by the records; for we find him bargaining with Kiger, not simply for the mortgaged premises, under a persuasion that all the trust property must be applied to its discharge, but also for part of the trust property; viz. Smither's lot. The truth appears to be this. The parties were deceived as to the amount of the encumbrance. Waite swears that he was ignorant of it, and that he referred the plaintiff to Tidball. Tidball says the plaintiff applied; and, from his deposition, it appears that he was not then capable of giving a correct statement of the amount due. The plaintiff knew of the encumbrances: it was his duty to see how far the property was or might be bound by them. The defendant swears he never, directly or indirectly, deceived him; that he always asserted his claim, though he was ignorant of its extent; that he informed the plaintiff, when the extent could be known; that he has released no part of the trust property since the defendant's interest occurred; but has been zealous in securing and disposing of it in the best possible manner for the plaintiff's advantage; (and this part of the answer appears to be supported by the evidence.) Though a hard case on the plaintiff, this court can only relieve, and perpetuate the injunction, on his paying the plaintiff 418 dollars and 49

cents, with interest, and the costs
532 *of this court and the ejectment at law. The mortgage ought not to be continued to guard against claims which are not even suggested to exist; nor for the value of the girl Beck, (1) which is a

barely possible, but scarcely probable, claim. The defendant may have redress for her, when injury appears."

For those reasons, it was adjudged, ordered, and decreed, "that the plaintiff's injunction be dissolved, unless the plaintiff, on or before the 10th day of July next, pay to the defendant the sum of 418 dollars and 49 cents, the amount of the lien appearing to be due upon the mortgaged premises, and also such costs as the defendant has sustained in prosecuting his writ of ejectment at law; and the court, not yet being advised as to the amount of interest to which the defendant is entitled on the 418 dollars and 49 cents aforesaid, or whether to any, doth refer the cause to Master Commissioner Bent, to state and report an account of said interest, provided the parties cannot agree upon the same."

And afterwards, (viz. on the 1st of August, 1808,) the plaintiff having been served with a copy of the decree, and failing to show cause to the contrary, the bill was dismissed with costs; whereupon an appeal was taken to the court of appeals.

Thursday, December 19th, 1811, the following was pronounced as the opinion of this court.

"The court is of opinion that the chancellor erred in dissolving the injunction, on the failure of the appellant to pay the sum stated in the decree;

"1st. In not directing a sale of the mortgaged premises; whereby the appel-
533 lant would have received the *residue of the value thereof, beyond that sum, if it would have sold for more; and,

"2dly. Because the appellant had procured the dower right of Kiger's wife, which had not been relinquished to the appellee, and who ought not to have been placed in a better situation than he stood under his mortgage; and the court, in letting the appellee into possession, or in directing a sale, ought to have guarded the appellant's right to the dower interest, which has now accrued, provided Mrs. Kiger has survived her husband.

"But the court also erred, as to the amount which was properly chargeable on the mortgage, as it respects the appellant, who claims as a purchaser under the mortgagor; that is to say, in allowing to the appellee the sum of two hundred and ninety-seven dollars on account of deficiency in the quantity of land.

"The purchaser from the mortgagor will be bound for the amount intended to be secured by the mortgage, but not for other claims, of the mortgagee, on the mortgagor; especially, if he has received no notice of such claims.

"In this case, neither the mortgage, nor the deed of trust, gives notice of this claim, on account of a deficiency of the quantity of land; but as well the mortgage and deed of trust, as the communications between the parties, had reference, first, to the inability of Tidball to convey, and, secondly, to the sum to be paid to him to procure the title, if he could convey. But as to a claim on Kiger for a deficiency in the

(1) Note. Beck was one of the negroes conveyed by the deed of trust, and, as Kiger pretended, was the property of one of his daughters (then an infant)

by a previous gift from himself. The daughter's right, if she had one, had never been asserted.—Note in Original Edition.

quantity of land, the purchaser had no notice thereof. That sum of two hundred and ninety-seven dollars must therefore be taken from the sum of four hundred and eighteen dollars and forty-nine cents, decreed to be paid; which will leave one hundred and twenty-one dollars and forty-nine cents, to which, with the interest thereon, the mortgaged premises are to be subjected in the hands of the appellant.

534 "Decree reversed with costs; and suit remanded to be proceeded in to a final decree according to the principles of this decree."

Young v. Price and Others.

Thursday, December 19th, 1811.

MILL Cases—Damages—When Payment Presumed.*—

Under circumstances, the payment of the damages assessed in a mill case ought to be presumed; especially, if a great length of time has elapsed, during which the owner of the land, to whom such damages were assessed, acquiesced in the building of the mill, without claim or objection on his part.

Upon an appeal from a decree of the superior court of chancery for the Richmond district, by which a bill, exhibited by William Young, against William Price, administrator of Charles Price, Robert Price, and Samuel Williamson, was dismissed with costs.

The complainant having purchased of Charles Price, agent for Robert, a mill-seat in the county of Henrico, for the sum of 130l. of which 40l. remained unpaid, was informed by Samuel Williamson, that he was owner of the land which, in the year 1776, had been condemned, upon a writ of ad quod damnum, for an abutment of the mill dam, and other uses connected with the mill; and that the damages assessed in his favour, including those allowed his brother, Thomas Williamson, (who owned a part of the said land, of which he the said S. Williamson had since become the purchaser,) had never been paid. He therefore demanded the same, (amounting, with nineteen years' interest, to 54l. 12s.) and threatened to institute an action of ejectment for the land, if payment were refused. Upon this, the complainant gave the said Robert Price a written notice, that, unless he would pay the money so demanded by Williamson, the complainant would be obliged to pay it, and to claim a discount for it; whereupon, Robert Price having refused, or neglected, to make the payment, or to settle the business in any other way, the complainant paid to Williamson the 54l. 12s. and took a special receipt, stating the circumstances.

A suit at law was afterwards brought by William Price, administrator of Charles Price, upon the complainant's note for 40l.; and judgment obtained; to enjoin which, and to recover the difference between that sum and the 54l. 12s. were the chief objects of the bill.

The ground relied upon, for relief in equity against the judgment was, that the complainant was unable to set off, at common law, against his note, the sum he had paid as aforesaid; to reimbursement of

which he was justly entitled, either from the estate of Charles Price, or from Robert Price, for whom the said Charles was agent; the mill-seat having been sold to the complainant without notice of the encumbrance, and he having been compelled to pay this money to avoid an ejectment, which must have been successful against him, since he had nothing to show to maintain a title; the records of Henrico court being destroyed by the British troops in the late war.

The defendants were severally called upon to answer and say, "whether the said Robert, or Charles Price, ever paid to the said Williamson the damages assessed by the jury on Robert Price's petitioning Henrico court, for an acre of S. Williamson's land? The defendant Williamson was particularly required to say whether he did not compel the complainant to pay the 54l. 12s. as aforesaid?" A decree was also prayed against him; that, "if he had received more than he ought, he should be directed to refund the money with interest."

William Price, in his answer, averred that he always understood, and verily believed, that Robert Price had paid (without taking a receipt) the whole of the damages assessed to Thomas Williamson; (saying nothing of damages allowed to Samuel Williamson;) that Charles Price was applied to by the complainant to purchase the mill-seat; that the complainant was well acquainted with the circumstance that a part of the land had been condemned by a jury, and insisted that the difficulties relative thereto should be removed

536 before he would make the *purchase; "whereupon the said Charles Price applied to the said Thomas Williamson, in whose favour the damages had been assessed as aforesaid, paid him the amount thereof, and took a receipt for the same; as the respondent thinks he shall be able to prove;" but of this no proof was adduced. The respondent contended that the payment by the complainant to Samuel Williamson was in his own wrong, and ought not to operate to the prejudice of Robert Price, or of the estate of Charles Price.

The answer of Robert Price said nothing about damages assessed to Thomas Williamson, but alleged that "when this respondent obtained an order of court for building said mill, the said Samuel Williamson promised to remit to him whatever damages the jury might assess, for the injury by him sustained by the erection of the said mill: but this defendant, not satisfied with his said promise, tendered him the whole amount of the said damages, which this defendant does not believe exceeded three pounds; but the said Samuel Williamson being, or pretending to be, mindful of his said promise, refused the money when tendered by this defendant. And, further, this defendant conceives that, as the said Charles Price was only authorized to sell the said mill, as she stood, without any clause of warranty to bind this defendant, and as the complainant may have paid the said sum of 54l. 12s. improperly and in his own wrong, this defendant should not be thereby aggrieved."

*See monographic note on "Mills and Milldams" appended to Calhoun v. Palmer, 8 Gratt. 88.

Samuel Williamson having departed this life, without answering the bill, a bill of revivor was filed against Dabney Williamson, his executor, who appeared and pleaded to the court's jurisdiction, on the ground that if the plaintiff had any right against his testator on the subject matter of the said bill, he had his remedy in the most ample manner at common law. He, also, answering, said, "that his testator was justly entitled to the money received by him from the complainant, for the

537 damages in *the bill mentioned, which had not been paid or discharged to his testator, in any shape, before the complainant paid them, as far as this defendant knows, has heard, or believes; that, on the contrary, his testator, until payment aforesaid, always asserted his right thereto; and the payment of those damages was in consideration of his testator's relinquishing his right (which was unquestionable) to the ground which the pond of the mill then covered."

No depositions were taken on either side. The deed from Robert Price, to the complainant, for the mill-seat in question, (which deed was among the exhibits,) contained a clause of general warranty.

The late chancellor, Wythe, on the 18th of May, 1801, overruled the plea to the jurisdiction, and directed "a jury to be empanelled and charged, before the county court of Henrico, to inquire what damages the said court, upon hearing the petition of the defendant Robert Price, for leave to build the mill in the bill mentioned, did adjudge that the said defendant should pay to owners of lands which would be overflowed? and who were those owners? (which inquiry, by loss of the record of proceeding upon the said petition, (as is suggested,) hath become necessary;) and whether that defendant paid those damages? and that the verdict of the jury be certified," &c.

No step appears to have been taken to carry this order into effect. And on the 8th of September, 1808, the present chancellor set it aside, and dismissed the bill, as to all the defendants, with costs; from which decree the plaintiff appealed.

The following was pronounced as the opinion of this court.

538 "The court is of opinion that, under the actual circumstances of this case, and especially, the great lapse of time which has occurred since the assessment of the damages under which the claim of Samuel Williamson to the sum in controversy is founded, and the acquiescence of the said Samuel Williamson (who probably resided in the neighbourhood) in the building the mill, (for which these damages were given,) without claim or objection on his part, the damages aforesaid ought to be presumed to have been paid; and that, therefore, the bill of the appellant as to the appellees, William Price and Robert Price, was properly dismissed by the decree now in question; but, inasmuch as the payment of the sum of fifty-four pounds twelve shillings, by the appellant to the said Williamson, was coerced by representations, on the part of the latter, which made it proper for the former to

come into a court of equity to have the questions resulting from the claim aforesaid adjusted, if not, to pay the said sum to the said Williamson in the first instance, and, (as the matter now appears,) the said sum being so paid to him without consideration; the court is of opinion that the said bill ought to have been sustained as to the appellee Dabney Williamson, and he decreed to repay the sum aforesaid, with interest and costs, to the appellant. Therefore, it is decreed and ordered that the said decree, so far as it dismisses the bill as to the last-mentioned appellee, be reversed and annulled; that the residue thereof be affirmed; and that the appellee Dabney Williamson, out of the estate of his testator in his hands to be administered, if so much thereof he hath, but, if not, then out of his own estate, pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And this court, proceeding, &c. it is further decreed and ordered, that the appellee Dabney Williamson, out of the estate of his testator in his hands to be administered, if so much thereof he hath, pay to

539 the appellant *the said sum of 54l. 12s. with interest thereon, to be computed, after the rate of five per centum per annum, from the 19th day of August, 1795, till paid, and his costs by him expended in prosecuting his suit in the said court of chancery; but, if not, then the costs aforesaid to be levied of his proper goods and chattels."

Holladay and Wife v. Littlepage.

Saturday, November 2d, 1811.

1. *Detinue**—Declaration—Defects Cured by Verdict.—In detinue, if a negro woman, by name, and her "issue" (without naming them) be demanded in the declaration, and the jury find the names of the issue, the defect (if any) is cured, and judgment should be entered according to the verdict. See *Royall v. Eppes*, ante, 479, pl. 7.
2. *Same—Same—Same*.—The failing to lay a separate value, as to each slave demanded, is an error which would be fatal on demurrer, but is cured by a verdict severing the values.
3. *Same—General Damages*.—It is not error that the jury find general damages for detaining several slaves; but the alternative value of each slave ought to be separately found.

In an action of detinue, in the district court of Richmond, the declaration demanded "a negro woman slave Amy, and her issue, of the value of 1,000 dollars, and Rachel, a negro woman slave, and her issue, of the value of 1,000 dollars." Pleas, non detinet, and the act of limitations, and issue. The verdict was, "that the defendant doth detain the negro woman slaves in the declaration mentioned, to wit, Amy and Rachel, and the issue of the said Amy named Maria, and the issue of the said Rachel named Dixon, in manner and form, &c.; that the said Amy is of the price of 100l. the said Rachel of the price of 100l. the said Maria of the price of 50l. and the said Dixon of the price of 50l. and that the action of the plaintiff did accrue within five years next before the suing out the original writ," &c. and damages were assessed to forty shillings.

*See monographic notes on "Detinue and Replevin" appended to *Hunt v. Martin*, 8 Gratt. 578. The principal case is cited in note to *Laughlin v. Flood*, 2 Munf. 350.

A motion was made in arrest of judgment, on the ground that the declaration was vague and uncertain, in demanding the issue of the two negro women therein mentioned; that the jury erred in finding for the plaintiff the two negroes Maria and Dixon, whose names were not mentioned in the declaration: and that the jury found general damages, which applied, as well to the detention of the negroes not named in the declaration, as of those who were named therein.

The district court was of opinion 540 that the said errors "were sufficient in law to arrest the judgment. It was therefore considered, "that the plaintiff take nothing by his bill, &c. and that the defendant go thereof without day, and recover his costs," &c.

From which judgment the plaintiff appealed.

Botts, for the appellant. The names of the slaves are not indispensably necessary in the declaration. If the reverse of this position were established, a child not yet named could not be recovered: and it is not certain that the issue in this case (being infants) had named at the time the declaration was filed.

Reasonable certainty is all that the law requires in an action of detinue. The not naming a horse is no defect in the declaration, notwithstanding he has a name of notoriety. If a negro has a common name, (such as John or Tom,) the description is by no means certain. The words "issue of a mother," who is named, describes the individual more positively.

2. If this declaration be defective, it is cured by the act of *jeofails*, according to which judgment is not to be arrested "for omitting the averment of any matter, without proving which the jury ought not to have given such verdict." Besides, two negroes were well named, and well found. Judgment ought to have been entered for those two, at any rate. Yet the court arrested it altogether. The only objection is, that general damages were assessed for all four. This, then, was error in the verdict; not in the pleadings; and, at utmost, a *venire de novo* should have been awarded. (a)

3. Costs were improperly given against the plaintiff; the rule being, that "where judgment is arrested, each party pays his own costs." (b)

541 *The Attorney General, contra, relied chiefly on the doctrine that, in detinue, a greater degree of certainty is required than in ordinary actions. (c)

Tuesday, November 5th, the president pronounced the following opinion of the court.

"This court (not admitting that the

(a) *Higgenbotham v. Rucker*, 2 Call, 318.

(b) *Cameron v. Reynolds*, Cowp. 407. *Impey's Pr.* 364. (1)

(1) Note. This is not law in Virginia. In 1 Rev. Code, p. 110, c. 76, s. 17, ad finem, it is enacted, that, "in all cases where judgment shall be given for the defendant, he shall recover his costs." And (p. 81, c. 66, s. 44,) "It shall be lawful for the district courts, in any cause originating there, where the verdict or judgment shall be given for the defendant, to award costs to the party in whose favour such judgment shall be given."—Note in Original Edition.

(c) *Buller's N. P.* 50; 3 *Tucker's Bl.* 153.

omission to state the names of the issue of the female slaves in the declaration mentioned was important, and being of opinion that the declaration, not laying a separate value as to all the negroes demanded thereby, might have been held erroneous upon demurrer) is yet of opinion that the judgment of the district court is, in this case, erroneous; the latter defect being cured by the verdict, which has severed the value aforesaid; and the former being, at most, only a fact imperfectly stated, (2) and, consequently, cured by the verdict, which finds the names of the issue of the female slaves in the declaration mentioned. It is therefore adjudged that the judgment aforesaid be reversed, with costs, and entered for the appellant, pursuant to the verdict."

Henry's Executor v. Elcan, and The Same v. Pickett, Pollard and Johnson.

Wednesday, December 18th, 1811.

Court of Appeals—Jurisdictional Amount.*—If a judgment of a county or corporation court, being for less than one hundred dollars, exclusive of costs, be reversed by a superior court of law, upon a writ of *supersedeas*; whereupon judgment is entered that the plaintiff take nothing by his bill, &c. he cannot appeal to the court of appeals: notwithstanding his declaration demanded a larger sum than one hundred dollars. See *Cooke v. Piles*, ante, 151.

These were actions of *assumpsit*, originally brought in the *Hustings* court of the city of Richmond, by John Henry, against Marcus Elcan, and Pickett, Pollard 542 and *Johnson. In the former case, the plaintiff by his declaration demanded 139l. 16s. 8d. for certain tobacco sold and delivered: and in the latter 157l. 19s. 3d. on a similar account. The judgments were for 24l. 0s. 5d. and 25l. 16s. 5d., besides costs. Upon writs of *supersedeas*, they were both reversed by the district court of Richmond, and judgments entered for the plaintiffs in error, "that the original plaintiff take nothing," &c. From which judgments, appeals were taken to this court, and, having abated by the death of John Henry, were revived in the name of his executor.

Friday, December 20th, JUDGE ROANE pronounced the opinion of the court, that the appeals be dismissed, the matters in controversy, exclusive of costs, being too small to give this court jurisdiction. (d)

Melson v. Melson's Administrator.

Wednesday, March 11th, 1812.

Court of Appeals—Jurisdiction—Matter in Controversy—What Constitutes.—The damages allowed by law, upon affirmance of a county court judgment by a superior court of law, are not to be reckoned as part of the "matter in controversy," for the purpose of giving the court of appeals jurisdiction. If, therefore, the judgment be for less than one hundred dollars: but would amount to more, by adding the damages, upon affirmance, an appeal does not lie to the court of appeals. See *Henry's Executor v. Elcan*, ante, 541.

This was an action of *assumpsit*, on behalf of Jonathan Melson against Smith

(2) Note. See *Fulgham v. Lightfoot*, 2 Call, 257. *See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268.

(d) See 1 Rev. Code, c. 63, s. 2.

†See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268.

Melson, in the county court of Accomack. The declaration demanded 48l. 2s. 2d. for goods, &c. sold and delivered. The verdict and judgment was for 29l. 6s. exclusive of costs. Upon a writ of supersedeas, the judgment was affirmed by the district court, with costs and damages according to law; whereupon the plaintiff in error, who was defendant in the county court, appealed to this court.

The case was submitted, on the question, whether the damages allowed by law upon the affirmance of the judgment were to be considered as part of the "matter in controversy;" (1) so that, if the judgment, added to the damages, *amounted to more than one hundred dollars, an appeal to this court would lie.

Thursday, March 12th, the president reported the opinion of the court, that the appeal be dismissed for want of jurisdiction.

Gay v. Moseley.

Argued Thursday, September 26th, 1811.

1. **Personality—Possession by Loanee over Five Years—Effect.**—A slave lent either before or after the act to prevent frauds and perjuries, having remained since the commencement of that act more than five years in the loanee's possession, without any demand made on the part of the lender, must be considered the absolute property of the person so remaining in possession, as to creditors of, and purchasers under, him.
2. **Same—Same—Notice of Loan—Effect.**—And proof of notice of the loan, or of a deed of trust, from the lender, recorded in the court of a county wherein neither of the parties lived, is not sufficient to do away the effect of such possession.

Detinue for a slave named Becky by William Gay, trustee, and for the benefit of Susanna Eldridge, against Francis Moseley, in the county court of Buckingham. Pleas, non detinet, and the statute of limitations. On the trial of the cause, the plaintiff produced in evidence a deed of trust, bearing date the 1st of April, 1790, between David Meade, of Maycox, in the county of Prince George, of the first part, William Gay, of the county of Powhatan, of the second part, and Susanna Eldridge, niece of the said David Meade, of the county of Buckingham, of the third part, which was recorded in Henrico county court, the 6th day of the same month. By this deed, in consideration of love and natural affection, and also of five shillings, sundry slaves were conveyed, by the said Meade, to the sole use and behoof of the said Susanna, (wife of Rolfe Eldridge,) for and during her natural life, and, after her death, to and for the use of such child, or children, of hers, as she might by will appoint; and in default of such appointment, to and for the use of all her children and their heirs forever. The slave in the declaration mentioned was proved to be the daughter of a female slave mentioned in the said deed. The plaintiff also produced two witnesses to prove that Rolfe Eldridge, and the said Susanna his wife, said, when the slaves came to his possession, (which happened several years after their marriage, and 12 or 14 years prior to 544 *the date of the deed,) that the same were a loan from David Meade; and that Rolfe Eldridge made the same declara-

tion and acknowledgment, at sundry times, before, and within, five years preceding the date of the said deed. The defendant by his counsel moved the court to withhold the said deed, and the evidence of the said witnesses from the jury; "there being no other testimony in this cause, but the acknowledgments of the said Rolfe, and Susanna, and the circumstance that the deed aforesaid is in the handwriting of the said Rolfe, to prove any loan from the before named David Meade, or any title in them to the said slaves: but the court permitted the deed aforesaid, and the testimony of the two witnesses aforesaid, to go to the jury: because the defendant had previously examined witnesses, on his part, to prove what had been the declarations of the said Rolfe Eldridge on the same subject, though subsequent to an examination by the plaintiff, of a witness to prove that the deed aforesaid was in the handwriting of the said Rolfe:" to which opinion the defendant excepted.

The plaintiff produced one of the subscribing witnesses to the deed, by whom he proved the execution thereof, and that the same was written by Rolfe Eldridge; also proof that the defendant had purchased the negro Beck at a sheriff's sale, by virtue of a writ of fieri facias against the said Rolfe for a debt which he contracted in the year 1800; that the creditor, at that time, had heard of the deed aforesaid; and that the sheriff, and the defendant also, were, on the day of sale, notified and informed of the said deed. the sheriff by letter from the plaintiff, and the defendant by verbal information from the plaintiff's agent, who forbade the sale; and that the defendant had possession of the negro Beck at the time of issuing of the writ in this cause. The defendant produced several witnesses, who proved that Rolfe Eldridge had possession of the negroes, in the said deed mentioned, 12 or 14 years before its date; and that he had, at sundry times, before and within five years preceding the same

545 *date, declared that part of the said negroes were his own property; and that they, knowing the circumstances of the said Rolfe Eldridge, before his marriage, supposed and believed that the aforesaid negroes had come to him, by his wife, as part of her portion. And, this being all the evidence in the cause, the plaintiff moved the court to instruct the jury that the law, upon the evidence aforesaid, was in his favour; and the court did so instruct the jury: to which opinion the defendant also excepted.

Verdict and judgment for the plaintiff.

Upon an appeal to the district court of Prince Edward, it seemed to the court there that the said judgment was erroneous, in this, that the county court admitted improper evidence to go to the jury; and also that the court was too general in its instructions to the jury. It was therefore considered, that the same be reversed and annulled, as far back as to the issue;" from which judgment the plaintiff appealed.

After argument, by Peyton Randolph, for the appellant, and Wickham, for the appellee, the following was pronounced, on

(1) See 1 Rev. Code, c. 68, s. 2.

Monday, March 16, 1812, by JUDGE ROANE, as the opinion of this court, consisting of Judges Roane, Brooke, and Coalter.

"The court is of opinion, that the female ancestor of the slave in the declaration mentioned having been loaned by David Meade to Rolfe Eldridge, and the said Rolfe Eldridge having remained in possession of the said slave more than five years since the commencement of the act to prevent frauds and perjuries, (a) without any demand made on the part of the lender; and the deed, under which the appellant claims the said slave, in trust for the benefit of Susannah Eldridge, not having been duly recorded in any court contemplated by that act, the same is not competent to do away the effect of such possession enuring in favour of the creditors of, or purchasers under, the said

546 Rolfe Eldridge; and as to the notice which *is alleged in the bill of exceptions to have existed, in the creditor under whose execution the appellee purchased, and in the said appellee himself, of the existence of the said deed of trust, the court is further of opinion that, under the true construction of the act aforesaid, the lapse of five years' possession, as aforesaid, was intended to shut up and conclude all inquiries as to such no-

tice, and to avoid the perjuries arising therefrom, in relation to controversies between persons claiming the property loaned as aforesaid under the lender, and the creditors of, and purchasers under, the persons so remaining in possession: on this ground, (without deciding on any other,) (1) the court is of opinion, that the judgment of the district court is right, so far as it goes; but that the said district court ought to have given an instruction to the county court, on such a new trial, corresponding with the principles now declared."

Judgment affirmed, adding such direction; and the cause ordered to be sent to the superior court, and from thence to the county court, for a new trial to be had therein.

(1) This court did not decide the point. (which in this case it was not necessary to decide,) whether the instruction given by the county court to the jury, "that, upon the evidence the law was in favour of the plaintiff," was too general or not; but from the case of Fisher's Executor v. Duncan and Turnbull, 1 H. & M. 568, it appears that the instruction in this case was erroneous, since, (though it seemed to relate to the law only,) in effect, it declared the sufficiency of the evidence, not only in point of law, but as establishing facts, to authorize a verdict for the plaintiff. Instructions may be founded on facts admitted by the parties; otherwise, they should be provisional, that, "if the jury shall be of opinion that certain facts are proved, the law arising upon those facts is so and so:" but the court ought not to express its opinion to the jury as to the weight of the evidence going to prove the facts.—Note in Original Edition.

(a) 1 Rev. Code, c. 10, s. 2.

RULE OF THE COURT OF APPEALS.

Friday, December 20th, 1811.

No appeal which shall have been dismissed, or abated, by the court, shall be reinstated or revived, after the lapse of sixty days from such dismissal or abatement; except for good cause shown to the court, verified by affidavit, and upon reasonable notice to the adverse party, of the time of making the motion; nor then, except in very special cases, unless such motion be made within one hundred and

twenty days from the time of such dismissal or abatement.

Provided, that if the court shall not be in session on the day to which such notice shall be given, a further time of ten days shall be allowed the party, to exhibit his motion, after the next meeting of the court.

On Saturday, December 21st, 1811, the court adjourned to the 6th day of January, 1812.

INDEX.

ABATEMENT.

1. See Issue, No. 2.
2. *Monroe (Governor) v. Redman.* 240
3. The writ is part of the record, for the purpose of amendment only, where issue has been joined upon a plea to the action.
4. *Payne and Fairfax v. Grim.* 297
5. After issue joined on a plea to the action, it is too late to move the court to dismiss the suit on the ground of a defect in the writ, or for leave to file a plea in abatement. Ib.
6. Process of revivor is not necessary, in the court of appeals, if the appellee died between verdict and judgment.
7. *Buckner and Wife v. Blair.* 336
8. See Practice, No. 35. 54

ACCOUNT.

1. It is not error in a court of equity to direct commissioners, instead of a jury, to state and report an account of the profits of land.
2. *Roberts's Widow and Heirs v. Stanton.* 129
3. Rents and profits of land, the possession of which was unlawfully withheld by the ancestor in his lifetime, and by his heirs after his death, ought not to be charged against his executors and heirs jointly, but apportioned among them, according to their respective interests. Ib.
4. See Equity, No. 4.
5. *Clay v. Williams and others.* 105
6. If a defendant, called upon to account for sales of certain public securities, deny that he ever received them, yet aver that the proceeds were accounted for to the plaintiff, "as would appear by the account and receipts annexed to his answer;" he ought to produce such accounts and receipts, or answer to interrogatories respecting them, if required so to do.
7. *Clay v. Williams and others.* 128
8. Any person interested in the settlement of an executor's account may object to its being allowed and recorded, and, being overruled in such objection, may appeal to a superior court.
9. *Triplett's Ex'r's v. Jameson.* 242
10. A commissioner's report, if erroneous upon its face, may be objected to at the hearing of the cause, though no exception be previously filed; and, also, in the appellate court, though no exception appears to have been taken in the court below; but, without such exception, it cannot be impeached on grounds, and in relation to subjects, which may be affected by extraneous testimony.
11. *White's Ex'r's v. Johnson and others.* 285
12. Whether interest ought to be charged in an administration account, is a question the decision of which may depend upon extraneous testimony. Ib.
13. A failure to set forth, in a commissioner's report, that notice was given to the parties, is not an error sufficient to reverse a decree, "if no exception to the report appear in the record."
14. *White's Ex'r's v. Johnson and others.* 285
15. Want of notice of the time and place of a commissioner's taking an account, or of the court's acting upon the report too soon, are not sufficient reasons for a bill of review; such objections not having been taken (as they ought to have been) before the rendition of the decree.
16. *Winston v. Johnson's Ex'r's.* 305
17. A mutual understanding and agreement between a debtor and creditor, that suit shall not be brought upon an account until the debtor shall have gone to Europe and returned, is a good bar to the act of limitations during his absence from this country, and may be given in evidence to prevent the court's expunging from such account items appearing to have been due five years before his death.
18. *Holladay, Ex'r of Littlepage, v. Littlepage.* 316
19. A wife who lived with her husband, and was maintained by him, cannot, after his death, demand an account of profits, which he received, of a separate estate settled upon her; no such demand having been made by her in his lifetime.
20. *Moore's Ex'r v. Ferguson and others.* 421
21. A decree, and execution thereupon, against an executor or administrator, for a balance due on his administration account, should not be against the goods and chattels of the decedent in his hands to

be administered, but against his own goods and chattels. Ib.

12. On a motion to recommit the report of a commissioner in chancery, if the previous neglect or contumacy of the party render it proper to overrule his motion, so far as it goes to open the accounts anew; he may nevertheless be permitted to show himself entitled to credits not considered by the commissioner if it appear probable, from the evidence in support of the motion, that he is entitled to such credits.

Snickers v. Dorsey. 505

14. In general, since the first of May, 1804, when interest is allowed in equity, it should not stop at the time when the balance of accounts is struck, nor at the date of the decree, but should run to the payment of such balance. Ib.

ACTION.

1. In the action on the case for conspiracy, as well as in the action for malicious prosecution, an averment in the declaration that the prosecution was false and malicious, is not sufficient; but it must be averred to have been without probable cause.
2. *Kirby v. Deck.* 10
3. See Executors and Administrators, No. 1.
4. *Catlett and others v. Carter's Ex'r's.* 24
5. See Executors and Administrators, No. 2. S. C.
6. In an action of slander, an averment in the declaration that the slanderous words were spoken "of or concerning the plaintiff," or "in some conversation or colloquium respecting him," is essentially necessary, unless the words, by fair construction, in themselves, plainly and necessarily relate to the plaintiff.
7. *Cave v. Shelor and Wife.* 193
8. In an action of general indebitatus assumpsit, for services rendered as an overseer, or of quantum meruit for like services, the plaintiff cannot give in evidence proof that the defendant had employed him as an overseer, and was to pay him a certain quantity of tobacco. In such case, he should declare upon the special agreement.
9. *Brooks v. Scott's Ex'r.* 344
10. Money levied by the sheriff, upon a judgment which is afterwards reversed, cannot be recovered back by general indebitatus assumpsit for money had and received, without proof that the money was actually received by the plaintiff, or applied to his use.
11. *Isom v. Johns.* 273
12. An action of debt will not lie against the acceptor of a bill of exchange.
13. *Wilson v. Crowthill.* 303
14. A judgment cannot be entered against the defendant and sheriff, upon his return that the writ was executed, and the defendant escaped; the proper remedy against the sheriff for an escape being by a separate suit.
15. *Waugh v. Carter.* 533
16. The istaction of the act "to reform the practice of the district, county, and corporation courts," which took effect the 1st of April, 1805, applies to suits instituted after that day, though upon writings of a previous date.
17. *Wallace and others v. Baker.* 334
18. An action of covenant does not lie upon the proviso, in a mortgage deed, "that, upon payment of a certain sum of money, the deed shall be void;" there being no express covenant for payment of the money.
19. *Drummond's Adm'r's v. Richards.* 337
20. In an action on the case for a deceit, if the defendant plead that the cause of action did not accrue within five years next before suing out the writ, a replication that the fraud came to the plaintiff's knowledge within that time, is not good, and issue joined upon it should be set aside by the court as immaterial.
21. *Callis v. Waddy.* 511

ACTS OF ASSEMBLY.

1. The 5th section of the act, passed January 20th, 1804, entitled "An act concerning the proceedings in courts of chancery, and for other purposes," did not authorize a judgment for interest upon the costs of suit.
2. *M'Rea v. Brown.* 46

2. It seems that under the act of 1785, c. 61, a right of entry into land by a person entitled as special occupant is devisable, though the devisor never was in possession. See Entry, (Right of,) and Hyer v. Shobe. 200

3. Quære, whether the proviso in the 24th section of the district court law extends to suits upon joint and several bonds with collateral conditions to be performed by the principal obligor only, as well as to bonds with collateral conditions to be performed by the obligors jointly and severally? 240

Monroe (Governor) v. Redman. 240
4. Under the 30th section of the act of 1748, c. 1, a judgment in favour of a petitioner, for land forfeited by nonpayment of quitrents, gave him a preferable right to a grant of the land, which right he could not lose by failure to apply for the grant, but only by a judgment against him in favour of another petitioner.

Norvell v. Camm and Wife. 257
5. The true construction of the 7th section of the act "reducing into one the several acts directing the course of descents," as to the case of an infant, is, that if there be no mother, &c. and the estate was derived from the father or mother, the inheritance shall not be divided into moieties, but the whole shall go to the kindred of that parent from whom the estate was derived; and the law was the same as to the distribution of unbequeathed personal estates belonging to infants who died between the 1st of October, 1795, and the 23d of January, 1803.

Addison and Wife v. Cove's Adm'r. 270
6. Under the 51st section of the execution law, (1 Rev. Code, c. 151.) the remedy by motion is given against the sureties of a deputy sheriff, after a judgment against him for the same cause, such judgment not appearing to be satisfied. The motion also may be made against the sureties, separately from their principal.

Royster and others v. Leake. 288
7. The 1st section of the act "to reform the practice of the district, county, and corporation courts," which took effect the 1st of April, 1806, applies to suits instituted after that day, though upon writings of a previous date.

Wallace and others v. Baker. 324
8. Under that act, the clerk is to issue execution for interest, though not mentioned in the writing, and not demanded by the declaration. Ib.

9. See Alexandria, No. 3.

Winchester and others v. The Bank of Alexandria. 330
10. According to the spirit of the act "concerning the glebe lands and churches within this commonwealth," passed the 12th day of January, 1802, no glebe land was to be considered vacant, and, as such, liable, to be sold if there was any minister, who, in behalf of the protestant episcopal church, had been put into possession, and was the incumbent thereof, on that day; whether the persons acting as a vestry, by whom he was inducted, had been canonically elected or not.

Cloughton and others v. Macnaughton. 518
11. The vestry's order that the "minister be inducted into the parish as incumbent," is a sufficient delivery of possession of the glebes thereto attached, to prevent a sale of the same as vacant. Ib.

ACTS OF CONGRESS.

1. Construction of the act of congress "laying duties on stamped vellum, parchment and paper," with respect to charter-parties. Under that act a writing altering or explaining a charter-party was not to be considered as itself a charter-party, and, therefore, subject to the duty.

Ashley v. Cornwell. 268

ADMINISTRATION.

See Executors and Administrators.

ADMIRALTY.

1. Quære, how far is the sentence of a foreign court of admiralty, or other foreign tribunal, to be regarded as evidence by the courts of Virginia? Hadfield v. Jameson. 53

ADMISSION.

1. If a bill of injunction, to stay proceedings on a judgment, charge the plaintiff at law with having failed to do an act on which the equity of his claim depends, and, in his answer, he take no notice of that allegation, the court, on the hearing, will consider this an admission that he has not done the act in question, and will decree against him finally, without any exception to the answer, or any interlocutory order, taking the bill for confessed in part. Page's Ex'r v. Winston's Adm'r. 298

2. A case agreed, in ejectment, finding the lease, entry and ouster in the declaration mentioned, sufficiently admits that all the defend-

ants who agreed to the case are in possession of the land in controversy; unless there be an express finding to the contrary.

Mooberry and others v. Marye. 458

AFFIRMANCE.

1. If, in a decree of a superior court of chancery reversing that of a county court, there be no error but an omission to direct the bill to be dismissed, the court of appeals will affirm the decree, and add the proper direction. Heffner v. Miller and others. 43

AGENT.

1. Freight (though, by the terms of a charter-party, payable monthly if required) is not to be recovered where the voyage was never completed, but the vessel was condemned, by a foreign tribunal, in consequence of a fraud attempted by one of the owners, intrusted by the rest with the care of the vessel; though no proof appear of their assenting to such fraudulent act.

Hadfield v. Jameson. 53

2. In such case the copartners are not entitled to "compensation for the loss; except against the fraudulent partner.

Hadfield v. Jameson. 53

3. It seems, too, that moreover, the copartners collectively, (as well as the fraudulent partner individually,) are responsible, to a third person, for a loss occasioned by the fraud. Ib.

AGREEMENT.

1. In an action of general indebitatus assumpsit, for services rendered as an overseer, or of quantum meruit for like services, the plaintiff cannot give in evidence proof that the defendant had employed him as an overseer, and was to pay him a certain quantity of tobacco. In such case he should declare upon the special agreement.

Brooks v. Scott's Ex'r. 344

2. See Pleading, No. 7.

Fenwick v. M'Murdo and Fisher. 344

3. A contract of sale is not considered, in equity, as binding on the parties, by the execution of a bond for the purchase-money, if it appear that the seller failed to perform what was to be done on his part in order to consummate the contract.

Page's Ex'r v. Winston's Adm'r. 298

4. G. having agreed to sell W. certain escape-warrants, upon W.'s giving bond and good security for the purchase-money: W. executes a bond, with a blank for the name of the surety, to be filled up at a certain time and place, when and where the escape-warrants are to be assigned and delivered by G.; if W. fail to give the surety, a court of equity will not permit G. to take advantage of the bond, without proof of his assigning, and delivering, or tendering, the escape-warrants, within a reasonable time and before commencing suit upon it; as to which, the onus probandi, in equity, lies on him. Ib.

5. A mutual understanding, between a debtor and creditor, that suit shall not be brought upon an account until the debtor shall have gone to Europe and returned, is a good bar to the act of limitations during his absence from this country, and may be given in evidence to prevent the court's expunging from such account items appearing to have been due five years before his death.

Holladay, Ex'r of Littlepage, v. Littlepage. 316

6. The point in Vance v. Walker, (3 H. & M. 238,) again solemnly determined.

Walker's Ex'r v. Aicklin. 357

7. A father-in-law having promised his son-in-law that if he would purchase a certain tract of land, he would assist him in paying for it, by letting him have the amount of a particular bond, when collected; and the son-in-law having thereupon made the purchase; this promise was determined to be upon sufficient consideration, and obligatory in law.

Scott's Ex'r's v. Osborne's Ex'r's. 413

8. And, since his claim did not accrue before such collection, the act of limitations did not begin to run against him until then. Ib.

9. T., being indebted to H. in the sum of £2001, payable, by four equal instalments, in little more than three years; an agreement took place between T. & W. that W., in consideration of 800l. cash, paid him by T., should exonerate T. from his debt to H.; this agreement is usurious and void; notwithstanding W. might have reaped advantage from it by buying the bonds of H. at a discount, or by selling him tobacco at a high price.

Watkins v. Taylor and Mewburn. 424

ALEXANDRIA.

1. Under the act of 1796, c. 31, the mayor and commonalty of Alexandria are not authorized to r

cover, by motion, money due for the town taxes; but only for "paving the streets."

Mayor and Commonalty of Alexandria v. Hunter, 228

2. In such case, the notice must state the true amount of the assessments, for paving the streets, due from the defendant; for if the sum in proof be different from that in the notice, the court will not give judgment for the sum actually due. Ib.

3. The true construction of the 20th sec. of the act "for establishing a bank in the town of Alexandria," is, that the power of granting appeals, writs of error, or supersedeas is taken away from the appellate court, in relation only to judgments rendered pursuant to that act, and upon writs of capias ad respondendum executed according to the directions thereof.

Winchester and others v. The Bank of Alexandria, 389

AMENDMENT.

1. The writ is part of the record, for the purpose of amendment only, where issue has been joined upon a plea to the action.

Payne and Fairfax v. Grim, 307

ANNUITY.

1. In a suit in equity, for arrears of an annuity, the decree should be, not only, for the sums due, with interest from the days when respectively payable; but reserving liberty to apply to the court, from time to time, to extend its decree, so as to embrace the payments thereafter falling due.

Marshall v. Thompson, 413

ANSWER IN CHANCERY.

1. The testimony of one witness is not sufficient to outweigh an answer denying the allegations of a bill.

Heffner v. Miller and others, 48

2. If a defendant, called upon to account for sales of certain public securities, deny that he ever received them; yet aver that the proceeds were accounted for to the plaintiff, "as would appear by the accounts and receipts annexed to his answer;" he ought to produce such accounts and receipts, or answer *to interrogatories respecting them, if required so to do.

Clay v. Williams and others, 138

3. After the term at which a decree is rendered, an appeal ought not to be granted to a defendant, who has been ordered to pay costs, but appears, from his answer, to have no right to the subject in controversy.

Garnett v. Childers, 277

4. If a bill of injunction, to stay proceedings on a judgment, charge the plaintiff at law with having failed to do an act on which the equity of his claim depends, and, in his answer, he take no notice of that allegation, the court on the hearing, will consider this an admission that he has not done the act in question, and will decree against him finally, without any exception to the answer, or any interlocutory order, taking the bill for confessed in part.

Page's Ex'r v. Winston's Adm'r, 396

5. If the plaintiff in equity call upon the defendant, as assignee of a bond, to say whether he had notice of the consideration thereof when he received the money due thereon, and in his answer, he say that he had no such notice when he took the assignment; the answer is not to be considered as admitting notice at the time of receiving the money.

Edgar v. Donnally and Jones, 387

APPEAL.

1. If, in a decree of a superior court of chancery, reversing that of a county court, there be no error but an omission to direct the bill to be dismissed, the court of appeals will affirm the decree, and add the proper direction.

Heffner v. Miller and others, 48

2. Where a complainant is appellant from a superior court of chancery, the court of appeals has no jurisdiction, unless the subject in controversy be a freehold, or franchise, or amount to one hundred and fifty dollars, exclusive of all costs incident to the original judgment, or arising from injunctions, or appeals subsequent thereto.

Cooke v. Piles, 151

3. See Deed, No. 3.

Holliday and Wife v. Coleman and Wife, 162

4. See Sale, No. 4.

Grantland v. Wight, 179

5. Any person interested in the settlement of an executor's account, may object to its being allowed and recorded; and, being overruled in such objection, may appeal to a superior court.

Triplett's Ex'rs v. Jameson, 242

6. See Execution, No. 2.

Bronaugh v. Freeman's Ex'r, 266

7. After the term at which a decree is rendered, an appeal ought not to be granted to a defendant who has been ordered to pay costs, but appears, from his answer, to have no right to the subject in controversy.

Garnett v. Childers, 277

8. See Account, No. 6. 8.

White's Ex'rs v. Johnson and others, 285

9. In what case the error of awarding costs against the plaintiff is sufficient, upon his appeal, to reverse the decree, though right in every other respect. See

Ross v. Gordon, 289

10. Where an appeal is admitted to be docketed (for good cause shown) after the time within which the record ought to have been sent up, and the appellant has been guilty of no neglect, the court will direct it not to lose its place on the docket.

Johnson v. Johnson's Adm'r, 304

11. The court of appeals has no jurisdiction to grant appeals from interlocutory decrees.

Gibson v. Randolph, 310

12. When, upon the reversal of a county court judgment, a cause has been retained in the district court by consent; if at a subsequent term, the order for retaining the cause be set aside, an appeal cannot, then, be taken to the court of appeals, even by consent of parties; but the cause should be sent back to the county court for farther proceedings.

Norris v. Tomlin and Gray, 336

13. Process of revivor is not necessary in the court of appeals, if the appellee died between verdict and judgment.

Buckner and Wife v. Blair, 339

14. See Alexandria, No. 3.

Winchester and others v. The Bank of Alexandria, 389

15. Rule as to bond and security for prosecuting appeals, when the decree is partly against an executor as such, and partly against him in his own right.

Dunton v. Robins, 341

16. A guardian ad litem appointed to prosecute an appeal on an infant's behalf, is not obliged to accept the appointment. A reasonable time ought therefore to be given him to consider whether he will accept, and to prepare for trial.

Wells's Heirs v. Winfree and others, 343

17. See Decree, No. 18.

Defarges v. Lipscomb, 451

18. The court of appeals will not reverse a judgment, on the ground that the court below refused to sign and seal a bill of exceptions to its opinion overruling a motion for a new trial, if the weight of evidence exhibited supports the verdict.

Shanks and McRea v. Fenwick, 478

19. It seems that, where an office judgment is reversed on the ground that the declaration is radically defective, the appellate court, if the writ be correct, will not enter judgment for the defendant, but send the cause back to be proceeded in from the writ.

Hill v. Harvey, 535

20. An appeal, which has been dismissed or abated by the court, cannot be reinstated, or revived, after the lapse of sixty days from such dismissal, or abatement; except for good cause shown to the court, verified by affidavit, and upon reasonable notice to the adverse party of the time of making the motion; nor then, except in very special cases, unless such motion be made within one hundred and twenty days from the time of such dismissal or abatement.

But if the court be not in session on the day to which such notice shall be given, a further time of ten days shall be allowed the party, to exhibit his motion, after the next meeting of the court.

21. If a judgment of a county or corporation court, being for less than one hundred dollars, exclusive of costs, be reversed by a superior court of law, upon a writ of supersedeas, whereupon judgment is entered, that the plaintiff take nothing by his bill, &c.; he cannot appeal to the court of appeals; notwithstanding his declaration demanded a larger sum than one hundred dollars.

Henry's Ex'r v. Elcan, 541

22. If a judgment of a county or corporation court be for less than one hundred dollars, and be affirmed by a superior court of law, an appeal does not lie to the court of appeals; notwithstanding he judgment would, by adding the damages

allowed by law upon the affirmance, amount to more than one hundred dollars.

Melson v. Melson's Adm'r. 548

APPEALS, (COURT OF.)

See Appeals.

1. The Judges of the court of appeals, or any one of them, out of court, have power to award injunctions, which have been refused by the judge of any superior court of chancery; but this power is not possessed by the court of appeals.

Mayo v. Haines & Coutts. 423

2. Quære, has the courts of appeals the power of coercing the judge of an inferior court to seal and allow a bill of exceptions regularly tendered, and containing the whole truth of the case?

Shanks and M'Rae v. Fenwick. 478

3. See Practice, No. 35. 547

APPEARANCE.

1. Where a judgment upon a forthcoming bond is obtained against a defendant, having legal notice, and appearing by attorney, but not moving to quash the bond, nor stating, by plea, or bill of exceptions, any variance between it and the execution, the appellate court is not to reverse the judgment on the ground of such variance.

Bronaugh v. Freeman's Ex'r. 266

ARBITRATION.

See Award.

ASSETS.

1. See Executors and Administrators, No. 1. 2.

Catlett and others v. Carter's Ex'rs. 24

2. The heir of an heir is responsible upon an obligation, in which the heirs are bound; provided he have assets by descent from the obligor.

Waller's Ex'rs v. Ellis and others. 68

3. If an executrix, (without being subject to compulsion, or undue influence,) for the fraudulent purpose of protecting the estate of her testator from the demands of creditors, give her own bond, as executrix for a fictitious debt, and confess a judgment, she is not entitled to relief in equity; neither will the court give its aid to the obligee, but will leave him to his remedy at law. Yet if he be entitled (independently of the transaction in question) to an account of assets, the court will decree such account, and allow him what may be justly due, not exceeding the amount of the judgment; the rule in such case being, that he is bound by his own fraud so far as it operates against him.

Clay v. Williams and others. 106

4. See Marriage Contract, No. 1. Ib.

ASSIGNEE.

1. If the plaintiff in equity call upon the defendant, as assignee of a bond, to say whether he had notice of the consideration thereof when he received the money due thereon; and in his answer, he say that he had no such notice when he took the assignment, the answer is not to be considered as admitting notice at the time of receiving the money.

Edgar v. Donnelly and Jones.

ASSIGNMENT.

1. If a bond be given without any consideration, but to be used as an article of traffic to raise money, the bona fide purchaser (though at a large discount) of such bond, without notice of the purpose for which it was executed, is entitled to recover the full amount.

Hansbrough v. Baylor. 36

2. A fair purchase of a bond, at any discount, is not usurious. Ib.

3. In debt upon an assigned bond, the declaration ought to charge a failure to pay the money to the obligee, and to each of the assignees, as well as to the plaintiff; and if it only charge a failure to pay to the plaintiff, it is too defective to maintain the action; and the defect is not cured by verdict.

Braxton's Adm'r v. Lipscomb. 282

4. In an action upon an assigned bond, a declaration charging "that the defendant has not paid the debt to the plaintiff," but containing no averment that, he did not pay it to the assignor before notice of the assignment," is radically defective, and not cured by verdict.

Green v. Dulany. 518

ASSUMPSIT.

1. In an action of general indebitatus assumpsit, for services rendered as an overseer, or of quantum

meruit for like services, the plaintiff cannot give in evidence proof that the defendant had employed him as an overseer, and was to pay him a certain quantity of tobacco. In such case, he should declare upon the special agreement.

Brooks v. Scott's Ex'r. 344

2. Money levied by the sheriff upon a judgment, which is afterwards reversed, cannot be recovered back, by general indebitatus assumpsit for money had and received, without proof that the money was actually received by the plaintiff, or applied to his use.

Isom v. Johns. 373

ATTACHMENT.

1. Quære, whether an endorsement on a subpoena in chancery without any previous order of court, and not by the clerk, but the plaintiff's attorney, can operate as an attachment to stay the effects of one defendant in the hands of another?

Hadfield v. Jameson. 58

2. Quære, also, whether, in cases of attachment against the effects of absent defendants, if a question purely legal arise, upon a contract of charter party, or policy of insurance entered into in a foreign country, where the defendant still resides, and where the proper remedy is by an action sounding altogether in damages, it be proper for the court (in which the attachment is levied, or security is given to perform the decree) only to retain the cause until the complainant shall have liquidated his demand by a settlement, or established the same by a judgment against the defendant in the country where he resides; or whether it be competent to the court in which the attachment is levied, to proceed to the trial and determination of every such question, whether of law, or fact, and to ascertain the plaintiff's damages, if entitled to any? And, in the latter case, whether the trial ought to be had according to the course of proceeding in courts of equity; or whether the court ought to direct an issue to be made up at law, and a trial thereof to be had by a jury for that purpose to be empanelled?

S. C. note. 78, 76

ATTORNEY AT LAW.

1. Quære, whether an endorsement on a subpoena in chancery without any previous order of court, and not by the clerk, but the plaintiff's attorney, can operate as an attachment to stay the effects of one defendant in the hands of another?

Hadfield v. Jameson. 58

2. Quære, whether the evidence of a person employed, by both parties, as an attorney, or scrivener, to write a bond for a fraudulent purpose, be admissible to prove the fraud?

Clay v. Williams and others. 106

AUTHENTICATION.

1. What is sufficient evidence to authenticate, in the courts of this country, the sentence or act of a foreign tribunal or government, after a destruction of such government by revolution or conquest.

Hadfield v. Jameson. 58

2. A writ of certiorari for defect of the record is proper, where the transcript has been certified by the proper officer, and is suggested to be defective; but not where it is not authenticated at all.

Scott v. Hall. 229

3. In such case, even after the cause had been argued, the supersedeas will be quashed, as having been improvidently granted. Ib.

AUTHORITIES.

1. See Cases, No. 1.

Carnagy and Wife v. Martin's Ex'rs. 234

AVERMENT.

1. See Conspiracy, No. 1.

Kirtley v. Deck and others. 10

2. In an action of slander, an averment, in the declaration, that the slanderous words were spoken "of or concerning the plaintiff" or in some "conversation or colloquium respecting him," is essentially necessary, unless the words, by fair construction, in themselves, plainly and necessarily relate to the plaintiff.

Cave v. Shelor and Wife. 198

3. See Breach, and Assignment.

AVOWRY.

1. See Evidence, No. 23.

Tuttle v. Eskridge. 330

AWARDS.

1. The circumstance that a submission to arbitration contains a recital that one of the parties had warranted the title to a tract of land, (when, in truth, the writing signed by him had not that effect,) is not a sufficient reason to disturb the award, no fraud or undue influence appearing; and it be-

ing possible that the contract was mutually understood as a warranty, though its legal construction was otherwise.

Kincaid v. Cunningham, 1

2. The power of the courts of equity to revise awards, is concurrent with that of the courts of common law; but, if the court of law first get possession of the subject, its decision is binding on the court of equity, unless new circumstances be adduced to authorize the interposition of the latter. Marginal note to

Flournoy's Ex'r's v. Halcomb, 84

339 The point decided in this case would be more properly expressed as follows: "The power of courts of equity to revise awards does not extend to cases in which the objections to the award have been fully heard in a court of law." The position, that "the power of the courts of equity to revise awards is concurrent with that of the courts of common law," is inaccurate; *there being cases in which the only remedy to set aside an award is in equity. Where the submission to arbitration is not made a rule of a court of law, the award, it seems, cannot be impeached, at law, for corruption or partiality of the arbitrators. See *Wills v. McCarmick*, 2 Wils. 148; 1 Bac. Abr. (Amer. ed.) 290; 1 Saund. 327; a. n. (6.) *Braddick v. Thompson*, 8 East, 344. And, though it is said in 2 Wils. 149, that "the remedy in this case is in equity, or at law, by action against the arbitrators," I apprehend that (if such action lies at all) it is not to set aside the award, but to recover damages for the injury sustained by their misconduct. It seems, too, that in cases where the submission is made a rule of a court of law, and the party having full opportunity to make his objections in such court, has neglected to do so, the court of equity ought not to give relief. See *Kamphshire v. Young*, 3 Atk. 155. As the proviso in the 3d section of our act of assembly, "concerning awards," (1 Rev. Code, 49, 50,) is not in the statute of 9 and 10 Wm. III. c. 15, it might be contended, in this country, that, in a case, where the submission was made a rule of court by virtue of the act of assembly, the party's failing to complain of the award to the court in which the submission was made, does not preclude him from applying to a court of equity. But, in answer to this, it may be said that the words of that proviso are satisfied by giving the courts of equity jurisdiction where a discovery by the oath of a party is wanting, or where the corruption or partiality of the arbitrator, or evidence to prove it, was not known until after judgment had been entered according to the award.

When the submission is made a rule of court, in an action depending at law, in which case it is done by virtue of the common law, and not the statute, (see *Lucas v. Wilson*, 2 Burr. 701, and *Halcomb v. Flournoy*, 2 Call 453,) it seems clear that where no discovery is wanting, and no reason is assigned for not applying to that court of which such submission has been made a rule," (see 1 Bac. Abr. 290,) a court of equity ought not to interfere. The doctrine laid down in *Lonsdale v. Littledale*, 2 Ves. jun. 453, by Lord Chancery Loughborough, that "the jurisdiction of the court of equity is not barred by a reference under the statute," plainly applies to a case where a discovery is wanting, and not to one where the court of law was competent to give full relief. And the meaning of the Chief Baron, in his opinion in the case of *Alardice v. Cambel*, 1 Barn. 152, S. C. Bunb. 265, was probably the same. See *Kyd on Awards*, (Amer. ed.) 336-339. But the difficulties and doubts of *Kyd* seem removed by the case of *Fetherstone v. Cooper*, 9 Ves. jun. 67, in which an injunction was dissolved, because "the objections to the award were such as might have been equally the subject of jurisdiction in the court of law, where the reference was made a rule of court." And since it is said in 2 Burr. 701, that "the intention of the statute was to put submissions to arbitrations, in cases where there was no cause depending, upon the same footing with those where there was a cause depending," the same rule ought to apply, with respect to the jurisdiction of the court of equity, whether the reference was made at common law, or under the statute. And I suppose a similar observation is correct in relation to our act of assembly. See

The Auditor v. Nicholas, ante, 81

Delima v. Glassell's Adm'r, 4 H. & M., 369

Fenwick v. M'Murdo and Fisher, ante, 244

BAIL.

1. When the appearance bail, having been admitted to defend the suit, afterwards waives his plea, judgment is to be entered against the principal as well as the bail.

Wallace and others v. Baker, 384

2. In debt upon a bill penal, if, through a mistake

of the clerk, the writ be issued for dollars, when it should be pounds, and (the plaintiff's declaration being filed conformably with the bill penal) judgment by default be entered against the defendant and his appearance bail for so many pounds, the bail, being informed of the mistake before he signed the bail bond, and having made no defence at law, is not entitled to relief in equity.

Carter v. Cockrill and Rogers, 448

BAIL BOND.

See Writ, No. 10.

Crews and Higgenbotham v. Garland, 491

BANK OF ALEXANDRIA.

1. The true construction of the 20th section of the act "for establishing a bank in the town of Alexandria" is, that the power of granting appeals, writs of error, or supersedeas, is taken away from the appellate court, in relation only to judgments rendered pursuant to that act, and upon writs of *capias ad respondendum* executed according to the directions thereof.

Winchester and others v. The Bank of Alexandria, 330

BAR.

1. A decree by a court of competent jurisdiction, dismissing a bill upon the ground that the deed under which the complainant claimed was fraudulent, is a complete bar to another original bill to try the validity of the same deed; the proper remedy, if such decree be erroneous, being by appeal, writ of error, supersedeas, or bill of review, and not by original bill.

Holliday and Wife v. Coleman and Wife, 163

2. It is no answer to the bar set up, by the plea of the act of limitations, that the plaintiff sued out a writ, for the same cause of action, *within the time prescribed by the act, which writ was executed and returned, and went off the docket for want of formality.

Callis v. Waddy, 511

BASTARDY.

1. A husband's declarations that a child born in wedlock is not his, are not sufficient evidence to prove it illegitimate, notwithstanding it was born only three months after the marriage, and a separation between his wife and him soon after took place, by mutual consent.

Bowles v. Bingham, 442

BILL IN CHANCERY.

See Equity.

1. If, before the time limited by law for recording a deed has expired, a bill be filed to impugn it as fraudulent, the court cannot afterwards declare it void, against the complainant, on the ground of its not having been duly recorded.

Gibson v. Randolph, 310

BILL OF EXCEPTIONS.

1. Quære, how far ought documents, referred to in a bill of exceptions, to be described, to make them properly part of the record?

Lovell v. Arnold, 162

2. Judgment reversed because the bill of exceptions stated the facts imperfectly.

Beattie v. Tabb's Adm'rs, 254

3. The court of appeals will not reverse a judgment on the ground that the court below refused to sign and seal a bill of exceptions to its opinion, overruling a motion for a new trial, if the weight of evidence exhibited support the verdict.

Shanks and M'Rae v. Fenwick, 473

4. Quære, has the court of appeals the power of coercing the judge of an inferior court to seal and allow a bill of exceptions regularly tendered, and containing the whole truth of the case? Ib.

BILL OF EXCHANGE.

1. An action of debt will not lie against the acceptor of a bill of exchange.

Wilson v. Crowhill, 302

BILL OF REVIEW.

1. A decree by a court of competent jurisdiction dismissing a bill, upon the ground that the deed under which the complainant claimed was fraudulent, is a complete bar to another original bill to try the validity of the same deed; the proper remedy, if such decree be erroneous, being by appeal, writ of error, supersedeas, or bill of review, and not by original bill.

Holliday and Wife v. Coleman and Wife, 162

2. Want of notice of the time and place of a commissioner's taking an account, or the court's acting upon the report too soon, are not sufficient reasons for a bill of review, such objections not having

been taken (as they ought to have been) before the rendition of the decree.

- Winston, Johnson's Ex'rs, 305
8. New matter is no ground for a bill of review, unless it was discovered since the decree was pronounced. Ib.
4. A bill of review lies only to a final decree. Mackey, Ex'r of Fuqua, v. Bell, 523

BILL OF SALE.

See Slaves. Fraud.

BONDS.

1. If a bond be given without any consideration, but to be used as an article of traffic to raise money, the bona fide purchaser (though at a large discount) of such bond, without notice of the purpose for which it was executed, is entitled to recover the full amount.

- Hansbrough v. Baylor, 86
2. A fair purchase of a bond, at any discount, is not usurious. Ib.

3. In an action against the representatives of one of two joint obligors in a bond dated in 1783, it is essential to state in the declaration that that obligor survived his companion.

- Braxton's Adm'x v. Hilyard, 49
4. See Heir and Ancestor, No. 1, 2, 3.
5. Where a bond is filed in a suit against the executor of the obligor, a copy may be declared upon, against the heirs in another court, and the original need not be produced, unless the defendants crave oyer of the original, or object to the copy as incorrect, or plead that there is no such bond, in either of which cases the original may be procured by a writ of subpoena duces tecum. Waller's Ex'rs v. Ellis and others, 88
6. See Executors and Administrators, No. 1, 2.
- Catlett and others v. Carter's Ex'rs, 24
7. See Evidence, No. 1.
- Braxton's Adm'x v. Hilyard, 49
8. See Obligation, No. 1, 2.
- Waller's Ex'rs v. Ellis and others, 88
9. Where a bond is filed in a suit against the executor of the obligor, a copy may be declared upon, against the heirs, in another court. Ib.

10. See Fraud, No. 4.
- Clay v. Williams and others, 105
11. See Legacies, No. 1.
12. Quære, whether the proviso in the 24th section of the district court law, extends to suits upon joint and several bonds, with collateral conditions, to be performed by the principal obligor only, as well as to bonds with collateral conditions to be performed by the obligors jointly or severally? Monroe (Governor) v. Redman, 240

558 *13. See Forthcoming Bond, No. 1.

- Bronaugh's v. Freeman's Ex'r, 206
14. See Execution, No. 2.
15. A bond from the deputy to the high sheriff, conditioned for the faithful performance of his duty during his continuance in the office of deputy sheriff, is binding upon him and his sureties for the second year as well as the first, and until the winding up of the business lawfully committed to him as deputy.

Royster and others v. Leake, 280

16. Under the 51st section of the execution law, (1 Rev. Code, c. 151.) the remedy by motion is given against the sureties of a deputy sheriff after a judgment against him for the same cause, such judgment not appearing to be satisfied. The motion also may be made against the sureties separately from their principal. Ib.

17. In debt upon an assigned bond, the declaration ought to charge a failure to pay the money to the obligee, and to each of the assignees, as well as to the plaintiff; and if it only charge a failure to pay to the plaintiff, it is too defective to maintain the action, and the defect is not cured by verdict.

- Braxton's Adm'x v. Lipscomb, 282
18. A contract of sale is not considered in equity as binding on the parties by the execution of a bond for the purchase money, if it appears that the seller failed to perform what was to be done on his part, in order to consummate the contract.

Page's Ex'r v. Winston's Adm'r, 298

19. G. having agreed to sell W. certain escape-warrants, upon W.'s giving bond and good security for the purchase-money; W. executes a bond, with a blank for the name of the surety, to be filled up at a certain time and place, when and where the escape-warrants are to be assigned and delivered by G., if W. fail to give the surety, a court of equity will not permit G. to take advantage of the bond without proof of his assigning and delivering, or tendering, the escape-warrants within a reasonable time, and before commencing suit upon it; as to which the onus probandi, in equity, lies on him. Ib.

20. It seems that an executor cannot be compelled

to pay a legacy until bond and security be given by the legatee to refund his due proportion of such debts and demands as may thereafter appear against the estate of the testator.

- Stovall's Ex'r v. Woodson and Wife, 308
21. The taking a guardian's bond is not a ministerial but a judicial act, imposed by law on the court, which (and not its clerk) is to judge of the sufficiency or insufficiency of the security offered.

Page, Adm'r of Nelson, v. Taylor and Thorn-ton, 492

22. A guardian's bond is to be executed by him and his securities in open court, and not in the clerk's office. Ib.

23. If a bond be payable to James Whitlow, jun., and the declaration describe it as payable to the plaintiff, after naming him as "James Whitlow, jun. alias James Whitlock," this is not such a variance as should prevent it from being received as evidence in support of the declaration, on the plea of payment.

- Whitlock v. Ramsey's Adm'x, 510
24. In an action upon an assigned bond, a declaration charging "that the defendant has not paid the debt to the plaintiff," but containing no averment "that he did not pay it to the assignor before notice of the assignment," is radically defective, and not cured by verdict.

Green v. Dulany, 518

25. If a forthcoming bond be delivered by the sheriff to the plaintiff before notice thereupon be given to the defendants, execution may be awarded upon it, though it has not been filed in the clerk's office.

- Eppes's Ex'rs v. Colley, 523

BOUNDARIES.

1. A count upon a writ of right describing the land as a certain number of acres part of a larger tract, and setting forth the boundaries of such larger tract, is sufficiently certain after verdict.

- Lovell v. Arnold, 167

BREACH.

1. In an action by a surviving executor for a debt due to the testator in his lifetime, if the declaration charge that the debt was not paid to the plaintiff, without charging also that it was not paid to the testator, nor to either of the coexecutors, the defect is fatal, and not cured by verdict.

- Buckner and wife v. Blair, 336
2. See Assignment, No. 3, 1.
- Braxton's Adm'x v. Lipscomb, 282
- Green v. Dulany, 518

BRITISH DEBTS.

1. The circumstance that a plaintiff is a British subject, and was entitled to his claim before the year 1776, is not in itself sufficient to protect him against the operation of the act of limitations.

- Beattie v. Tabb's Adm'rs, 264

CASE (ACTION ON) FOR MALICIOUS PROSECUTION.

1. In the action on the case for conspiracy, as well as in the action for malicious prosecution, an averment in the declaration that the prosecution was false and malicious, is not sufficient; but it must be averred to have been without probable cause.

- Kirtley v. Deck and others, 10

CASE AGREED.

1. A case agreed in ejectment, finding the lease *entry, and ouster in the declaration mentioned, sufficiently admits that all the defendants who agreed the case are in possession of the land in controversy; unless there be an express finding to the contrary.

- Mooberry and others v. Marye, 454
2. By a case agreed, the parties may rest the decision of the cause upon certain specified points of law; to the exclusion of all extraneous facts or circumstances.

Royall v. Eppes, Adm'r of Royall, 479

3. If the plaintiff and defendant claim under the same executory bequest, and a case be agreed, submitting the right, to be adjudged according to the legal construction of the will, without saying anything about the executor's assent to the legacy, the court will assume that as a fact between the present parties. Ib.

4. It seems that if a declaration in detinue demand a negro woman, by name, and her three children, without mentioning their names; and a case be agreed, submitting that, if the law be for the plaintiff upon certain other points, judgment may be entered in his favour, "for the slaves in the declaration mentioned," the court may insert the names of the negro children in the judgment. Ib.

CASES.

See Authorities.

1. When, in the context of a will, the testator has explained his own meaning in the use of certain words, the court should take that as their guide, without resorting to lexicographers to determine what those words ought to signify in the abstract, or to adjudicated cases, to discover what they have been decided to mean under different circumstances.

Carnagy and Wife v. Martin's Ex'rs. 234

CAVEAT.

1. The remedy of persons aggrieved by decisions of the land commissioners was by caveat in the general court to prevent the patent from emanating; and if a party had such an equity as would, on a caveat, have entitled him to a preference, it was no ground for a bill in equity to set aside the patent, unless he was prevented by fraud or accident from prosecuting a caveat.

Ross v. Keewood, Hoofacre, and Smith, 141

CAVEAT EMPTOR.

1. In the case of legal rights, the principle caveat emptor properly applies; but equitable rights may be lost by a sale to a bona fide purchaser without notice.

Taylor v. Stone, 314

CERTIORARI.

1. A writ of certiorari for defect of the record is proper where the transcript has been certified by the proper officer, and is suggested to be defective, but not where it is not authenticated at all.

Scott v. Hall, 220

CHANCERY.

1. See Equity, No. 1, 2.
Kincaid v. Cunningham, 1
2. See Answer in Chancery, No. 1.
Heffner v. Miller and others, 43
3. If, in a decree of a superior court of chancery, reversing that of a county court, there be no error but an omission to direct the bill to be dismissed, the court of appeals will affirm the decree, and add the proper direction. Ib.

4. See Attachment, No. 1.

Hadfield v. Jameson, 58

5. See Answer in Chancery, No. 2.

Clay v. Williams and others, 123

6. See Legatees, No. 1.

7. See Equity, No. 10, 11.

Roberts' Widow and Heirs v. Stanton, 120

8. See Vendor and Vendee, No. 2.

Grantland v. Wright, 179

9. See Parties, No. 2.

Lambert v. Nanny, 196

10. See Jurisdiction, No. 9.

Fenwick v. McMurdo and Fisher, 244

11. See Equity, No. 24.

Garnett v. Childers, 277

12. The judges of the court of appeals, or any one of them out of court, have power to award injunctions, which have been refused by the judge of any superior court of chancery; but this power is not possessed by the court of appeals.

Mayo v. Hains and Coutts, 423

13. When a decree, by which an injunction is made perpetual in part, is considered erroneous, (to the injury of the appellee,) in not having made it perpetual in toto; the court of appeals will affirm so much as allows him his costs, in the court of chancery; and, reversing the residue, and making such decree as that court should have made, will also allow him his costs in this court.

Defarges v. Lipscomb, 451

14. See Account, No. 13, 14.

Snickers v. Dorsey, 506

15. A decree, though deciding the right to the property in controversy, and awarding the costs of suit, is still only interlocutory, if commissioners be appointed to carry it into effect, and the court have yet to act upon their report. Neither does it cease to be interlocutory, in consequence of an order, that the defendant be attached for failing to comply with it.

Mackey, Ex'r of Fuqua, v. Bell, 523

16. A bill of review lies only to a final decree. Ib.

17. See Relief, No. 7, 8.

Davison v. Waite, 527

560 *CHARTER-PARTY.

1. Construction of the act of congress "laying duties on stamped vellum, parchment and paper;" with respect to charter-parties. Under that act a writing altering or explaining a charter-party was not to be considered as itself a charter-party, and therefore subject to the duty.

Ashley v. Cornwell, 208

CHILDREN.

1. Where slaves are specifically bequeathed to a

child, when he or she shall attain the age of 21 years, or shall marry, and no provision is made, expressly, for maintenance in the mean time, their intermediate profits, if not otherwise disposed of, do not pass by a general residuary clause, but go to the legatee.

Quarles's Ex'r v. Quarles and others, 321

2. In such case, the legatee is also entitled to interest on the profits from the time of the receipt thereof by the executor; no good reason appearing for his failure to apply the principal to the use of the legatee. Ib.

3. A marriage settlement by a husband on his wife and her children by him, (though born in fornication,) is a conveyance to purchasers for a valuable consideration, as to the children, as well as the wife, and not void as to creditors; no fraudulent intention being proved.

Coutts and others v. Greenhow, 303

CITIZENSHIP.

1. The proviso in the 4th section of the act of 1792, concerning importation of slaves from other states of the union did not authorize such importation by citizens of this commonwealth, returning thereto, after a temporary residence elsewhere, without having made a permanent settlement, or become citizens of the state from which the slaves were imported.

Murray v. McCarty, 308

2. Construction of the clause in the 4th article of the constitution of the United States, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Ib.

3. Quære, whether the right of citizenship, in Virginia, can be relinquished, without complying with the terms of our act of assembly concerning expatriation? Ib.

CLERKS OF COURTS.

1. On a motion, against a clerk, for the penalty incurred by failing to pay the taxes on law process, he may defend himself by showing that he used due diligence to get a commissioner of the revenue to compare his account with the books in his office, and certify thereupon as the law requires, and was prevented by the default of such commissioner from obtaining a quietus. And if he fail to make such defence, without a competent excuse, he cannot obtain relief in equity on the same ground.

The Auditor v. Nicholas, 31

2. Under the act to reform the practice of the district, county, and corporation courts, the clerk is to issue execution for interest, though not mentioned in the writing, and not demanded by the declaration.

Wallace and others v. Baker, 334

3. The taking a guardian's bond is not a ministerial but a judicial act, imposed by law on the court, which (and not its clerk) is to judge of the sufficiency, or insufficiency, of the security offered.

Page, Adm'r of Nelson, v. Taylor and Thornton, 492

4. A guardian's bond is to be executed by him and his securities, in open court, and not in the clerk's office. Ib.

COLLATERAL CONDITIONS.

1. Quære, whether the proviso in the 24th section of the district court law extends to suits upon joint and several bonds with collateral conditions to be performed by the principal obligor only, as well as to bonds with collateral conditions to be performed by the obligors jointly or severally?

Monroe (Governor) v. Redman, 340

COMMISSIONERS IN CHANCERY.

1. It is not error in a court of equity to direct commissioners, instead of a jury, to state and report an account of the profits of land.

Roberts' Widow and Heirs v. Stanton, 120

2. A commissioner's report, if erroneous upon its face, may be objected to at the hearing of the cause, though no exception be previously filed; and also, in the appellate court, though no exception appears to have been taken in the court below; but, without such exception, it cannot be impeached on grounds, and in relation to subjects, which may be affected by extraneous testimony.

White's Ex'rs v. Johnson and others, 285

3. A failure to set forth in a commissioner's report, that notice was given to the parties, is not an error sufficient to reverse a decree, if no exception to the report appear in the record. Ib.

4. See Account, No. 13.

Snickers v. Dorsey, 506

COMMISSIONER OF THE REVENUE.

1. See Penalty, No. 1.

Auditor v. Nicholas, 31

COMMISSIONS.

1. A commission of more than five per cent., on the amount of sales and collections, ought
561 *not to be allowed an executor, except upon peculiar circumstances.
Triplett's Ex'rs v. Jameson, 242

COMPENSATION FOR DEFICIENCY.

1. Whenever it appears that the vendor's own title deeds must have disclosed to him the true quantity of land, he is bound to make compensation for a deficiency, though his deed to the vendee expresses a quantity "more or less."
Duvals v. Ross, 290

COMPOSITIONS OF CLAIMS.

1. A court of equity will not assist in carrying into effect compositions of claims by executors or other fiduciaries, unless the party praying it will first unfold and disclose all the circumstances of the case, that the court may see there has been no fraud, and that every thing was fair.
Clay v. Williams and others, 105

CONDITIONAL SALE.

1. Whether a contract is a mortgage, or a conditional sale, "depends on the whole circumstances of the contract, and not the mere written evidence of it;" the great point to be considered being, whether the parties intended to treat of a purchase, and, contemplating the value of the commodity, fixed the price, or whether the object was a loan of money, and a security or pledge for repayment.
King v. Newman, 40

CONGRESS, (ACTS OF.)

1. See Acts of Congress, No. 1.
Ashley v. Cornwell, 208

CONSENT OF PARTIES.

1. When, upon the reversal of a county court judgment, a cause has been retained in the district court, by consent, if, at a subsequent term, the order for retaining the cause be set aside, an appeal cannot then be taken to the court of appeals, even by consent of parties; but the cause should be sent back to the county court for farther proceedings.
Norris v. Tomlin and Gray, 393
2. If the plaintiff and defendant claim under the same executory bequest, and a case be agreed, submitting the right to be adjudged, according to the legal construction of the will, without saying any thing about the executor's assent to the legacy, the court will assume that as a fact between the present parties.
Royall v. Eppes, Adm'r of Royall, 470

CONSIDERATION.

1. A father-in-law having promised his son-in-law that if he would purchase a certain tract of land, he would assist him in paying for it by letting him have the amount of a particular bond, when collected; and the son-in-law having thereupon made the purchase, this promise was determined to be upon sufficient consideration, and obligatory in law.
Scott's Ex'r v. Osborne's Ex'rs, 413

CONSPIRACY.

1. In the action on the case for conspiracy, as well as in the action for malicious prosecution, an averment in the declaration that the prosecution was false and malicious, is not sufficient; but it must be averred to have been without probable cause.
Kirtley v. Deck and others, 10

CONSTITUTION OF THE UNITED STATES.

1. Construction of the clause in the 4th article of the constitution of the United States which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."
Murray v. M'Carty, 399

CONSTRUCTION OF LAWS.

1. The 5th section of the act, passed January 20th, 1804, entitled "An act concerning the proceedings in courts of chancery, and for other purposes," did not authorize a judgment for interest upon the cost of suit.
M'Rea v. Brown, 46
2. It seems that under the act of 1785, c. 61, a right of entry into lands by a person entitled as special occupant, is devisable, though the devisor never was

in actual possession. See Entry, (Right of.) and Hyer v. Shobe, 200

3. See Charter-Party, No. 1.
Ashley v. Cornwell, 208
4. Construction of the clause in the 4th article of the constitution of United States, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."
Murray v. M'Carty, 399
5. According to the spirit of the act "concerning the glebe lands and churches within this commonwealth," passed the 12th day of January, 1803, no glebe land was to be considered vacant, and, as such, liable to be sold, if there was any minister, who, in behalf of the protestant episcopal church, had been put into possession, and was the incumbent thereof, on that day: whether the persons acting as a vestry, by whom he was inducted, had been canonically elected or not.

Cloughton and others v. Macnaughton, 513
6. The vestry's order that the minister "be inducted 'into the parish as incumbent,'" is a sufficient delivery of possession of the glebes thereto attached, to prevent a sale of the same as vacant.

7. See Frauds and Perjuries, (Act to Prevent,) No. 1, 2, and
Gay v. Moseley, 543

CONTINGENT INTEREST.

1. See Devise, No. 7.
Royall v. Eppes, Adm'r of Royall, 470

CONTRACT.

1. See Award, No. 1.
Kincaid v. Cunningham, 1
2. Whether a contract is a mortgage or a conditional sale "depends on the whole circumstances of the contract," and not the mere "written evidence of it;" the great point to be considered being, whether the parties intended to treat of a purchase, and, contemplating the value of the commodity, fixed the price, or whether the object was a loan of money, and a security or pledge for repayment.
King v. Newman, 40
3. See Pleading, No. 7.
Fenwick v. M'Murdo and Fisher, 244
4. A contract of sale is not considered in equity as binding on the parties by the execution of a bond for the purchase-money, if it appear that the seller failed to perform what was to be done on his part in order to consummate the contract.
Page's Ex'r v. Winston's Adm'r, 296
5. G. having agreed to sell W. certain escape-warrants, upon W.'s giving bond and good security for the purchase-money; W. executes a bond, with a blank for the name of the surety, to be filled up at a certain time and place, when and where the escape-warrants are to be assigned and delivered by G.; if W. fail to give the surety, a court of equity will not admit G. to take advantage of the bond, without proof of his assigning, and delivering, or tendering, the escape-warrants, within a reasonable time, and before commencing suit upon it; as to which the onus probandi, in equity, lies on him.
Ib.
6. T. being indebted to H. in the sum of 1,200l. payable, by four equal instalments, in little more than three years; an agreement took place between T. & W. that W., in consideration of 800l. cash, paid him by T., should exonerate T. from his debt to H.; this agreement is usurious and void; notwithstanding W. might have reaped advantage from it by buying the bonds of H. at a discount, or by selling him tobacco at a high price.

Watkins v. Taylor and Mewburn, 424
7. See Vendor and Vendee, No. 10.
Trueheart v. Price, 463
8. See Evidence, No. 4.
Ib.

CONVEYANCE.

1. See Executors and Administrators, No. 10.
Roberts's Widow and Heirs v. Stanton, 129
2. See Deed, No. 5.
Grantland v. Wight, 179
3. See Lands, No. 16, 18.
Lambert v. Nanny, 196
4. See Equity, No. 21.
Ib.
5. See Deed, No. 11, 12.
Hughes v. Hughes's Ex'r, 209
6. See Bill of Sale, No. 1.
Hardaway v. Manson, 230
7. A marriage settlement, on the wife and her children, by the husband, though born in fornication, is a conveyance to purchasers for valuable consideration, as to the children as well as the wife, and not void as to creditors, no fraudulent intention being proved.
Counts and others v. Greenhow, 303

8. If a mortgagee of lands (though not in his actual use or occupation) suffer them to be sold for taxes, quære, whether he shall be indemnified out of other property, bona fide conveyed by the mortgagor to a mere volunteer? *Ib.*

COPY.

1. Where a bond is filed in a suit against the executor of the obligor, a copy may be declared upon, against the heirs, in another court.

Waller's Ex'rs v. Ellis and others, 88

COSTS.

1. The 5th section of the act, passed January 20th, 1804, entitled "An act concerning the proceedings in courts of chancery, and for other purposes," did not authorize a judgment for interest upon the costs of suit.

M'Rea v. Brown, 46

2. Where a complainant is appellant from a superior court of chancery, the court of appeals has no jurisdiction, unless the subject in controversy be a freehold, or franchise, or amount to one hundred and fifty dollars, exclusive of all costs incident to the original judgment, or arising from injunctions, or appeals, subsequent thereto.

Cooke v. Piles, 151

3. After the term at which a decree is rendered, an appeal ought not to be granted to a defendant who has been ordered to pay costs, but appears from his answer to have no right to the subject in controversy.

Garnett v. Childers, 277

4. Where an injunction is perpetuated in part, the complainant ought, in general, not to be decreed to pay costs.

Ross v. Gordon, 289

5. In such case the error of awarding costs against the plaintiff is sufficient, upon his appeal, to reverse the decree, though right in every other respect. *Ib.*

568 *6. When a decree, by which an injunction is made perpetual in part, is considered erroneous, (to the injury of the appellee,) in not having made it perpetual in toto, the court of appeals will affirm so much as allows him his costs in the court of chancery; and, reversing the residue, and making such decree as that court should have made, will also allow him his costs in this court.

Defarges v. Lipscomb, 451

7. See Chancery, No. 15.

Mackey, Ex'r of Fuqua, v. Bell, 523

COURT OF APPEALS.

1. Where a complainant is appellant from a superior court of chancery, the court of appeals has no jurisdiction unless the subject in controversy be a freehold, or franchise, or amount to one hundred and fifty dollars, exclusive of all costs incident to the original judgment, or arising from injunctions, or appeals, subsequent thereto.

Cooke v. Piles, 151

2. Where an appeal is admitted to be docketed (for good cause shown) after the time within which the record ought to have been sent up, and the appellant has been guilty of no neglect, the court will direct it not to lose its place on the docket.

Johnson v. Johnson's Adm'r, 304

3. The court of appeals has no jurisdiction to grant appeals from interlocutory decrees.

Gibson v. Randolph, 310

4. See Appeals, No. 31, 22.

Henry's Ex'r v. Elean, 541; and

Melson v. Melson's Adm'r, 542

COURTS.

1. The 1st section of the act "to reform the practice of the district, county, and corporation courts," which took effect the 1st of April, 1806, applies to suits instituted after that day, though upon writings of a previous date.

Wallace v. others v. Baker, 334

2. When, upon the reversal of a county court judgment, a cause has been retained in the district court, by consent; if at a subsequent term the order for retaining the cause be set aside, an appeal cannot then be taken to the court of appeals, even by consent of parties; but the cause should be sent back to the county court for farther proceedings.

Norris v. Tomlin and Gray, 336

3. The taking a guardian's bond is not a ministerial but a judicial act, imposed by law on the court, which (and not its clerk) is to judge of the sufficiency or insufficiency of the security offered.

Page, Adm'r of Nelson, v. Taylor and Thornton, 493

4. A guardian's bond is to be executed, by him

and his securities, in open court, and not in the clerk's office. *Ib.*

5. Quære, has the court of appeals the power of coercing the judge of an inferior court to seal and allow a bill of exceptions, regularly tendered, and containing the whole truth of the case?

Shanks and M'Rea v. Fenwick, 478

6. It seems that if a declaration in detinue demand a negro woman, by name, and her three children, without mentioning their names; and a case be agreed, submitting that, if the law be for the plaintiff upon certain other points, judgment may be entered in his favour, "for the slaves in the declaration mentioned," the court may insert the names of the negro children in the judgment.

Royall v. Eppes, Adm'r of Royall, 479

COVENANT.

1. In an action of covenant upon articles, by which the defendants authorized the plaintiff "to take into his possession certain mills, to put the same in complete repair, and to make such alterations in the construction thereof as should, in his opinion, be best calculated to give them their full power and effect; engaging that they, at all times, would be ready to pay the amount of the expenditures incurred on the production of proper vouchers; and that the plaintiff should retain the possession and use of the premises for a term of years, paying a certain rent; provided, that, in all the repairs and improvements, thus left to his discretion, he would not consider his own temporary accommodation only, but the permanent advantage of the property also, and proportion the expenditures accordingly." Upon the plea of "covenants performed," and issue, the question whether the plaintiff had complied with the terms of the proviso was properly before the jury.

Fenwick v. M'Murdo and Fisher, 244

2. An action of covenant does not lie upon the proviso, in a mortgage deed, "that, upon payment of a certain sum of money, the deed shall be void;" there being no express covenant for payment of the money.

Drummond's Adm'r's v. Richards, 337

CREDITORS.

1. Property claimed by a son-in-law, under a marriage contract with a decedent in his lifetime, and recovered, by a decree against the administratrix and distributees, is not in any manner responsible to the creditors of such decedent; unless it appear that such decree was obtained by fraud and collusion between the parties.

Clay v. William and others, 128

2. See Legatees, No. 1, 129, and

Stovall's Ex'r v. Woodson and Wife, 308

3. See Lands, No. 16, 17.

Lambert v. Nanny, 196

4. The circumstance that the plaintiff is a British subject, and was entitled to his claim before the year 1776, is not, in itself, sufficient to protect him against the operation of the act of limitations.

Beattie v. Tabb's Adm'r's, 264

5. See Purchaser, No. 13.

Winston v. Johnson's Ex'rs, 306

6. It seems now settled, that an absolute deed of slaves, or other personal property, the possession of which remains with the vendor, is fraudulent, per se, as to creditors.

Alexander v. Deneale, 341

7. See Fraud, No. 13.

Coutts and others v. Greenhow, 363

8. See Frauds and Perjuries, (Act to Prevent,) No. 1, 2.

Gay v. Moseley, 543

CROPS.

1. By a devise of a tract of land in fee-simple, together with all the crops thereon, whether gathered or growing at the time of the testator's death, not only the crops made the year the testator died, but those of the preceding year, remaining on the land, and those brought thither from other plantations to be stored, will pass.

Carnagy and Wife v. Martin's Ex'rs, 234

DAMAGES.

1. Under circumstances, the payment of the damages assessed in a mill case ought to be presumed; especially, if a great length of time has elapsed, during which the owner of the land, to whom such damages were assessed, acquiesced in the building of the mill, without claim or objection on his part.

Young v. Price and others, 534

2. The damages allowed by law upon affirmance of a county court judgment by a superior court of

law, are not to be reckoned as part of the "matter in controversy," for the purpose of giving the court of appeals jurisdiction. See Appeal. No. 22.

Melson v. Melson's Adm'r. 542

3. It is not error that the jury find general damages for detaining several slaves; but the alternative value of each slave ought to be separately found.

Holladay and Wife v. Littlepage. 539

DEBET AND DETINET.

1. An heir should be charged in the debet and detinet; but if he be charged in the detinet only, the defect is not fatal after verdict, or upon general demurrer.

Waller's Ex'rs v. Ellis and others. 86

DEBT.

1. In debt upon an assigned bond, the declaration ought to charge a failure to pay the money to the obligee, and to each of the assignees, as well as to the plaintiff; and if it only charge a failure to pay to the plaintiff, it is too defective to maintain the action; and the defect is not cured by verdict.

Braxton's Adm'x v. Lipscomb. 282

2. An action of debt will not lie against the acceptor of a bill of exchange.

Wilson v. Crowdhill. 302

3. See Declaration. No. 12.

Buckner and Wife v. Blair. 286

4. In an action upon an assigned bond, a declaration charging "that the defendant has not paid the debt to the plaintiff," but containing no averment "that he did not pay it to the assignor before notice of the assignment," is radically defective, and not cured by verdict.

Green v. Dulany. 518

DEBTOR.

1. A debtor holding an equitable title to land, having conveyed it by deed of trust to secure a creditor, and having afterwards caused a conveyance of the legal title to be made to another creditor, who had notice of the prior deed, need not be a party to a bill in equity exhibited by the cestui que trust, to compel a conveyance of legal title, and performance of the trust.

Lambert v. Nanny. 196

DECEIT.

See Fraud.

DECLARATION.

1. In the action on the case for conspiracy, as well as in the action for malicious prosecution, an averment in the declaration that the prosecution was false and malicious, is not sufficient; but it must be averred to have been without probable cause.

Kirtley v. Deck and others. 10

2. In an action against the representatives of one of two joint obligors, in a bond dated in 1788, it is essential to state in the declaration, that that obligor survived his companion.

Braxton's Adm'x v. Hilyard. 49

3. In declaring against a remote heir, he should be charged as heir of the heir of the obligor, or as heir of the obligor, with a videlicet setting forth the intervening descent; but it is not necessary to state how he is heir.

Waller's Ex'rs v. Ellis and others. 88

4. An heir should be charged in the debet and detinet, but if he be charged in the detinet only, the defect is not fatal, after verdict, or upon general demurrer.

Ib.

5. Where a bond is filed in a suit against the executor of the obligor, a copy may be declared upon, against the heirs, in another court.

Ib.

6. In an action of slander, an averment in the declaration that the slanderous words were spoken "of or concerning the plaintiff," or "in some conversation or colloquium respecting him," is essentially necessary, unless the words, by fair construction, in themselves, plainly and necessarily relate to the plaintiff.

Cave v. Shelor and Wife. 193

7. In an action of general indebitatus assumpsit, for services rendered as an overseer, or of quantum meruit for like services, the plaintiff cannot give in evidence proof that the defendant had employed him as an overseer, and was to pay him a certain quantity of tobacco. In such case, he should declare upon the special agreement.

Brooks v. Scott's Ex'r. 344

8. In trespass quare clausum fregit, the declaration charging the trespass generally, in a parish and county, if the defendant plead not guilty, and a justification "that the land in question was his

freehold," the plaintiff must reply to the justification as well as join issue upon the plea of not guilty.

Mangum v. Flowers. 206

9. In debt upon an assigned bond, the declaration ought to charge a failure to pay the money to the obligee, and to each of the assignees, as well as to the plaintiff; and if it only charge a failure to pay the plaintiff, it is too defective to maintain the action, and the defect is not cured by verdict.

Braxton's Adm'x v. Lipscomb. 282

10. It is error sufficient to reverse an office judgment, that the common order was entered before the plaintiff filed his declaration.

Waugh v. Carter. 333

11. See Clerks of Courts, No. 2.

Wallace and others v. Baker. 334

12. In an action by a surviving executor, for a debt due to the testator in his lifetime, if the declaration charge that the debt was not paid to the plaintiff, without charging also that it was not paid to the testator, nor to either of the coexecutors, the defect is fatal, and not cured by verdict.

Buckner and Wife v. Blair. 286

13. In a suit against a mercantile company, if the names of the partners be omitted in the writ and declarations, and the writ be served on a person not named in either, a judgment against the company, for that person's failing to appear, cannot be sustained.

Scott & Co. v. Dunlop, Pollock & Co. 349

Quere, in such case whether any judgment by default could be sustained?

Ib.

14. It seems that if a declaration in detinue demand a negro woman by name, and her three children, without mentioning their names, and a case be agreed submitting that if the law be for the plaintiff upon certain other points, judgment may be entered in his favour, "for the slaves in the declaration mentioned," the court may insert the names of the negro children in the judgment.

Royal v. Eppes, Adm'r of Royal. 479

15. If a bond be payable to James Whitlow, jun., and the declaration describe it as payable to the plaintiff, after naming him as "James Whitlow, jun., alias James Whitlock," this is not such a variance as should prevent it from being received as evidence in support of the declaration, on the plea of payment.

Whitlock v. Ramsey's Adm'x. 510

16. In an action upon an assigned bond, a declaration charging "that the defendant has not paid the debt to the plaintiff," but containing no averment "that he did not pay it to the assignor before notice of the assignment," is radically defective, and not cured by verdict.

Green v. Dulany. 518

17. It seems that, where an office judgment is reversed on the ground that the declaration is radically defective, the appellate court, if the writ be correct, will not enter judgment for the defendant, but send the cause back to be proceeded in from the writ.

Hill v. Harvey. 525

18. In detinue if a negro woman, by name, and her "issue," (without naming them,) be demanded in the declaration, and the jury find the names of the issue, the defect (if any) is cured, and judgment should be entered according to the verdict.

Holladay and Wife v. Littlepage. 539

19. The failing to lay a separate value as to each slave demanded is an error which would be fatal on demurrer, but is cured by a verdict serving the values.

Ib.

DECREE.

1. See Interlocutory Decree. No. 1.

Goodwin and others v. Miller and others. 42

2. Property claimed by a son-in-law, under a marriage contract with a decedent in his lifetime, and recovered by a decree against the administratrix and distributees, is not in any manner responsible to the creditors of such decedent, unless it appear that such decree was obtained by fraud and collusion between the parties.

Clay v. Williams and others. 28

3. A legatee is not entitled to a decree but on the terms of giving bond and security (if demanded by the executor) to refund in case it be needful for the payment of debts, Ib. 129, and

Stovall's Ex'r v. Woodson and Wife. 303

4. It is error to enter a decree against infant defendants without assigning them a guardian ad litem, and though the infancy did not appear in the original proceedings, yet, if it be alleged in a petition for a rehearing, (the decree being interlocutory,) a guardian ad litem ought to be appointed.

Roberts's Widow and Heirs v. Stanton. 129

5. Where defendants holding lands by a joint title are decreed to surrender possession, and pay rents and profits, they are not jointly and severally, but only jointly liable.

Hite's Ex'r v. Paul's Heirs. 154

6. A decree against an executor, for rents and profits, received by the testator, ought expressly to direct that he should pay the sum in question out of the assets in his hands to be administered, otherwise it is to be understood as against him personally, and, therefore, erroneous. **Ib.**
- 566 7. A decree by a court of competent jurisdiction, dismissing a bill upon the ground that the deed under which the complainant claimed was fraudulent, is a complete bar to another original bill to try the validity of the same deed; the proper remedy, if such decree be erroneous, being by appeal, writ of error, supersedeas, or bill of review, and not by original bill.
- Holiday and Wife v. Coleman and Wife. **162**
8. In tracing a title to land in controversy, a decree in a suit between other parties is not evidence (against a person claiming under neither of them) that one of those parties was, in fact, as therein described, eldest son and heir of a former proprietor, it being incumbent upon the party wishing to avail himself of such fact to prove it by evidence alunde, but such decree may be received (as a link in the chain of evidence) to prove the fact that it was rendered.
- Lovell v. Arnold. **167**
9. Quære, whether a deed to a purchaser at a sale directed by a decree, conveys any title without a subsequent decree confirming the sale? **Ib.**
10. In such case it seems, however, that if the chancellor decrees a compensation to the purchaser, and the vendor does not appeal, the court of appeals will not correct the error to his injury upon an appeal by the other party.
- Grantland v. Wight. **179**
11. After the term at which a decree is rendered, an appeal ought not to be granted to a defendant who has been ordered to pay costs, but appears, from his answer, to have no right to the subject in controversy.
- Garnett v. Childers. **277**
12. See Notice, No. 9.
- White's Ex'rs v. Johnson and others. **285**
13. In what case the error of awarding cost against the plaintiff is sufficient, upon his appeal, to reverse the decree, though right in every other respect. See Hindent.
- Ross v. Gordon. **289**
14. New matter is no ground for a bill of review, unless it was discovered since the decree was pronounced.
- Winston v. Johnson's Ex'rs. **305**
15. The court of appeals has no jurisdiction to grant appeals from interlocutory decrees.
- Gibson v. Randolph. **310**
16. Though specific legatees jointly sue, the decree ought to be several, conformably to their respective rights.
- Quarles's Ex'r v. Quarles and others. **321**
17. Rule as to bond and security for prosecuting appeals, where the decree is partly against an executor as such, and partly against him in his own right.
- Dunton v. Robins. **341**
18. In a suit in equity, for arrears of an annuity, the decree should be, not only for the sum due, with interest from the days when respectively payable, but reserving liberty to apply to the court, from time to time, to extend its decree, so as to embrace the payments hereafter falling due.
- Marshall v. Thompson. **412**
19. A decree, and execution thereupon, against an executor or administrator, for a balance due on his administration account, should not be against the goods and chattels of the decedent in his hands to be administered, but against his own goods and chattels.
- Moore's Ex'rs v. Ferguson and others. **421**
20. When a decree, by which an injunction is made perpetual in part, is considered erroneous, (to the injury of the appellee,) in not having made it perpetual in toto, the court of appeals will affirm so much as allows him his costs in the court of chancery; and, reversing the residue, and making such decree as that court should have made, will also allow him his costs in this court.
- Defarges v. Lipscomb. **451**
21. A decree, though deciding the right to the property in controversy, and awarding the costs of suit, is still only interlocutory, if commissioners be appointed to carry it into effect, and the court have yet to act upon their report. Neither does it cease to be interlocutory, in consequence of an order, that the defendant be attached for failing to comply with it.
- Mackey, Ex'r of Fuqua, v. Bell. **523**
22. A bill of review lies only to a final decree. **Ib.**

DEED.

1. A deed of above thirty years' standing requires no farther proof of its execution than the bare pro-

duction, where the possession has gone according to its provisions, and there is no apparent erasure or alteration.

Roberts's Window and Heirs v. Stanton. **129**

2. See Executors and Administrators, No. 10. **Ib.**

3. A decree of a court of competent jurisdiction dismissing a bill, upon the ground that the deed under which the complainant claimed was fraudulent, is a complete bar to another original bill to try the validity of the same deed; the proper remedy, if such decree be erroneous, being by appeal, writ of error, supersedeas, or bill of review, and not by original bill.

Holiday and Wife v. Coleman and Wife. **162**

4. Quære, whether a deed to a purchaser at a sale directed by a decree, conveys any title without a subsequent decree confirming the sale?

Lovell v. Arnold. **167**

5. An injunction to a judgment for purchase-money ought not to be dissolved, until a good and sufficient deed for the land be tendered by the vendor.

Grantland v. Wight. **179**

6. What evidence, of circumstances prior and subsequent to the date of a deed of gift, is sufficient, to set it aside on the ground of mistake on the part of the donor, and fraud on the part of the writer.

Jones v. Robertson. **187**

7. Proof of subsequent declarations and acts on the part of the donor (though not admissible taken singly) may be received (under a total absence

567 of testimony applying to the time of the contract, and in connexion with corroborating circumstances) to show that the writing was misrepresented or misunderstood at the time of the signature.

Jones v. Robertson. **187**

8. A debtor holding an equitable title in land may convey it by deed of trust to secure a creditor, and a court of equity, on a bill exhibited by the cestuy que trust, will compel another creditor (who with notice of such deed, (though not recorded,) has obtained a conveyance of the legal title, by means of an order from the debtor) to convey such legal title to the trustee for the purpose of applying it to the object of the trust.

Lambert v. Nanny. **196**

9. In such case, the notice is binding if received at any time before the conveyance.

See Lands, No. 18. **Ib.**

10. It seems that a deed of trust conveying all the property of the grantor to certain persons and their heirs "forever," with warranty, nevertheless, upon special trust that they shall pay the profits to himself during his life; concluding with declaring its true intent and meaning to be, "that at his death, every thing therein contained between the parties should become null and void," is a conveyance to the trustees and their heirs of an estate for the life of the grantor only, and not a revocation of a previous will.

Hughes v. Hughes's Ex'r. **209**

12. Quære, whether parol testimony of declarations by a testator of his intention in making a deed, ought to be regarded by a court of probate as evidence to rebut an implied revocation of a will by such deed? **Ib.**

See Bill of Sale, No. 1.

Hardaway v. Manson. **230**

14. If, before the time limited by law for recording a deed has expired, a bill be filed to impugn it as fraudulent, the court cannot afterwards declare it void, as against the complainant, on the ground of its not having been duly recorded.

Gibson v. Randolph. **310**

15. In detinue for slaves, parol evidence to prove that a deed was executed for the purpose of defrauding creditors, and therefore void, is admissible upon the plea of non detinet and issue.

Stratton v. Minnia. **329**

16. A deed of lease from one of two copartners, sealed with his seal, and in terms, binding himself only, is not admissible evidence in support of an avowry laying a demise by the copartner; notwithstanding the deed be expressed as "for himself and his partner," and it be proved that the other partner knew of the demise, and was satisfied with it.

Tuttle v. Eskridge. **330**

17. It seems now settled, that an absolute deed of slaves, or other personal property, the possession of which remain with the vendor, is fraudulent per se as to creditors.

Alexander v. Deneale. **341**

18. See Fraud and Perjuries, (Act to Prevent,) No. 1. 2.

Gay v. Moseley. **543**

DEFAULT.

1. A judgment by default cannot be entered when the writ has not been returned.
- Winchester and others v. The Bank of Alexandria. **330**

2. In a suit against a mercantile company, if the names of the partners be omitted in the writ and declaration, and the writ be served on a person not named in either, a judgment against the company for that person's failing to appear cannot be sustained.

Scott & Co. v. Dunlop, Pollock & Co., 249
3. Quære, in such case, whether any judgment by default could be sustained? Ib.

DEFENDANT.

1. Under the act of 1792, (1 Rev. Code, c. 66, s. 40.) the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence, notwithstanding such several matters be inconsistent with each other.

Waller's Ex'rs v. Ellis and others, 88
2. If a defendant plead and demur to the whole declaration, and the demurrer be overruled, judgment ought not to be entered without first trying the issues joined on the other pleas. Ib.

3. Where defendants, holding lands by a joint title are decreed to surrender possession, and pay rents and profits, they are not jointly and severally but only jointly liable.

Hite's Ex'rs v. Paul's Heirs, 154
4. See Issue, No. 2.

Monroe (Governor) v. Redman, 240
5. After the term at which a decree is rendered, an appeal ought not to be granted to a defendant who has been ordered to pay costs, but appears from his answer to have no right to the subject in controversy.

Garnett v. Childers, 277

DEFICIENCY.

1. A piece of ground being sold at public auction, expressly according to certain metes and bounds, (then and there shown to the purchaser before he became the highest bidder,) "be the same more or less;" he is not entitled to any compensation for a deficiency, although the previous advertisement described the tenement as containing more than the actual quantity: neither is the case varied by subsequent articles of agreement under seal, (written by the purchaser and signed by the vendor, for the purpose of binding the vendor to make a title,) in which the terms of the sale are referred to, but the quantity of ground, mentioned in the advertisement, specified, omitting the words "more or less." The vendor is not precluded *by such articles from proving the terms of sale by parol testimony.

Grantland v. Wight, 179

2. Whenever it appears that the vendor's own title deed must have disclosed to him the true quantity of land, he is bound to make compensation for a deficiency, though his deed to the vendee express a quantity "more or less."

Duvals v. Ross, 290

DEMURRER.

1. See Heir and Ancestor, No. 3.
Waller's Ex'rs v. Ellis and others, 88

2. Under the act of 1792, (1 Rev. Code, c. 66, s. 40.) the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence; notwithstanding such several matters be inconsistent with each other. Ib.

3. If a defendant plead and demur to the whole declaration, and the demurrer be overruled, judgment ought not to be entered without first trying the issues joined on the other pleas. Ib.

4. It appearing from the demurrer to the evidence, in ejectment, that the right of the lessor of the plaintiff originated in a lease to I. S., his heirs and assigns, for the lives of his sons A. S. and M. S., and his grandson A. S., jun. renounce to the said I. S. his heirs and assigns forever; and that I. S. dying intestate, his heir at law devised the land to the lessor of the plaintiff; the defendant claiming under a conveyance from the said A. S., jun. and others, grandchildren of the said I. S.; a judgment for the plaintiff was affirmed, though it did not certainly appear, from the demurrer, whether the said A. S., M. S., and A. S., jun. were yet living or not.

Hyer v. Shobe, 200

5. The weight of testimony to establish any fact (though it be a fact upon which a question of law arises) is a question belonging exclusively to the jury, unless it be withdrawn from their determination by a demurrer to evidence.

Hardaway v. Manson, 280

6. If the defendant plead several pleas on which issues in fact are joined, and moreover demur to a replication by the plaintiff, who joins in demurrer, a jury ought not to be sworn to try the facts, but the court should decide upon the issue in law, in the first place; that, if the demurrer be adjudged

insufficient, an issue in fact may be made up, upon the said replication, to be tried by a jury.

Green v. Dulany, 518

7. The failing (in a declaration in detinue) to lay a separate value, as to each slave demanded, is an error which would be fatal on demurrer, but is cured by a verdict severing the values.

Holladay and Wife v. Littlepage, 539

DEPUTY SHERIFF.

1. A bond from the deputy to the high sheriff, conditioned for the faithful performance of his duty during his continuance in the office of deputy sheriff, is binding upon him and his sureties for the second year as well as the first, and until the winding up of the business lawfully committed to him as deputy.

Royster and others v. Leake, 280

DESCENTS.

1. The true construction of the 7th section of the act "reducing into one the several acts directing the course of descents," as to the case of an infant is, that if there be no mother, &c. and the estate was derived from the father or mother, the inheritance shall not be divided into moieties, but the whole shall go to the kindred of that parent from whom the estate was derived. And the law was the same as to the distribution of unbequeathed personal estates, belonging to infants who died between the 1st of October, 1793, and the 22d of January, 1802.

Addison and Wife v. Core's Adm'r, 279

DESCRIPTION.

1. A count upon a writ of right describing the land demanded as a certain number of acres, part of a larger tract, and setting forth the boundaries of such larger tract, is sufficiently certain after verdict.

Lovell v. Arnold, 167

2. Quære, how far ought documents referred to in a bill of exceptions, to be described, to make them properly part of the record? Ib.

3. A forthcoming bond mentioning the persons against whom the execution issued, and that "they were desirous of keeping in their possession, until the day of sale, the property taken by the sheriff," sufficiently describes it as their property.

Bronaugh's v. Freeman's Ex'r, 266

DETINUE.

1. In detinue for several slaves, if their value be jointly assessed in the verdict, judgment ought not to be entered: but a writ of inquiry to ascertain their respective values should be awarded.

Cornwell v. Truss, 195

2. In detinue for slaves parol evidence to prove that a deed was executed for the purpose of defrauding creditors, and therefore void, is admissible upon the plea of non detinet and issue.

Stratton v. Minnis, 329

3. An executor or administrator holding slaves in which his testator or intestate had only an estate for life terminable upon his dying without issue living at the time of his death, (which event actually took place,) may be "charged in detinue personally, and not as executor or administrator.

Royall v. Eppes, Adm'r of Royall, 479

4. It seems that if a declaration in detinue demand a negro woman, by name, and her three children, without mentioning their names, and a case be agreed, submitting that if the law be for the plaintiff upon certain other points, judgment may be entered in his favour, "for the slaves in the declaration mentioned," the court may insert the names of the negro children in the judgment. Ib.

5. In detinue, if a negro woman, by name, and her "issue," (without naming them,) be demanded in the declaration, and the jury find the names of the issue, the defect (if any) is cured, and judgment should be entered according to the verdict.

Holladay and Wife v. Littlepage, 539

6. The failing to lay a separate value, as to each slave demanded, is an error which would be fatal on demurrer, but is cured by a verdict severing the values. Ib.

7. It is not error that the jury find general damages for detaining several slaves; but the alternative value of each slave ought to be separately found. Ib.

DEVASTAVIT.

1. An action against the sureties in an administration bond cannot be sustained on the ground that, after a verdict, judgment, execution and return of "no effects" against the executor or administrator as such, (the verdict being that he had not

fully administered, but had assets to satisfy the debt,) the defendant died, and, his estate having been committed to the sheriff, the county court allowed the judgment as a lawful claim against his estate, and directed the sheriff to pay it if assets should be in his hands, and it appeared by the sheriff's return that no such assets existed.

Catlett and others v. Carter's Ex'rs, 24

2. It seems that the executor or administrator must be convicted of a devastavit by a verdict in a second suit, finding that "he has wasted the assets," or "has enoigned, disposed of, and converted the same to his own use," before an action can be sustained against the sureties. Ib.

But see the next No.

3. A decree and execution thereupon, against an executor or administrator, for a balance due on his administration account, should not be against the goods and chattels of the decedent in his hands to be administered, but against his own goods and chattels.

Moore's Ex'x v. Ferguson and others, 421

Quære, if, on such decree, a fieri facias against the executor's own goods and chattels be returned nulla bona, is it then necessary to bring an action suggesting a devastavit, before an action can be maintained against the sureties in the administration bond?

DEVISE.

See Wills.

1. It seems that, under the act of 1785, c. 61, a right of entry into land by a person entitled as special occupant, is devisable by him, though he never was in actual possession. See Entry, (Right of,) and

Hyer v. Shobe, 200

2. By a devise of a tract of land in fee-simple, together with all the crops thereon, whether gathered or growing at the time of the testator's death, not only the crops made the year the testator died, but those of the preceding year remaining on the land, and those brought thither from other plantations to be stored, will pass.

Carnagy and Wife v. Martin's Ex'rs, 284

3. A testator, in February, 1779, devised to his four sons certain lands, "to them and their heirs forever," desiring that "if any of them should die without heirs of their bodies, then the parts of them so dying should be divided among the survivors and their heirs." This was a devise of an estate in tail, which, by the act of October, 1779, was converted into a fee-simple.

Sydnor v. Sydnors, 263

4. A devise of lands before the 1st of January, 1787, without words of perpetuity, will not be enlarged to a fee-simple on the ground of a general charge arising from a direction that all the testator's debts be first paid, especially if other funds be appropriated for payment of the debt.

Mooberry and others v. Marye, 453

5. Where a will is systematically composed, and the meaning plain, the court will not, for the purpose of enlarging the estate of devisees, or creating limitations in their favour, transpose expressions occurring in other clauses, and obviously relating to other subjects. Ib.

6. In a will dated in 1788, and recorded in 1784, the following clause occurred: "It is my will and devise that, in case my son John should die without heir of his body lawfully begotten, that then and, in that case, I give to my wife Lucy, and to her heirs forever, all the negroes which I had by her." This was determined to be a good executory devise in favour of Lucy, not on the ground that the word "then" was used, or the word "heir" in the singular number, but because the bequest was of the negroes which the testator had by her, (saying nothing of their issue,) and this was considered as evincing that he did not intend a return of them or their posterity to his wife at any remote period of time.

Royall v. Eppes, Adm'r of Royall, 479

7. And, though Lucy died in the lifetime of John, who was her only son and heir, her contingent interest did not thereby accrue to him, but to her administrator, so that the latter became entitled to recover the slaves, upon John's dying without issue living at the time of his death.

Royall v. Eppes, Adm'r of Royall, 479

DISCOVERY.

1. To give a court of equity jurisdiction on the ground of discovery, it is not sufficient to charge that certain facts are known to the defendants, and ought to be disclosed by them; but it should be averred that the plaintiff is unable to prove such facts by other testimony.

Duvals v. Ross, 240

2. See Agreement, No. 7. 8, a case in which it was determined that suit was properly brought in chancery to discover when the money due on a bond was collected.

Scott's Ex'r v. Osborne's Ex'r, 418

DISTRIBUTEES.

1. See Marriage Contract, No. 1. Clay v. Williams and others, 128
 2. All the residuary legatees or distributees ought to be parties to a suit for division of a residuum. Richardson's Ex'r v. Hunt, 148
- But see the note to Legatees, No. 2.

DISTRIBUTIONS.

1. The true construction of the 7th section of the act "reducing into one the several acts directing the course of descents," as to the case of an infant, is, that if there be no mother, &c. and the estate was derived from the father or mother, the inheritance shall not be divided into moieties, but the whole shall go to the kindred of that parent from whom the estate was derived. And the law was the same as to the distribution of unbequeathed personal estates belonging to infants who died between the 1st of October, 1798, and the 23d of January, 1802. Addison and Wife v. Core's Adm'r, 279

DOCKET.

1. Where an appeal is admitted to be docketed (for good cause shown) after the time within which the record ought to have been sent up, and the appellant has been guilty of no neglect, the court will direct it not to lose its place on the docket. Johnson v. Johnson's Adm'r, 304

DOWER.

1. When a widow marries again, the slaves which she held for the term of her life, as part of the estate of her first husband, belong to her second husband, and his representatives until her death. M'Cargo, Ex'r of Callicott, v. Callicott, 501
2. In such case, if the dower interest of the mortgagor's wife has been relinquished to the complainant, but not to the mortgagee, the court, in directing the sale, ought to guard the complainant's right to such dower interest. Davison v. Walte, 527

DUTIES.

1. Construction of the act of congress "laying duties on stamped vellum, parchment and paper," with respect to charter-parties. Under that act a writing altering or explaining a charter-party was not to be considered as itself a charter-party, and therefore subject to the duty. Ashley v. Cornwell, 208

EJECTMENT.

1. It appearing from a demurrer to the evidence, in ejectment, that the right of the lessor of the plaintiff originated in a lease to I. S., his heirs and assigns, for the lives of his sons A. S. and M. S.; and his grandson A. S., jun., renewable to the said I. S., his heirs and assigns forever; and that I. S. dying intestate, his heirs at law devised the land to the lessor of the plaintiff; the defendant claiming under a conveyance from the said A. S., jun. and others, grandchildren of the said I. S.; a judgment for the plaintiff was affirmed, though it did not certainly appear, from the demurrer, whether the said A. S., M. S. and A. S., jun., were yet living or not.

Hyer v. Shobe, 200

2. Where the lessor of the plaintiff in ejectment dies pending the suit, judgment is to be rendered as if he were still living; and possession is to be given under control of the court.

Mooberry and others v. Marye, 453

3. A case agreed, in ejectment, finding the lease, entry and ouster in the declaration mentioned, sufficiently admits that all the defendants who agreed the case are in possession of the land in controversy; unless there be an express finding to the contrary. Ib.

ENQUIRY, (WRIT OF.)

1. In detinue, for several slaves, if their value be jointly assessed in the verdict, judgment ought not to be entered; but a writ of enquiry, to ascertain their respective values, should be awarded. Cornwell v. Truss, 195

ENTRY, (RIGHT OF.)

1. It seems, that under the act of 1785, c. 61, a right of entry into land, by a person entitled as special occupant, is devisable by him, though he never was in actual possession, "and another person held the land, with an adverse claim, at the time of the devise.

Hyer v. Shobe, 200

EQUITY.

1. A court of equity will not relieve, against a

judgment, on the ground of error in law only: it must appear that justice requires its interposition, and that the party was prevented from obtaining it by the legal forms of pleading, or by some fraud, accident or mistake.

Kincaid v. Cunningham, 1
2. A party having a good ground of defence at law, but failing to make it, without a competent excuse, cannot obtain relief in equity on the same ground.

The Auditor v. Nicholas, 31

3. See Award, No. 2, and note annexed; and

Flournoy's Ex'r v. Halcumb, 34

4. If an executrix, (without being subject to any compulsion, or undue influence,) for the fraudulent purpose of protecting the estate of her testator from the demands of creditors, give her own bond, as executrix for a fictitious debt, and confess a judgment, she is not entitled to relief in equity: neither will the court give its aid to the obligee, but will leave him to his remedy at law. Yet if he be entitled (independently of the transaction in question) to an account of assets, the court will decree such account, and allow him what may be justly due, not exceeding the amount of the judgment: the rule in such case being, that he is bound by his own fraud so far as it operates against him. Clay v. Williams and others, 106

5. A court of equity will not assist in carrying into effect compositions of claims by executor or other fiduciaries, unless the party praying it will first unfold and disclose all the circumstances of the case, that the court may see there has been no fraud, and that every thing was fair. Ib.

6. See Answer in Chancery, No. 1.

Heffner v. Miller and others, 43

7. Property claimed by a son-in-law, under a marriage contract with a decedent in his lifetime, and recovered by a decree against the administratrix and distributees, is not in any manner responsible to the creditors of such decedent, unless it appear that such decree was obtained by fraud and collusion between the parties.

Clay v. Williams and others, 128

8. If a defendant, called upon to account for sales of certain public securities, deny that he ever received them, yet aver that the proceeds were accounted for to the plaintiff, "as would appear by the accounts and receipts annexed to his answer," he ought to produce such accounts and receipts, or answer to interrogatories respecting them, if required so to do. Ib.

9. A legatee is not entitled to a decree, but upon the terms of giving bond and security (if demanded by the executor) to refund, in case it be needful for the payment of debts.

Clay v. Williams and others, 129

10. It is error to enter a decree against infant defendants, without assigning them a guardian ad litem; and though the infancy did not appear in the original proceedings, yet if it be alleged in a petition for rehearing, (the decree being interlocutory,) a guardian ad litem ought to be appointed.

Robert's Widow and Heirs v. Stanton, 129

11. It is not error in a court of equity to direct commissioners, instead of a jury, to state and report an account of the profits of land. Ib.

12. As far as circumstances will permit, a court of equity will supply any defect in the execution of a power given, by a will, to executors, or trustees, to sell lands for payment of debts or legacies. A conveyance, therefore, by one executor or trustee only, (instead of three,) but in all other respects conformable to the intention of the testator in creating the trust, will be supported in favour of a purchaser for a valuable consideration; and this, notwithstanding it be provided, by the will, that, if one or more of the executors, or trustees, should die before the object of the trust was accomplished, others should be appointed by the survivors, jointly with them to finish the execution of the trust. Ib.

13. A patent, though not registered, is good in equity against a purchaser having notice: And quære, is it not also good in law? Ib.

14. See Patent for Land, No. 2.

15. The remedy of persons aggrieved by decisions of the land commissioners was by caveat in the general court to prevent the patents from emanating: and if a party had such an equity as would, on a caveat, have entitled him to a preference, it was no ground for a bill in equity to set aside the patent, unless he was prevented by fraud or accident from prosecuting a caveat.

Ross v. Keewood, Hoofacre and Smith, 141

16. All the residuary legatees or distributees ought to be parties to a suit for division of a residuum.

Richardson's Ex'r v. Hunt, 148

But see note to Legatees, No. 2.

17. A decree by a court of competent jurisdiction, dismissing a bill upon the ground that the deed

under which the complainant claimed was fraudulent, is a complete bar to another original bill to try the validity of the same deed: the proper remedy, if such decree be erroneous, being by appeal, writ of error, supersedeas, or bill of review, and not by original bill.

Holliday and Wife v. Coleman and Wife, 162

18. The power of a court of equity to rule a tenant for life, of slaves, or other personal property, to give security that the property shall be forthcoming at his or her death, is to be exercised, not as a matter of course, but of sound discretion, according to circumstances. Ib.

*19. See Vendor and Vendee, No. 2.

Grantland v. Wight, 179

20. A debtor holding an equitable title to land may convey it by deed of trust to secure a creditor, and a court of equity, on a bill exhibited by the cestuy que trust, will compel another creditor (who with notice of such deed, (though not recorded,) has obtained a conveyance of the legal title, by means of an order from the debtor) to convey such legal title to the trustee for the purpose of applying it to the object of the trust.

Lambert v. Nanny, 196

21. In such case the notice is binding if received at any time before the conveyance. Ib.

22. A debtor holding an equitable title to land, having conveyed it by deed of trust to secure a creditor, and having afterwards caused a conveyance of the legal title to be made to another creditor, who had notice of the prior deed, need not be a party to a bill in equity exhibited by the cestuy que trust, to compel a conveyance of the legal title, and performance of the trust. Ib.

23. Where a cause has been once fully heard and decided in a court of common law, having competent jurisdiction of the case, a court of equity ought not to interfere, unless fraud or surprise be suggested and proved, or some material adventitious circumstance had arisen, which could not have been foreseen or guarded against.

Fenwick v. M'Murdo and Fisher, 244

24. After the term at which a decree is rendered, an appeal ought not to be granted to a defendant who has been ordered to pay costs, but appear from his answer to have no right to the subject in controversy.

Garnett v. Childers, 277

25. See Account, No. 6, 7, 8.

White's Ex'r v. Johnson and others, 285

26. Where an injunction is perpetuated in part, the plaintiff in equity ought, in general, not to be decreed to pay costs.

Ross v. Gordon, 289

27. In such case the error of awarding costs against the plaintiff is sufficient upon his appeal, to reverse the decree, though right in every other respect. Ib.

28. To give a court of equity jurisdiction on the ground of discovery, it is not sufficient to charge that certain facts are known to the defendants, and ought to be disclosed by them: but it should be averred that the plaintiff is unable to prove such facts by other testimony.

Duvals v. Ross, 290

29. A contract of sale is not considered in equity as binding on the parties by the execution of a bond for the purchase-money, if it appears that the seller failed to perform what was to be done on his part, in order to consummate the contract.

Page's Ex'r v. Winston's Adm'r, 298

30. G. having agreed to sell W. certain escape-warrants, upon W.'s giving bond and good security for the purchase-money: W. executes a bond, with a blank for the name of the surety, to be filled up at a certain time and place, when and where the escape-warrants are to be assigned and delivered by G., if W. fail to give the surety, a court of equity will not permit G. to take advantage of the bond without proof of his assigning and delivering, or tendering, the escape-warrants within a reasonable time, and before commencing suit upon it: as to which the onus probandi, in equity, lies on him.

Page's Ex'r v. Winston's Adm'r, 298

31. If a bill of injunction, to stay proceedings on a judgment, charge the plaintiff at law with having failed to do an act on which the equity of his claim depends, and, in his answer, he take no notice of that allegation, the court, on the hearing, will consider this an admission that he has not done the act in question, and will decree against him finally, without any exception to the answer, or any interlocutory order, taking the bill for confessed in part. Ib.

32. It seems that voluntary purchasers of lands subject to the lien of a judgment are personally responsible, in equity, to the creditor (the goods and chattels of the debtor being exhausted) for half the profits (or so much of half as may be sufficient to satisfy the judgment) jointly, and not pro

rata; notwithstanding they hold tracts of unequal values, and by distinct conveyances.

Winston v. Johnson's Ex'rs. 805

33. Want of notice of the time and place of a commissioner's taking an account, or the court's acting upon the report too soon, are not sufficient reasons for a bill of review; such objections not having been taken (as they ought to have been) before the rendition of the decree. Ib.

34. New matter is no ground for a bill of review unless it was discovered since the decree was pronounced. Ib.

35. If, before the time limited by law for recording a deed has expired, a bill be filed to impugn it as fraudulent, the court cannot afterwards declare it void, as against the complainant, on the ground of its not having been duly recorded.

Gibson v. Randolph. 810

36. In the case of legal rights, the principle caveat emptor properly applies; but equitable rights may be lost by a sale to a bona fide purchaser without notice.

Taylor v. Stone. 814

37. Though specific legatees jointly sue, the decree ought to be several, conformably to their respective rights.

Quarles's Ex'r v. Quarles and others. 821

38. If, after the qualification of an executor, he die without closing his administration, and the legatees (without the intervention of an administrator de bonis non) take possession of the assets, a court of equity, on a bill for discovery, will consider such of them as are solvent responsible to creditors for the whole amount, and will not give them credit for the proportions of such as prove to be insolvent; yet, in decreeing against the solvent legatees, the court will not charge them jointly, but pro rata.

Hopkirk v. Dennis and others. 828

39. See Lands, No. 27, 38.

Edgar v. Donnelly and Jones. 837

40. If the plaintiff in equity call upon the defendant, as assignee of a bond, to say whether he had notice of the consideration thereof when he received the money due thereon, and in his answer he say that he had no such notice when he took the assignment; the answer is not to be considered as admitting notice at the time of receiving the money. Ib.

41. In a suit in equity for arrears of an annuity, the decree should be, not only for the sum due, with interest from the days when respectively payable, but reserving liberty to apply to the court, from time to time, to extend its decree, so as to embrace the payments thereafter falling due.

Marshall v. Thompson. 412

42. Where the testimony to an important fact is such as to leave it doubtful, the court of equity ought to direct an issue to ascertain it. Ib.

43. In debt upon a bill penal, if, through a mistake of the clerk, the writ be issued for dollars, when it should be pounds; and (the plaintiff's declaration being filed, conformably with the bill penal) judgment by default be entered against the defendant and his appearance bail for so many pounds; the bail, being informed of the mistake before he signed the bail-bond, and having made no defence at law, is not entitled to relief in equity.

Carter v. Cockrill and Rogers. 448

44. See Usury, No. 1, 2.

Marks v. Morris. 407

45. See Agreement, No. 7, 8, a case in which it was determined that suit was properly brought in chancery, to discover whether, and at what time, the money due on a bond was collected.

Scott's Ex'r v. Osborne's Ex'r. 418

46. See Executors and Administrators, No. 23.

Moore's Ex'r v. Ferguson and others. 421

47. The judges of the court of appeals, or any one of them out of court, have power to award injunctions, which have been refused by the judge of any superior court of chancery; but this power is not possessed by the court of appeals.

Mayo v. Haines and Counts. 423

48. When a decree, by which an injunction is made perpetual in part, is considered erroneous, (to the injury of the appellee,) in not having made it perpetual in toto, the court of appeals will affirm so much as allows him his costs in the court of chancery; and, reversing the residue, and making such decree as that court should have made, will also allow him his costs in this court.

Defarges v. Lipscomb. 451

49. If the vendor of land assure the vendee (though not in writing) that a piece of ground, adjoining thereto, is always to be kept open as an alley; by which assurance the vendee is induced to purchase, or to give a higher price for the property; a court of equity will perpetually enjoin the vendor from shutting up such alley.

Trueheart v. Price. 408

50. Quære, in such case, whether the vendee, who

has afterwards conveyed the premises with their appurtenances, but without warranty, to a third person, be a competent witness to prove that such verbal assurance was given to himself by the original vendor? Ib.

51. On a motion to recommit a report of a commissioner in chancery, if the previous neglect or contumacy of the party render it proper to overrule his motion, so far as it goes to open the accounts anew, he may, nevertheless, be permitted to show himself entitled to credits not considered by the commissioner, if it appear probable, from the evidence in support of the motion, that he is entitled to such credits.

Snickers v. Dorsey. 506

52. In general, since the 1st of May, 1804, when interest is allowed in equity, it should not stop at the time when the balance of accounts is struck, nor at the date of the decree, but should run to the payment of such balance. Ib.

53. See Decree, No. 19, 30.

Mackey, Ex'r of Fuqua, v. Bell. 523

54. If a purchaser of land, subject to encumbrance by mortgage, apply to equity for relief against a judgment in ejectment, the decree ought not to be "that the injunction be dissolved, unless the complainant pay the sum due to the mortgagee;" but that the mortgaged premises be sold, unless, &c.; and that, out of the proceeds of the sale, the sum due be paid to the mortgagee, and the surplus, if any, to the complainant.

Davison v. Walte. 527

55. In such case, if the dower interest of the mortgagor's wife has been relinquished to the complainant, but not the mortgagee, the court, in directing the sale, ought to guard the complainant's right to such dower interest. Ib.

ERROR.

1. A court of equity will not relieve against a judgment on the ground of error in law only: it must appear that justice requires its interposition, and that the party was prevented from obtaining it by the legal forms of pleading, or by some fraud, accident, or mistake.

Kincaid v. Cunningham. 1

2. See Action, No. 2.

Kirtley v. Deck and others. 10

3. If, in a decree of a superior court of chancery, reversing that of a county court, there be no error but an omission to direct the bill to be dismissed, the court of appeals will affirm the decree, and add the proper direction.

Heffner v. Miller and others. 43

4. See Sale, No. 4.

Grantland v. Wight. 179

5. In debt upon an assigned bond, the declaration ought to charge a failure to pay the money to the obligee, and to each of the assignees, as well as to the plaintiff; and if it only charge a failure to pay to the plaintiff, it is too defective to maintain the action, and the defect is not cured by verdict.

Braxton's Adm'r v. Lipscomb. 232

6. See Exceptions, No. 1.

White's Ex'rs v. Johnson and others. 235

7. A failure to set forth in a commissioner's report, that notice was given to the parties, is not an error sufficient to reverse a decree, if no exception to the report appear in the record. Ib.

8. In what case the error of awarding costs against the plaintiff is sufficient, upon his appeal, to reverse the decree, though right in every other respect. See

Ross v. Gordon. 230

9. It is error sufficient to reverse an office judgment that the common order was entered before the plaintiff filed his declaration.

Waugh v. Carter. 333

10. See Alexandria, No. 3.

Winchester and others v. The Bank of Alexandria. 339

11. See Appeal, No. 18.

Shanks and M' Rae v. Fenwick. 478

12. See Declaration, No. 16.

Green v. Dulany. 518

13. See Declaration, No. 17.

Hill v. Harvey. 525

ESCAPE.

1. A judgment cannot be entered against the defendant and sheriff, upon his return that the writ was executed, and the defendant escaped; the proper remedy against the sheriff, for an escape, being by a separate suit.

Waugh v. Carter. 333

EVIDENCE.

1. The widow of one of the joint obligors is a competent witness, in support of the plea of infancy.

in a suit against the other, or his representatives; and this, notwithstanding her husband died intestate; her interest, in such case, being remote and uncertain, and either equal between the parties, or against the party in whose favour her testimony operates.

Braxton's Adm'r v. Hillyard, 49
2. What is sufficient evidence to authenticate, in the courts of this country, the sentence or act of a foreign tribunal or government, after a destruction of such government by revolution or conquest.
Haddfield v. Jameson, 53

3. See Executors and Administrators, No. 1, 2.
Catlett and others v. Carter's Ex'rs, 34
4. The testimony of one witness is not sufficient to outweigh an answer denying the allegations of a bill.

Heffner v. Miller and others, 48
5. Quære, how far is the sentence of a foreign court of admiralty, or other foreign tribunal, to be regarded as evidence by the courts of Virginia?
Haddfield v. Jameson, 53

6. Quære, whether the evidence of a person employed, by both parties, as an attorney, or scrivener, to write a bond for a fraudulent purpose, be admissible to prove the fraud?

Clay v. Williams and others, 105
7. A deed of above thirty years' standing requires no farther proof of its execution than the bare production, where the possession has gone according to its provisions, and there is no apparent erasure or alteration.

Roberts's Widow and Heirs v. Stanton, 129
8. Information of the existence of an unregistered patent, by neighbourhood report, and from a person declaring he had seen it, together with knowledge of possession and cultivation by tenants of the patentee, is sufficient notice to bar the laying a warrant upon the land as waste and unappropriated. Ib.

9. A person acknowledging that he considers himself interested in the event of a suit is not a competent witness, though in fact not interested.
Richardson's Ex'r v. Hunt, 148

10. In tracing a title to land in controversy, a decree in a suit between other parties is not evidence, against a person claiming under neither of them, that one of those parties was, in fact, as therein described, eldest son and heir of a former proprietor, it being incumbent upon the party wishing to avail himself of such fact, to prove it by evidence alunde, but such decree may be received (as a link in the chain of evidence) to prove the fact that it was rendered.

Lovell v. Arnold, 167
11. What evidence of circumstances prior and subsequent to the date of a deed of gift, is sufficient to set it aside on the ground of mistake on the part of the donor, and fraud on the part of the writer.
Jones v. Robertson, 187

12. Proof of subsequent declarations and acts of the donor (though not admissible taken singly) may be received, under total absence of testimony applying to the time of the contract, and in connexion with corroborating circumstances, to show that the writing was misunderstood, or misrepresented, at the time of signature. Ib.

13. In an action of general indebitatus assumpsit, for services rendered as an overseer, or of quantum meruit for like services, the plaintiff cannot give in evidence proof that the defendant had employed him as an overseer, and was to pay him a certain quantity of tobacco. In such case, he should declare upon the special agreement.

Brooks v. Scott's Ex'r, 344

14. It appearing from the demurrer to the evidence, in ejectment, that the right of the lessor of the plaintiff originated in a lease to I. S., his heirs and assigns, for the lives of his sons A. S. and M. S., and his grandson A. S., jun. renewable to the said I. S., his heirs and assigns forever; and that I. S., dying intestate, his heir at law devised the land to the lessor of the plaintiff: the defendant claiming under a conveyance from the said A. S., jun. and others, grandchildren of the said I. S.:

a judgment for the plaintiff was affirmed, though it did not certainly appear, from the demurrer, whether the said A. S., M. S., and A. S., jun. were yet living or not.

Hyer v. Shobe, 200
1b. Quære, whether parol testimony of a declaration by a testator of his intention in making a deed, ought to be regarded by a court of probate as evidence to rebut an implied revocation of a will by such deed?

Hughes v. Hughes's Ex'r, 209
16. See Summary Proceedings, No. 3.
Mayor &c. of Alexandria v. Hunter, 228

17. The weight of testimony to establish any fact (though it be a fact upon which a question of law arises) is a question belonging exclusively to the

jury, unless it be withdrawn from their determination by a demurrer to evidence.

Hardaway v. Manson, 230
18. Money levied by the sheriff upon a judgment, which is afterwards reversed, cannot be recovered back, by general indebitatus assumpsit for money had and received, without proof that the money was actually received by the plaintiff, or applied to his use.

Isom v. Johns, 273
19. See Executors and Administrators, No. 15.

White's Ex'rs v. Johnson and others, 285
20. A mutual understanding and agreement between a debtor and creditor, that suit shall not be brought upon an account until the debtor shall have gone to Europe and returned, is a good bar to the act of limitations during his absence from this country, and may be given in evidence to prevent the court's expunging from such account items appearing to have been due five years before his death.

Holladay, Ex'r of Littlepage v. Littlepage, 316
21. Proof of a parol acknowledgment by a third person, that he received a sum of money from the plaintiff for the defendant's use, may with propriety be left to the jury, as a link in the chain of circumstances; such acknowledgments having been made at or about a time when the defendant, or some person for him, must have paid the money in question; and by a person competent to charge himself by an ordinary receipt. But the death of such person is not sufficient ground for admitting the evidence. Ib.

22. In detinue for slaves parol evidence to prove that a deed was executed for the purpose of defrauding creditors, and therefore void, is admissible upon the plea of non detinet and issue.

Stratton v. Minnis, 329
23. A deed of lease from one of two copartners, sealed with his seal, and in terms, binding himself only, is not admissible evidence in support of an avowry laying a demise by the copartners: notwithstanding the deed be expressed as "for himself and his partner," and it be proved that the other partner knew of the demise, and was satisfied with it.

Tuttle v. Eskridge, 330
24. The point in Vance v. Walker (3 H. & M. 288) again solemnly determined.

Walker's Ex'r v. Aicklin, 357
25. In a suit for freedom, a finding by the jury, from inspection, that the plaintiff is a white person, is conclusive in his favour, unless it be proved, on the other side, that he descended in the maternal line from a slave.

Hook v. Nanny Pagee and others, 379
26. Where the testimony to an important fact is such as to leave it doubtful, the court of equity ought to direct an issue to ascertain it.

Marshall v. Thompson, 413
27. A husband's declarations that a child born in wedlock is not his, are not sufficient evidence to prove it illegitimate, notwithstanding it was only three months after the marriage, and a separation between his wife and him soon after took place, by mutual consent.

Bowles v. Bingham, 442
28. It seems that a specific legatee is not a competent witness to disprove the claim of a creditor against the estate of the testator.

Temple's Ex'r v. Ellett's Ex'r, 452

29. See Equity, No. 49, 50.

Trueheart v. Price, 468

30. See Appeal, No. 18.

Shanks and M'Rae v. Fenwick, 478

31. In trials at law, where the evidence exhibited is legally admissible, but contradictory, it is most proper to be left to the consideration of the jury. Ib.

32. See Bond, No. 23.
Whitlock v. Ramsey's Adm'r, 510

EXCEPTIONS.

1. A commissioner's report, if erroneous upon its face, may be objected to at the hearing of the cause, though no exception be previously filed; and also, in the appellate court, though no exception appear to have been taken in the court below: but, without such exception, it cannot be impeached on grounds, and in relation to subjects, which may be affected by extraneous testimony.

White's Ex'rs v. Johnson and others, 285
2. A failure to set forth, in a commissioner's report, that notice was given to the parties, is not an error sufficient to reverse a decree, if no exception to the report appear in the record. Ib.

3. See Appeal, No. 18.

Shanks and M'Rae v. Fenwick, 478

4. See Courts, No. 6. Ib.

EXCHANGE, (BILL OF.)

1. See Bill of Exchange, No. 1.
Wilson v. Crowdhill, 302

EXECUTION.

1. A forthcoming bond mentioning the persons against whom the execution issued, and that "they were desirous of keeping in their possession, until the day of sale, the property taken by the sheriff," sufficiently describes "it as their property." *Bronaugh v. Freeman's Ex'r.* 266
2. When a judgment upon a forthcoming bond is obtained against a defendant, having legal notice, and appearing by attorney, but not moving to quash the bond, nor stating by plea or bill of exceptions any variance between it and the execution, the appellate court is not to reverse the judgment on the ground of such variance. *Bronaugh v. Freeman's Ex'r.* 266
3. Under the 51st section of the execution law, (1 Rev. Code, c. 151,) the remedy by motion is given against the sureties of a deputy sheriff after a judgment against him for the same cause, such judgment not appearing to be satisfied. The motion also may be made against the sureties separately from their principal. *Royster and others v. Leake.* 280
4. Under that act the clerk is to issue execution for interest, though not mentioned in the writing and not demanded by the declaration. *Wallace and others v. Baker.* 334
5. A decree, and execution thereupon, against an executor or administrator, for a balance due on his administration account, should not be against the goods and chattels of the decedent in his hands to be administered, but against his own goods and chattels. *Moore's Ex'r v. Ferguson and others.* 421
6. If a forthcoming bond be delivered by the sheriff to the plaintiff, before notice thereupon be given to the defendants, execution may be awarded upon it, though it has not been filed in the clerk's office. *Eppes's Ex'rs v. Colley.* 523

EXECUTION OF WRIT.

1. A writ cannot be legally executed after the term to which it was returnable. *Crews & Higginbotham v. Garland.* 491
2. A judgment entered in the clerk's office before the execution and return of the writ is erroneous, and cannot be supported by the writ's being returned executed to the term when such judgment is made final. *Id.*
3. See Writ, No. 10. *Id.*

EXECUTORS AND ADMINISTRATORS.

1. An action against the sureties in an administration bond cannot be sustained on the ground that after a verdict, judgment, execution, and return of "no effects," against the executor or administrator as such, (the verdict being "that he had not fully administered, but had assets to satisfy the debt.") the defendant died, and, his estate having been committed to the sheriff, the county court allowed the judgment as a lawful claim against his estate, and directed the sheriff to pay it, if assets should be in his hands, and it appear by the sheriff's return that no such assets existed. *Catlett and others v. Carter's Ex'rs.* 24
2. It seems that the executor or administrator must be convicted of a devastavit by a verdict in a second suit, finding that "he has wasted the assets," or has "eloiigned, disposed of, and converted the same to his own use," before an action can be sustained against the sureties. *Catlett and others v. Carter's Ex'rs.* 24
3. Quære, whether there may not be some exceptions to this rule? *Id.*
4. A decree empowering an executor, for payment of debts, to sell the lands of his testator, and report his proceedings in execution thereof to the court, is not final but interlocutory. *Goodwyn and others v. Miller and others.* 42
5. If an executrix, (without being subject to any compulsion or undue influence,) for the fraudulent purpose of protecting the estate of her testator from the demands of creditors, give her own bond, as executrix, for a fictitious debt, and confess a judgment, she is not entitled to relief in equity, neither will the court give its aid to the obligee, but will leave him to his remedy at law; yet if he be entitled (independently of the transaction in question) to an account of assets, the court will decree such account, and allow him what may be justly due, not exceeding the amount of the judgment; the rule in such case being, that he is bound by his own fraud so far as it operates against him. *Clay v. Williams and others.* 106

6. A court of equity will not assist in carrying into effect compositions of claims by executors or other fiduciaries, unless the party praying it will first unfold and disclose all the circumstances of the case, that the court may see there has been no fraud, and that every thing was fair. *Id.*
7. See Marriage Contract, No. 1. *Id.* 128
8. A legatee is not entitled to a decree but on the terms of giving bond and security (if demanded by the executor) to refund in case it be needful for the payment of debts. *Id.* 129
9. Rents and profits of land, the possession of which was unlawfully withheld by the ancestor in his lifetime, and by his heirs after his death, ought not to be charged against his executors and heirs jointly, but apportioned among them, according to their respective interests. *Stovall's Ex'rs v. Woodson and Wife.* 303
10. As far as circumstances will permit, a court of equity will supply any defect in the execution of a power given by a will to executors or trustees, to sell lands for payment of debts or legacies. A conveyance, therefore, by one executor or trustee only (instead of three,) but in all other respects conformable to the intention of the testator in creating the trust, will be supported in favour of a purchaser for a valuable consideration, and this, notwithstanding it be provided in the will, that, if one or more of the executors or trustees should die before the object of the trust was accomplished, others should "be appointed by the survivors jointly with them, to finish the execution of the trust." *Roberts's Widow and Heirs v. Stanton.* 129
11. See Residuum, No. 1. *Richardson's Ex'r v. Hunt.* 148
12. A decree against an executor, for rents and profits received by the testator, ought expressly to direct that he pay the sum in question out of the assets in his hands to be administered, otherwise it is to be understood as against him personally, and, therefore, erroneous. *Hite's Ex'r v. Paul's Heirs.* 154
13. Any person interested in the settlement of an executor's account may object to its being allowed and recorded, and, being overruled in such objection, may appeal to a superior court. *Triplett's Ex'rs v. Jameson.* 242
14. A commission of more than five per cent., on the amount of sales and collections, ought not to be allowed an executor, except upon peculiar circumstances. *Id.*
15. Whether interest ought to be charged in an administration account, is a question the decision of which may depend upon extraneous testimony. *White's Ex'rs v. Johnson and others.* 285
16. It seems that an executor cannot be compelled to pay a legacy until bond and security be given by the legatee to refund his due proportion of such debts and demands as may thereafter appear against the estate of the testator. *Stovall's Ex'r v. Woodson and Wife.* 303
17. See Account, No. 10. *Holladay, Ex'r of Littlepage, v. Littlepage.* 316
18. In what case a legatee is entitled to interest on profits from the time of the receipt thereof by the executor, no good reason appearing for his failure to apply the principal to the use of the legatee. *Quarles's Ex'r v. Quarles and others.* 321
19. If, after the qualification of an executor, he die without closing his administration, and the legatees (without the intervention of an administrator de bonis non) take possession of the assets, a court of equity, on a bill for discovery, will consider such of them as are solvent responsible to creditors for the whole amount, and will not give them credit for the proportions of such as prove to be insolvent; yet in decreeing against the solvent legatees, the court will not charge them jointly, but pro rata. *Hopkirk v. Dennis and others.* 328
20. In an action by a surviving executor for a debt due to the testator in his lifetime, if the declaration charge that the debt was not paid to the plaintiff, without charging also that it was not paid to the testator, nor to either of the coexecutors, the defect is fatal, and not cured by verdict. *Buckner and Wife v. Blair.* 336
21. Rule as to bond and security for prosecuting appeals, where the decree is partly against an executor as such, and partly against him in his own right. *Dunton v. Robins.* 241
22. A decree and execution thereupon, against an executor or administrator, for a balance due on his administration account, should not be against the goods and chattels of the decedent in his hands to be administered, but against his own goods and chattels. *Moore's Ex'r v. Ferguson and others.* 421
23. It seems that an administrator, appointed and

qualified by a court of competent authority, is the lawful representative of the personal estate, (until his appointment be rescinded,) notwithstanding another had the better right to be the administrator.

- Royall v. Eppes, Adm'r of Royall, 479
 24. See Devise, No. 7. Ib.
 25. If the plaintiff and defendant claim under the same executory bequest, and a case be agreed, submitting the right to be adjudged, according to the legal construction of the will, without saying any thing about the executor's assent to the legacy, the court will assume that as a fact between the present parties. Ib.
 26. An executor or administrator holding slaves in which his testator or intestate had only an estate for life, terminable upon his dying without issue living at the time of his death, (which event actually took place,) may be charged in detinue personally, and not as executor or administrator. Ib.

EXECUTORY DEVISE.

1. A testator "lent to his granddaughter, A. S. P., a negro woman, and one bed and furniture for her, her heirs, executors and administrators forever; but if she should die without lawful heir of her body, then to return to his son, and his heirs forever." This limitation over was adjudged to be upon an indefinite failure of issue, and therefore void.

Williamson, Ex'r of Mayes, v. Ledbetter and others, 521

EXPATRIATION.

1. See Slaves, No. 6.
 Murray v. McCarty, 393
 2. See Constitution of the United States, No. 1. Ib.
 3. Quære, whether the right of citizenship, in Virginia, can be relinquished, without complying with the terms of our act of assembly concerning expatriation? Ib.

FEES.

1. The sheriff's fee for taking the forthcoming bond may be included in it.
 Bronaugh v. Freeman's Ex'r, 206

FOREIGN JUDGMENTS.

1. Quære, how far is the sentence of a foreign court of admiralty, or other foreign tribunal, "to be regarded as evidence by the courts of Virginia?"
 Hadfield v. Jameson, 53
 2. What is sufficient evidence to authenticate in the courts of this country, the sentence or act of a foreign tribunal, or government, after a destruction of such government by revolution or conquest. Ib.

FORFEITURE.

1. Where a judgment of the land commissioners was, that the claimant should obtain a patent upon paying the surveyor's fees, and purchase-money, to the company, or their agent, on or before a subsequent day, with interest until payment, and that otherwise the land should revert to the company; a tender to the company's agent within the time limited, was sufficient to prevent the forfeiture.
 Ross v. Keewood, Hoofacre and Smith, 141

FORTHCOMING BOND.

1. A forthcoming bond mentioning the persons against whom the execution issued, and that "they were desirous of keeping in their possession, until the day of sale, the property taken by the sheriff," sufficiently describes it as their property.
 Bronaugh v. Freeman's Ex'r, 206
 2. Where a judgment upon a forthcoming bond is obtained against a defendant, having legal notice, and appearing by attorney, but not moving to quash the bond, nor stating by plea, or bill of exceptions, any variance between it and the execution, the appellate court is not to reverse the judgment on the ground of such variance. Ib.
 3. The sheriff's fee for taking the forthcoming bond may be included in it. Ib.
 4. If a forthcoming bond be delivered by the sheriff to the plaintiff before notice thereupon be given to the defendants, execution may be awarded upon it, though it has not been filed in the clerk's office.
 Eppes's Ex'rs v. Colley, 533

FRAUD.

1. Freight (though by the terms of a charter-party payable monthly if required) is not to be recovered,

where the voyage was never completed, but the vessel condemned by a foreign tribunal, in consequence of a fraud attempted by one of the owners intrusted by the rest with the care of the vessel, though no proof appear of their assenting to such fraudulent act.

- Hadfield v. Jameson, 53
 2. In such case, the copartners are not entitled to compensation for the loss, except against the fraudulent partner. Ib.
 3. It seems, too, that, moreover, the copartners collectively, (as well as the fraudulent partner individually,) are responsible to a third person for a loss occasioned by the fraud. Ib.
 4. Quære, whether the evidence of a person employed by both parties as an attorney, or scrivener, to write a bond for a fraudulent purpose, be admissible to prove the fraud?

Clay v. Williams and others, 106
 5. If an executrix, (without being subject to any compulsion or undue influence,) for the fraudulent purpose of protecting the estate of her testator from the demands of creditors, give her own bond as executrix for a fictitious debt, and confess a judgment, she is not entitled to relief in equity, neither will the court give its aid to the obligee, but will leave him to his remedy at law. Yet if he be entitled (independently of the transaction in question) to an account of assets, the court will decree such account, and allow him what may be justly due, not exceeding the amount of the judgment; the rule in such case being, that he is bound by his own fraud so far as it operates against him. Ib.

6. A court of equity will not assist in carrying into effect compositions of claims by executors or other fiduciaries, unless the party praying it will first unfold and disclose all the circumstances of the case, that the court may see there has been no fraud, and that every thing was fair. Ib.

7. See Marriage Contract, No. 1. S. C., 128
 8. What evidence of circumstances prior and subsequent to the date of a deed of gift, is sufficient to set it aside on the ground of mistake on the part of the donor, and fraud on the part of the writer.

Jones v. Robertson, 187
 9. Proof of subsequent declarations and acts of the donor (though not admissible taken singly) may be received (under total absence of testimony applying to the time of the contract, and in connexion with corroborating circumstances) to show that the writing was misunderstood or misrepresented at the time of signature. Ib.

10. In detinue for slaves, parol evidence to prove that a deed was executed for the purpose of defrauding creditors, and therefore void, is admissible upon the plea of non detinet and issue.

Stratton v. Minnis, 339
 11. It seems now settled, that an absolute deed of slaves, or other personal property, the possession of which remains with the vendor, is fraudulent, per se, as to creditors.

Alexander v. Deneale, 341
 12. The point in Vance v. Walker (3 H. & M. 288) again solemnly determined.

Walker's Ex'r v. Aicklin, 357
 13. A marriage settlement, on a wife and her children, by the husband, though born in fornication, is a conveyance to purchasers for valuable consideration, as to the children as well as the wife, and not void as to creditors, no fraudulent intention being proved.

Coutts and others v. Greenhow, 363
 14. In an action on the case for a deceit, if the defendant plead that the cause of action did not accrue within five years next before suing
 579 "out the writ, a replication, that the fraud came to the plaintiff's knowledge within that time is not good; and issue joined upon it should be set aside by the court as immaterial.

Callis v. Waddy, 511
 15. See Frauds and Perjuries, (Act to Prevent,) No. 1, 2, and
 Gay v. Moseley, 543

FRAUDS AND PERJURIES, (ACT TO PREVENT.)

1. A slave, lent either before or after the act, having remained, since its commencement, more than five years in the loanee's possession, without any demand made on the part of the lender, must be considered the absolute property of the person so remaining in possession, as to creditors of, and purchasers under him.

Gay v. Moseley, 543
 2. And proof of notice of the loan, or of a deed of trust from the lender, recorded in the court of a county wherein neither of the parties lived, is not sufficient to do away the effect of such possession. Ib.

FREEDOM.

1. In a suit for freedom, a finding by the jury, from

inspection, that the plaintiff is a white person, is conclusive in his favor, unless it be proved, on the other side, that he descended in the maternal line from a slave.

Hook v. Nanny Pagee and others, 579

FREIGHT.

1. Freight, though by the terms of a charter-party, payable monthly if required, is not to be recovered, where the voyage was never completed, but the vessel condemned, by a foreign tribunal, in consequence of a fraud attempted by one of the owners, intrusted by the rest with the care of the vessel; though no proof appear of their assenting to such fraudulent act.

Hadfield v. Jameson, 53

FURNITURE.

1. By a bequest of "all my household goods and furniture, except my plate and watch," every thing about the houses, that had been usually held and enjoyed therewith, and that would tend to the comfort and accommodation of the householder, will pass.

Carnagy and Wife v. Martin's Ex'rs, 234

GENERAL COURT.

1. See Settlement-Rights, No. 2.
Ross v. Keewood, Hoofacre and Smith, 141

GLEBES.

1. According to the spirit of the act "concerning the glebe lands and churches within this commonwealth," passed the 12th day of January, 1802, no glebe land was to be considered vacant, and, as such, liable to be sold, if there was any minister, who, in behalf of the protestant episcopal church, had been put into possession, and was the incumbent thereof, on that day; whether the persons acting as a vestry, by whom he was inducted, had been canonically elected or not.

Cloughton and others v. Macnaughton, 513
2. The vestry's order that the minister "be inducted into the parish as incumbent," is a sufficient delivery of possession of the glebes thereto attached, to prevent a sale of the same as vacant. Ib.

GRANT.

See Patent for Land.

GREENBRIER COMPANY.

1. See Lands, No. 7.
Ross v. Keewood, Hoofacre and Smith, 141
2. See Settlement-Rights, No. 2. Ib.
3. See Tender and Refusal, No. 1, 2. Ib.

GUARDIAN AD LITEM.

1. It is error to enter a decree against infant defendants, without assigning them a guardian ad litem; and though the infancy did not appear in the original proceedings, yet, if it be alleged in a petition for a rehearing (the decree being interlocutory,) a guardian ad litem ought to be appointed.

Roberts's Widow and Heirs v. Stanton, 129
2. A guardian ad litem appointed to prosecute an appeal on an infant's behalf, is not obliged to accept the appointment. A reasonable time ought, therefore, to be given him to consider whether he will accept, and to prepare for trial.

Wells's Heirs v. Winfree and others, 342

GUARDIAN AND WARD.

1. The taking a guardian's bond is not a ministerial but a judicial act, imposed by law on the court, which (and not its clerk) is to judge of the sufficiency of the security offered.

Page, Adm'r of Nelson, v. Taylor and Thornton, 492

2. A guardian's bond is to be executed, by him and his securities, in open court, and not in the clerk's office. Ib.

580 *HEIR AND ANCESTOR.

1. The heir of an heir is responsible upon an obligation, in which the heirs are bound; provided he have assets by descent from the obligor.

Waller's Ex'rs v. Ellis and others, 88
2. In declaring against such remote heir, he should be charged as heir of the heir of the obligor, or as heir of the obligor, with a videlicet, setting forth the intervening descent; but it is not necessary to state how he is heir. Ib.

3. An heir should be charged in the debt and detinet, but if he be charged in the detinet only, the defect is not fatal, after verdict, or upon general demurrer. Ib.

4. Where a bond is filed in a suit against the executor of the obligor, a copy may be declared upon, against the heirs in another court. Ib.

5. Rents and profits of land, the possession of which was unlawfully withheld by the ancestor in his lifetime, and by his heirs after his death, ought

not to be charged against his executors and heirs jointly, but apportioned among them according to their respective interests.

Roberts's Widow and Heirs v. Stanton, 129
6. In tracing a title to land in controversy, a decree in a suit between other parties is not evidence, against a person claiming under neither of them, that one of those parties was, in fact, as therein described, eldest son and heir of a former proprietor, it being incumbent upon the party wishing to avail himself of such fact, to prove it by evidence allunde, but such decree may be received (as a link in the chain of evidence) to prove the fact that it was rendered.

Lovell v. Arnold, 167

7. See Partnership, No. 7, 8.
Edgar v. Donnally and Jones, 387

HUSBAND AND WIFE.

1. A marriage settlement by a husband on his wife and her children by him, (though born in fornication,) is a conveyance to purchasers for a valuable consideration, as to the children as well as the wife, and not void as to creditors, no fraudulent intention being proved.

Coutts and others v. Greenhow, 363

2. A wife, who lived with her husband and was maintained by him, cannot, after his death, demand an account of profits which he received, of a separate estate settled upon her, no such demand having been made by her in his lifetime.

Moore's Ex'x v. Ferguson and others, 421

3. A husband's declarations that a child born in wedlock is not his, are not sufficient evidence to prove it illegitimate, notwithstanding it was born only three months after the marriage, and a separation between his wife and him soon after took place, by mutual consent.

Bowles v. Bingham, 442

4. See Promise, No. 4.

Scott's Ex'r v. Osborne's Ex'r, 413

5. When a widow marries again, the slaves which she held for the term of her life, as part of the estate of her first husband, belong to her second husband, and his representatives until her death.

M'Cargo, Ex'r of Callicott v. Callicott, 501

ILLEGITIMACY.

1. See Husband and Wife, No. 3.
Bowles v. Bingham, 442

IMMATERIAL ISSUE.

1. In an action on the case for a deceit, if the defendant plead that the cause of action did not accrue within five years next before suing out the writ, a replication that the fraud came to the plaintiff's knowledge within that time, is not good, and issue joined upon it should be set aside by the court as immaterial.

Callis v. Waddy, 511

IMPLICATION.

1. The doctrine of implied revocations of wills discussed.

Hughes v. Hughes's Ex'r, 209

2. See Intendment, No. 1.
Tunnell and Wife v. Watson and Wife, 263

INCUMBRANCE.

1. See Purchaser, No. 20, 21, 22.
Davison v. Waite, 537

INFANTS.

1. It is error to enter a decree against infant defendants without assigning them a guardian ad litem, and though the infancy did not appear in the original proceedings, yet, if it be alleged in a petition for a rehearing, (the decree being interlocutory,) a guardian ad litem ought to be appointed.

Roberts's Widow and Heirs v. Stanton, 129

2. The true construction of the 7th section of the act "reducing into one the several acts directing the course of descents," as to the case of an infant is, that if there be no mother, &c. and the estate was derived from the father or mother, the inheritance shall not be divided into moieties, but the whole shall go to the kindred of that parent from whom the estate was derived. And the law was the same as to the distribution of unbequeathed

581 personal estates, belonging to infants *who died between the 1st of October, 1793, and the 22d of January, 1802.

Addison and Wife v. Core's Adm'r, 379

3. A guardian ad litem appointed to prosecute an appeal on an infant's behalf, is not obliged to accept the appointment; a reasonable time ought, therefore, to be given him to consider whether he will accept, and to prepare for trial.

Wells's Heirs v. Winfree and others, 342

INJUNCTION.

1. See Plaintiff, No. 1.
2. An injunction to a judgment for purchase-money ought not to be dissolved until a good and sufficient deed for the land be tendered by the vendor.
Grantland v. Wright, 179
3. Where an injunction is perpetuated in part, the complainant ought, in general, not to be decreed to pay costs.
Ross v. Gordon, 289
4. In such case the error of awarding costs against the plaintiff is sufficient, upon his appeal, to reverse the decree, though right in every other respect.
Ib.
5. If a bill of injunction, to stay proceedings on a judgment, charge the plaintiff at law with having failed to do an act on which the equity of his claim depends, and, in his answer, he take no notice of that allegation, the court, on the hearing, will consider this an admission that he has not done the act in question, and will decree against him finally, without any exception to the answer, or interlocutory order, taking the bill for confessed in part.
Page's Ex'r v. Winston's Adm'r, 298
6. The judges of the court of appeals, or any one of them out of court, have power to award injunctions, which have been refused by the judge of any superior court of chancery; but this power is not possessed by the court of appeals.
Mayo v. Haines and Courts, 428
7. Where a bill in equity is filed to stay proceedings upon a usurious deed of trust, on the ground that the complainant had no opportunity at law to plead the usury, and prays for no discovery, but, on the contrary is ready to prove the fact, the court ought not to grant him relief against the usury, upon the condition of his paying the principal sum of money, (without interest,) but should altogether enjoin the trustee from selling until by some proper proceeding, to be instituted by the cestui que trust, he establish the validity of his contract, in which case the injunction should be dissolved, and, in the contrary event, perpetuated.
Marks v. Morris, 407
8. Upon the result of such proceeding, if the injunction be dissolved, the deed (being then cleansed of its usurious taint by the judgment of a competent tribunal) should be enforced as a security to compel the payment of the debt.
Ib.
9. See Chancery, No. 13.
10. *Defarges v. Lipscomb*, 451
11. If the vendor of land in a town assure the vendee (though not in writing) that a piece of ground, adjoining thereto, is always to be kept open as an alley; by which assurance the vendee is induced to make the purchase, or to give a higher price for the property; a court of equity will perpetually enjoin the vendor from shutting up such alley.
Trueheart v. Price, 468
12. *Quære*, in such case, whether the vendee, who has afterwards conveyed the premises with their appurtenances, but without warranty, to a third person, be a competent witness to prove that such verbal assurance was given to himself by the original vendor?
Ib.
13. See Relief, No. 7, 8.
- Davison v. Waite*, 527

INSURANCE.

1. See Fraud, No. 1, 2, and
- Hadfield v. Jameson*, 53

INTENDMENT.

1. No material fact not found expressly, or by very evident implication, in a special verdict can be supplied by intendment.
Tunnell and Wife v. Watson and Wife, 283

INTEREST ON MONEY.

See Tender and Refusal.

1. The 5th section of the act, passed January 20th, 1804, entitled "An act concerning the proceedings in courts of chancery, and for other purposes," did not authorize a judgment for interest upon the costs of suit.
M'Rea v. Brown, 46
2. Whether interest ought to be charged, in an administration account, is a question the decision of which may depend upon extraneous testimony.
White's Ex'r's v. Johnson and others, 285
3. Where a legatee is entitled to the profits of slaves, he is also entitled to interest thereon from the time of the receipt thereof by the executor, no good reason appearing for the failure to apply the principal to the use of the legatee.
Quarles's Ex'r v. Quarles and others, 821

4. In what case the clerk is to issue execution for interest, though not mentioned in the writing, and not demanded by the declaration. See Acts of Assembly, No. 7, 8, and
Wallace and others v. Baker, 334
5. In general, since the 1st of May, 1804, when interest is allowed in equity, it should not stop at the time when the balance of accounts is struck, nor at the date of the decree, but should run to the payment of such balance.
Snickers v. Dorsey, 505

INTEREST OF WITNESS.

1. A person acknowledging that he considers himself interested in the event of a suit is not a competent witness, though in fact not interested.
Richardson's Ex'r v. Hunt, 148
2. See Joint Obligation, No. 3.
- Braxton's Adm'r v. Hilyard*, 49

INTERLOCUTORY DECREE.

1. A decree empowering an executor, for payment of debts, to sell the lands of his testator, and report his proceedings in execution thereof to the court, is not final but interlocutory.
Goodwyn and others v. Miller and others, 42
2. The court of appeals has no jurisdiction to grant appeals from interlocutory decrees.
Gibson v. Randolph, 310

INTESTATES' ESTATES.

1. The true construction of the 7th section of the act "reducing into one the several acts directing the course of descents," as to the case of an infant, is, that if there be no mother, &c. and the estate was derived from the father or mother, the inheritance shall not be divided into moieties, but the whole shall go to the kindred of that parent from whom the estate was derived. And the law was the same as to the distribution of unbequeathed personal estate belonging to infants who died between the 1st of October, 1793, and the 23d of January, 1802.
Addison and Wife v. Core's Adm'r, 279

ISSUE AT LAW.

1. See Declaration, No. 8.
- Mangum v. Flowers*, 206
2. It is too late after issue joined to object to the court's jurisdiction on the ground of non-residence of the defendant.
Monroe (Governor) v. Redman, 240
3. The writ is part of the record, for the purpose of amendment only, where issue has been joined upon a plea to the action.
Payne and Fairfax v. Grim, 297
4. After issue joined on a plea to the action it is too late to move the court to dismiss the suit, on the ground of a defect in the writ, or for leave to file a plea in abatement.
Ib.
5. If the defendant plea several pleas, on which issues in fact are joined, and moreover demur to a replication by the plaintiff, who joins in demurrer, a jury ought not to be sworn to try the facts, but the court should decide upon the issue in law in the first place, that, if the demurrer be adjudged insufficient, an issue in fact may be made up, upon the said replication to be tried by a jury.
Green v. Dulaney, 518

ISSUE OUT OF CHANCERY.

1. Where the testimony to an important fact is such as to leave it doubtful, the court of equity ought to direct an issue to ascertain it.
Marshall v. Thompson, 412
2. See Attachment, No. 2.
- Hadfield v. Jameson*, note, 75, 76

JEOFAILS.

1. An heir should be charged in the debt and detinet; but if he be charged in the detinet only, the defect is not fatal after verdict, or upon general demurrer.
Waller's Ex'r's v. Ellis and others, 88
2. A count upon a writ of right describing the land demanded as a certain number of acres, part of a larger tract, and setting forth the boundaries of such larger tract, is sufficiently certain after verdict.
Lovell v. Arnold, 167
3. In debt upon an assigned bond, the declaration ought to charge a failure to pay the money to the obligee, and to each of the assignees, as well as to the plaintiff; and if it only charge a failure to pay to the plaintiff, it is too defective to maintain the action, and the defect is not cured by verdict.
Braxton's Adm'r v. Lipscomb, 232
4. In an action by a surviving executor, for a debt

due to the testator in his lifetime, if the declaration charge that the debt was not paid to the plaintiff, without charging that it was not paid to the testator, nor to either of the coexecutors, the defect is fatal, and not cured by verdict.

Buckner and Wife v. Blair, 336

5. See Declaration, No. 16.

Green v. Dulany, 518

6. In detinue if a negro woman, by name, and her "issue," (without naming them,) be demanded in the declaration, and the jury find the names of the issue, the defect (if any) is cured, and judgment should be entered according to the verdict.

Holladay and Wife v. Littlepage, 539

7. The failing to lay a separate value, as to each slave demanded, is an error which would be fatal on demurrer, but is cured by a verdict severing the values. Ib.

JOINT OBLIGATION.

1. In an action against the representatives of one of two joint obligors, in a bond dated in 1788, it is essential to state in the declaration, that that obligor survived his companion.

Braxton's Adm'r v. Hilyard, 49

2. The widow of one of two joint obligors is a competent witness, in support of the plea of infancy, in a suit against the other, or his representatives; and this, notwithstanding her husband died intestate; her interest, in such case, being remote and uncertain, and either equal between the parties, or against the party in whose favour her testimony operates.

Braxton's Adm'r v. Hilyard, 49

JOINT RIGHTS.

1. Where defendants holding lands by a joint title are decreed to surrender possession, and pay rents and profits, they are not jointly and severally, but only jointly liable.

Hite's Ex'r v. Paul's Heirs, 154

JUDGMENT.

1. See Costs, No. 1.

M'Rea v. Brown, 46

2. See Foreign Judgments, No. 1, 2.

Hadfield v. Jameson, 58

3. If a defendant plead and demur to the whole declaration, and the demurrer be overruled, judgment ought not to be entered without first trying the issues joined on the other pleas.

Waller's Ex'rs v. Ellis and others, 88

4. See Plaintiff, No. 1.

Cooke v. Piles, 151

5. In detinue, for several slaves, if their value be jointly assessed in the verdict, judgment ought not to be entered; but a writ of inquiry, to ascertain their respective values, should be awarded.

Cornwell v. Truss, 195

6. Judgment reversed, because the bill of exceptions stated the facts imperfectly.

Beattie v. Tabb's Adm'rs, 254

7. See Forthcoming Bond, No. 2.

Bronaugh's v. Freeman's Ex'rs, 266

8. Money levied by the sheriff upon a judgment which is afterwards reversed, cannot be recovered back, by general indebitatus assumpsit for money had and received, without proof that the money was actually received by the plaintiff, or applied to his use.

Isom v. Johns, 272

9. See Acts of Assembly, No. 6.

Royster and others v. Leake, 280

10. See Injunction, No. 3, 4.

Ross v. Gordon, 289

11. It seems that voluntary purchasers of lands subject to the lien of a judgment are personally responsible, in equity, to the creditor (the goods and chattels of the debtor being exhausted) for half the profits (or so much of them as may be sufficient to satisfy the judgment) jointly, and not pro rata; notwithstanding they hold tracts of unequal values, and by distinct conveyances.

Winston v. Johnson's Ex'rs, 305

12. It is error sufficient to reverse an office judgment, that the common order was entered before the plaintiff filed his declaration.

Waugh v. Carter, 333

13. A judgment cannot be entered against the defendant and sheriff, upon his return that the writ was executed, and the defendant escaped; the proper remedy against the sheriff, for an escape, being by a separate suit.

Waugh v. Carter, 333

14. When the appearance bail, having been admitted to defend the suit, afterwards waives his plea, judgment is to be entered against the principal, as well as the bail.

Wallace and others v. Baker, 334

15. Process of revivor is not necessary in the court of appeals, if the appellee died between verdict and judgment.

Buckner and Wife v. Blair, 336

16. A judgment by default cannot be entered when the writ has not been returned.

Winchester and others v. The Bank of Alexandria, 339

17. See Alexandria, No. 3.

18. In a suit against a mercantile company, if the names of the partners be omitted in the writ and declaration, and the writ be served on a person not named in either, a judgment against the company, for that person's failing to appear, cannot be sustained.

Scott & Co. v. Dunlop, Pollock & Co., 349

19. Quære, in such case whether any judgment by default could be sustained? Ib.

20. See Equity, No. 43.

Carter v. Cockrill and Rogers, 448

21. Where the lessor of the plaintiff in ejectment dies pending the suit, judgment is to be rendered as if he were still living; and possession is to be given under control of the court.

Mooberry and others v. Marye, 453

22. See Appeal, No. 18.

Shanks and M'Rea v. Fenwick, 478

23. A judgment entered in the clerk's office before the execution and return of the writ is erroneous, and cannot be supported by the writ's being returned executed to the term when such judgment is made final.

Crews and Higginbotham v. Garland, 491

24. In such case the bail bond should be quashed by the court of error; all the proceedings back to the common order, (inclusive,) set aside; and the cause remanded for farther proceedings. Ib.

25. It seems, that where an office judgment is reversed on the ground that the declaration is radically defective, the appellate court, if the writ be correct, will not enter judgment for the defendant, but send the cause back to be proceeded in from the writ.

Hill v. Harvey, 525

26. If a judgment of a county or corporation court, being for less than one hundred dollars, exclusive of costs, be reversed by a superior court of law, upon a writ of supersedeas; whereupon judgment is entered that the plaintiff take nothing by his bill, &c.; he cannot appeal to the court of appeals; notwithstanding his declaration demanded a larger sum than one hundred dollars.

Henry's Ex'r v. Elcan, 541

27. The damages allowed by law upon affirmance of a county court judgment by a superior court of law, are not to be reckoned as part of the "matter in controversy," for the purpose of giving the court of appeals jurisdiction. If, therefore, the judgment be for less than one hundred dollars, but would amount to more, by adding the damages upon affirmance, an appeal does not lie to the court of appeals.

Melson v. Melson's Adm'r, 542

JURISDICTION.

1. A court of equity will not relieve against a judgment on the ground of error in law only: it must appear that justice requires its interposition, and that the party was prevented from obtaining it by the legal forms of pleading, or by some fraud, accident, or mistake.

Kincald v. Cunningham, 1

2. A party having a good ground of defence at law, but failing to make it, without a competent excuse, cannot obtain relief in equity on the same ground.

The Auditor v. Nicholas, 31

3. See Awards, No. 2, and the note subjoined.

4. Where a complainant is appellant from a superior court of chancery, the court of appeals has no jurisdiction, unless the subject in controversy be a freehold, or franchise, or amount to one hundred and fifty dollars, exclusive of all costs incident to the original judgment, or arising from injunctions, or appeals, subsequent thereto.

Cook v. Piles, 151

5. Where an act of assembly authorizes a judgment, by motion, in a summary way, in the court of the county where the defendant resides, the plaintiff is bound to prove the defendant's residence, though no objection be made on his part; for the court will presume nothing in favour of a summary motion.

Mayor, &c. of Alexandria v. Hunter, 228

6. Quære, whether the proviso in the 24th section of the district court law extends to suits upon joint and several bonds with collateral conditions, to be performed by the principal obligor only, as well as to bonds with collateral conditions to be performed by the obligors jointly or severally?

Munroe (Governor) v. Redman, 240

7. It is too late, after issue joined, to object to the court's jurisdiction, on the ground of non-residence of the defendant. **1b.**

8. See Account, No. 5.

Triplet's Ex'rs v. Jameson, **242**

9. Where a cause has been once fully heard and decided in a court of common law, having competent jurisdiction of the case, a court of equity, ought not to interfere, unless fraud or surprise be suggested and proved, or some material adventitious circumstance had arisen, which could not have been foreseen or guarded against.

Fenwick v. M'Murdo and Fisher, **244**

10. To give a court of equity jurisdiction on the ground of discovery, it is not sufficient to charge that certain facts are known to the defendants, and ought to be disclosed by them; but it should be averred that the plaintiff is unable to prove such facts by other testimony.

Duvals v. Ross, **290**

11. The court of appeals has no jurisdiction to grant appeals from interlocutory decrees.

Gibson v. Randolph, **310**

12. The true construction of the 20th section of the act "for establishing a bank in the town of Alexandria," is that the power of granting appeals, writs of error, or supersedeas, is taken away from the appellate court, in relation only to judgments rendered pursuant to that act, and upon writs of capias ad respondendum executed according to the directions thereof.

Winchester and others v. the Bank of Alexandria, **330**

13. See Promise, No. 2.

Scott's Ex'r v. Osborne's Ex'r, **413**

14. If a judgment of a county or corporation court, being for less than one hundred dollars, exclusive of costs, be reversed by a superior court of law, upon a writ of supersedeas, whereupon judgment is entered, that the plaintiff take nothing by his bill, &c.; he cannot appeal to the court of appeals, notwithstanding his declaration demanded a larger sum than one hundred dollars.

Henry's Ex'r v. Elcan, **541**

15. The damages allowed by law, upon affirmance of a county court judgment by a superior court of law, are not to be reckoned, as part of the "matter in controversy," for the purpose of giving the court of appeals jurisdiction. If, therefore, the judgment be for less than one hundred dollars; but would amount to more, by adding the damages, upon affirmance, an appeal does not lie to the court of appeals.

Melson v. Melson's Adm'r, **542**

JURY.

1. It is not error in a court of equity to direct commissioners, instead of a jury, to state and report an account of the profits of land.

Roberts's Widow and Heirs v. Stanton, **120**

2. The weight of testimony to establish any fact (though it be a fact upon which a question of law arises) is a question belonging exclusively to the jury, unless it be withdrawn from their determination by a demurrer to evidence.

Hardaway v. Manson, **230**

3. Proof of a parol acknowledgment by a third person, that he received a sum of money from the plaintiff for the defendant's use, may with propriety be left to the jury, as a link in the chain of circumstances; such acknowledgment having been made at or about a time when the defendant, or some person for him, must have paid the money in question; and by a person competent to charge himself by an ordinary receipt. But the death of such person is not sufficient ground for admitting the evidence.

Holladay, Ex'r of Littlepage v. Littlepage, **316**

585 4. In trials at law, where the evidence exhibited is legally admissible, but contradictory, it is most proper to be left to the consideration of the jury.

Shanks and M'Rae v. Fenwick, **478**

JUSTIFICATION.

1. In trespass quare clausum fregit, the declaration charging the trespass generally, in a parish and county, if the defendant plead not guilty, and a justification "that the land in question was his freehold," the plaintiff must reply to the justification as well as join issue upon the plea of not guilty.

Mangum v. Flowers, **205**

LAND COMMISSIONERS.

1. See Lands, No. 7, 8, 9, 10.

Ross v. Keewood, Hoofacre and Smith, **141**

LANDS.

1. See Award, No. 1, and

Kincaid v. Cunningham, **1**

2. A decree empowering an executor, for payment

of debts, to sell the lands of his testator, and report his proceedings in execution thereof to the court, is not final, but interlocutory.

Goodwyn and others v. Miller and others, **42**

3. It is not error in a court of equity to direct commissioners instead of a jury to state and report an account of the profits of land.

Roberts's Widow and Heirs v. Stanton, **120**

4. Rents and profits of land, the possession of which was unlawfully withheld by the ancestor in his lifetime, and by his heirs after his death, ought not to be charged against his executors and heirs jointly, but apportioned among them, according to their respective interests.

1b.

5. A patent, though not registered, is good in equity against a purchaser having notice; and quære, is it not also good at law?

1b.

6. In such case, information of the existence of the patent, by neighbourhood report, and from a person declaring he had seen it, together with knowledge of possession and cultivation by the tenants of the patentee, is sufficient notice to bar the laying a warrant upon the land as waste and unappropriated.

1b.

7. The land commissioners appointed under the act of May, 1779, c. 13, had full power to determine without appeal the rights of persons claiming as settlers, or by purchase from settlers or others, under the authority of the Loyal and Greenbrier companies, and to direct patents to be issued from the land-office of the commonwealth to persons so entitled, and this as well before as after the decision of the court of appeals. In May, 1783, establishing the rights of those companies.

Ross v. Keewood, Hoofacre and Smith, **141**

8. The remedy of persons aggrieved by decisions of those commissioners was by caveat in the general court, to prevent the patent from emanating; and if the party had such an equity as would, on a caveat, have entitled him to a preference, it was no ground for a bill in equity to set aside the patent, unless he was prevented by fraud or accident from prosecuting a caveat.

1b.

9. Where a judgment of the commissioners was, that the claimant should obtain a patent upon paying the surveyor's fees and purchase-money to the company, or their agent, on or before a subsequent day, with interest until payment, and that otherwise the land should revert to the company; a tender to the company's agent within the time limited was sufficient to prevent the forfeiture.

1b.

10. In such case, upon refusal of the company's agent to receive the money, the person making the tender was not responsible to the company, or its assignee, for interest after the day.

1b.

11. Where defendants holding lands by a joint title are decreed to surrender possession, and pay rents and profits, they are not jointly and severally, but only jointly liable.

Hite's Ex'r v. Paul's Heirs, **154**

12. A decree against an executor for rents and profits received by the testator, ought expressly to direct that he pay the sum in question out of the assets in his hands to be administered, otherwise it is to be understood as against him personally, and, therefore, erroneous.

1b.

13. A piece of ground being sold at public auction, expressly according to certain metes and bounds, (then and there shown to the purchaser before he became the highest bidder,) "be the same more or less;" he is not entitled to any compensation for a deficiency, although the previous advertisement described the tenement as containing more than the actual quantity: neither is the case varied by subsequent articles of agreement under seal, (written by the purchaser and signed by the vendor, for the purpose of binding the vendor to make a title,) in which the terms of the sale are referred to, but the quantity of ground, mentioned in the advertisement, is specified, omitting the words "more or less." The vendor is not precluded by such articles from proving the terms of sale by parol testimony only.

Grantland v. Wight, **170**

14. In such case it seems, however, that if the chancellor decree a compensation to the purchaser, and the vendor does not appeal, the court of appeals will not correct the error to his injury upon an appeal by the other party.

1b.

15. An injunction to a judgment for purchase-money ought not to be dissolved, until a good and sufficient deed for the land be tendered by the vendor.

Grantland v. Wight, **170**

16. A debtor holding an equitable title to land may convey it by deed of trust to secure a creditor, and a court of equity, on a bill exhibited by the cestui que trust, will compel another creditor (who with notice of such deed, (though not recorded,) has obtained a conveyance of the legal title, by means of an order from the debtor) to convey such legal title

to the trustee for the purpose of applying it to the object of the trust.

Lambert v. Nanny. 196
17. In such case the notice is binding if received at any time before the conveyance. Ib.

18. A debtor holding an equitable title to land, having conveyed it by deed of trust to secure a creditor, and having afterwards caused a conveyance of the legal title to be made to another creditor, who had notice of the prior deed, need not be a party to a bill in equity exhibited by the cestui que trust, to compel a conveyance of the legal title, and performance of the trust. Ib.

19. See Lease, No. 1.

Hyer v. Shobe. 200
20. It seems that, under the act of 1785, c. 61, a right of entry into lands by a person entitled as special occupant, is devisable though the devisee never was in actual possession. See Entry, (Right of.) and Hyer v. Shobe.

21. By a devise of a tract of land in fee-simple, together with all the crops thereon, whether gathered or growing at the time of the testator's death, not only the crops made the year the testator died, but those of the preceding year, remaining on the land, and those brought thither from other plantations to be stored, will pass.

Carnagy and Wife v. Martin's Ex'rs. 234
22. Under the 30th section of the act of 1748, c. 1, a judgment in favour of a petitioner for land forfeited by non-payment of quitrents, gave him a preferable right to a grant of the land, which right he could not lose by failure to apply for the grant, but only by a judgment against him in favour of another petitioner.

Norvell v. Camm and Wife. 257
23. A treasury land-warrant cannot be laid upon land as "waste and unappropriated," which is in the possession of a person holding under a patent and settlement. Ib.

24. Whenever it appears that the vendor's own title deeds must have discovered to him the true quantity of land, he is bound to make compensation for a deficiency, though his deed to the vendee expresses a quantity "more or less."

Duvals v. Ross. 290
25. It seems that voluntary purchasers of lands, subject to the lien of a judgment, are personally responsible in equity to the creditor (the goods and chattels of the debtor being exhausted) for half the profits (or so much of half as may be sufficient to satisfy the judgment) jointly and not pro rata; notwithstanding they hold tracts of unequal values, and by distinct conveyances.

Winston v. Johnson's Ex'rs. 305
26. The point in Vance v. Walker (3 H. & M. 238) again solemnly determined.

Walker's Ex'r v. Aicklin. 357
27. Prior to the act of 1785, "concerning partitions and joint rights and obligations," two men, who were partners in a drove of cattle, applied part thereof to a joint purchase of a settlement-right to land, and one of them died; the survivor had the land surveyed by virtue of a land-office treasury-warrant, and sold it to a third person, who, having notice of the partnership right, obtained a grant for the whole from the commonwealth; a purchaser from the heir of the deceased partner was, nevertheless, entitled in equity to his share of the land.

Edgar v. Donnelly and Jones. 387
28. In such case the surviving partner and the purchaser from him being defendants to the bill, the heir of the deceased partner is not a necessary party, a deed from him conveying all his right to the plaintiff being produced. Ib.

29. See Vendor and Vendee, No. 4.

Trueheart v. Price. 468

30. See Evidence, No. 4. Ib.

31. See Construction of Laws, No. 5, 6.

Claughton and others v. Macnaughton. 513

32. See Relief, No. 7, 8.

Davidson v. Waite. 527

33. Land encumbered by mortgage is liable (in possession of a purchaser with notice) for the sum intended to be secured by the mortgage, but not for other claims of the mortgagee against the mortgagor, especially if the purchaser has had no notice of such claims. It is therefore not liable for a deficiency or quantity in another tract of land for the title of which the mortgage is a collateral security, there having been no stipulation, known to the purchaser, that the mortgaged premises should be liable for such deficiency. Ib.

LAND-WARRANT.

1. A treasury land-warrant cannot be laid upon land, as "waste and unappropriated," which is in the possession of a person holding under a patent and settlement.

Norvell v. Camm and Wife. 257

LEASE.

1. It appearing from a demurrer to the evidence, in ejectment, that the right of the lessor of the plaintiff originated in a lease to I. S., his heirs and assigns, for the lives of his sons A. S. and M. S.; and his grandson A. S., jun., renewable to the said I. S., his heirs and assigns forever; and that I. S., dying intestate, his heir at law devised the land to the lessor of the plaintiff; the defendant claiming under a conveyance from the said A. S., jun. and others, grandchildren of the said I. S.; a judgment for the plaintiff was affirmed, 587 though it did not certainly appear, "from the demurrer, whether the said A. S., M. S. and A. S., jun., were yet living or not.

Hyer v. Shobe. 200
2. A deed of lease from one of two copartners, sealed with his seal, and in terms binding himself only, is not admissible evidence in support of an avowry laying a demise by the copartners; notwithstanding the deed be expressed as "for himself and his partner," and it be proved that the other partner knew of the demise, and was satisfied with it.

Tuttle v. Eskridge. 330

LEGACY.

1. By a bequest of "all my household goods and furniture, except my plate and watch," everything about the house which had been usually held and enjoyed therewith, and that would tend to the comfort and accommodation of the householder, will pass.

Carnagy and Wife v. Martin's Ex'rs. 234
2. A legacy to a wife for her life, and afterwards to the children of the marriage, is no satisfaction of a promise to the husband of the amount of a specific debt, (when recovered,) to be applied to a particular purpose, there being no declaration in the will that the legacy was intended as satisfaction for the promise.

Scott's Ex'r v. Osborne's Ex'r. 413
3. If the plaintiff and defendant claim under the same executory bequest, and a case be agreed, submitting the right to be adjudged, according to the legal construction of the will, without saying any thing about the executor's assent to the legacy, the court will assume that as a fact between the present parties.

Royall v. Eppes, Adm'r of Royall. 479

LEGATEES.

1. A legatee is not entitled to a decree, but on the terms of giving bond and security (if demanded by the executor) to refund, in case it be needful, for the payment of debts.

Clay v. Williams and others. 129
Stovall's Ex'r v. Woodson and Wife, S.P., 303

2. All the residuary legatees or distributees ought to be parties to a suit for division of a residuum. (1) Richardson's Ex'r v. Hunt. 148

3. Where slaves are specifically bequeathed to a child, when he or she shall attain the age of 21 years, or shall marry, and no provision is made expressly for maintenance in the mean time, their intermediate profits (if not otherwise disposed of) do not pass by a general residuary clause, but go to the legatee.

Quarles's Ex'r v. Quarles and others. 321
4. In such case the legatee is also entitled to interest on the profits from the time of the receipt thereof by the executor: no good reason appearing for his failure to apply the principal to the use of the legatee.

Quarles's Ex'r v. Quarles and others. 321
5. Though specific legatees jointly sue, the decree ought to be several, conformably to their respective rights. Ib.

6. If after the qualification of an executor, he die without closing his administration, and the legatees (without the intervention of an administrator de bonis non) take possession of the assets, a court of equity, on a bill for discovery, will consider such of them as are solvent responsible to creditors for the whole amount, and will not give them credit for the proportions of such as prove to be insolvent: yet, in decreeing against

(1) On this subject the following point has been decided in the case of Branch's Adm'r v. Booker's Adm'r, March 20, 1812. Where a division of a testator's estate, in pursuance of his will, is not to be made at one and the same time, but at the several periods when any one or more of his children shall separate from the family, it is not necessary that all the legatees be made parties to each suit in chancery for a division, but only those entitled to participate in the division then in question.—Note in Original Edition.

the solvent legatees, the court will not charge them jointly, but pro rata.

Hopkirk v. Dennis and others, 328
7. It seems that a specific legatee is not a competent witness to disprove the claim of a creditor against the estate of the testator.

Temple's Ex'r v. Ellett's Ex'r, 452

LIEN.

1. It seems that voluntary purchasers of lands subject to the lien of a judgment are personally responsible, in equity, to the creditor (the goods and chattels of the debtor being exhausted) for half the profits (or so much of half as may be sufficient to satisfy the judgment) jointly, and not pro rata; notwithstanding they hold tracts of unequal values, and by distinct conveyances.

Winston v. Johnston's Ex'rs, 305

LIFE ESTATE.

1. An executor or administrator, holding slaves in which his testator or intestate had only an estate for life, terminable upon his dying without issue living at the time of his death, (which event actually took place,) may be charged in defining personally, and not as executor or administrator.

Royall v. Eppes, Adm'r of Royall, 479

2. When a widow marries again, the slaves which she held for the term of her life, as part of the estate of her first husband, belong to her second husband, and his representatives, until her death.

M'Cargo, Ex'r of Callicott v. Callicott, 501

LIMITATIONS OF TIME.

1. The circumstance that a plaintiff is a British subject, and was entitled to his claim 588 *before the year 1776, is not, in itself, sufficient to protect him against the operation of the act of limitations.

Beattie v. Tabb's Adm'rs, 254

2. A mutual understanding and agreement between a debtor and creditor, that suit shall not be brought upon an account until the debtors shall have gone to Europe and returned, is a good bar to the act of limitations during his absence from this country, and may be given in evidence to prevent the court's expunging from such account items appearing to have been due five years before his death.

Holladay, Ex'r of Littlepage v. Littlepage, 316

3. See Promise, No. 1, 2, and

Scott's Ex'r v. Osborne's Ex'r, 413

4. It is no answer to the bar set up by the plea of the act of limitations, that the plaintiff sued out a writ for the same cause of action within the time prescribed by the act, which writ was executed and returned, and went off the docket for want of formality.

Callis v. Waddy, 511

5. In an action on the case for a deceit, if the defendant plead that the cause of action did not accrue within five years next before suing out the writ, a replication that the fraud came to the plaintiff's knowledge within that time is not good; and issue joined upon it should be set aside by the court as immaterial.

Ib.

6. See Loan, No. 2, 3.

Gay v. Moseley, 543

LOAN.

1. See Mortgage, No. 1, and

King v. Newman, 40

2. A slave, lent either before or after the act to prevent frauds and perjuries, having remained, since the commencement of that act, more than five years in the loanee's possession, without any demand made on the part of the lender, must be considered the absolute property of the person so remaining in possession, as to creditors of, and purchasers under him.

Gay v. Moseley, 543

3. And proof of notice of the loan, or of a deed of trust from the lender, recorded in the court of a county wherein neither of the parties lived, is not sufficient to do away the effect of such possession.

Ib.

LOYAL COMPANY.

1. See Lands, No. 7, 8, 9, 10.

Ross v. Keewood, Hoofacre and Smith, 141

LUNACY.

1. A commission of lunacy against a testator is not a revocation of a will which he made when of sound mind.

Hughes v. Hughes's Ex'r, 209

MAINTENANCE.

1. Where slaves are specifically bequeathed to a

child when he or she shall attain the age of 21 years, or shall marry, and no provision is made expressly for maintenance in the mean time, their intermediate profits, if not otherwise disposed of, do not pass by a general residuary clause, but go to the legatee.

Quarles's Ex'r v. Quarles and others, 331

2. In such case the legatee is also entitled to interest on the profits from the time of the receipt thereof by the executor, no good reason appearing for his failure to apply the principal to the use of the legatee.

Ib.

MALICIOUS PROSECUTION.

1. In the action on the case for conspiracy, as well as in the action for malicious prosecution, an averment in the declaration that the prosecution was false and malicious is not sufficient, but it must be averred to have been without probable cause.

Kirtley v. Deck and others, 10

MARRIAGE.

1. See Husband and Wife, No. 2.

Bowles v. Bingham, 442

MARRIAGE CONTRACT.

1. Property claimed by a son-in-law, under a marriage contract with a decedent in his lifetime, and recovered by a decree against the administratrix and distributees, is not in any manner responsible to the creditors of such decedent, unless it appear that such decree was obtained by fraud and collusion between the parties.

Clay v. Williams and others, 128

2. See Promise, No. 1, and

Scott's Ex'r v. Osborne's Ex'r, 413

MARRIAGE SETTLEMENT.

1. A marriage settlement by a husband on his wife and her children by him, (though born in fornication,) is a conveyance to purchasers for valuable consideration as to the children, as well as the wife, and not void as to creditors, no fraudulent intention being proved.

Coutts and others v. Greenhow, 363

2. A wife, who lived with her husband and was maintained by him, cannot, after his death, demand an account of profits which he received, of a separate estate settled upon her, 569 *no such demand having been made by her in his lifetime.

Moore's Ex'r v. Ferguson and others, 431

MAXIMS.

1. In the case of legal rights, the principle caveat emptor properly applies; but equitable rights may be lost by a sale to a bona fide purchaser without notice.

Taylor v. Stone, 314

MILLS.

1. Under circumstances, the payment of the damages assessed in a mill case ought to be presumed, especially if a great length of time has elapsed, during which the owner of the land to whom such damages were assessed, acquiesced in the building of the mill without claim or objection on his part.

Young v. Price and others, 534

MISTAKE.

1. What evidence of circumstances prior and subsequent to the date of a deed of gift, is sufficient to set it aside on the ground of mistake on the part of the donor, and fraud on the part of the writer.

Jones v. Robertson, 187

2. Proof of subsequent declarations and acts of the donor (though not admissible taken singly) may be received, under total absence of testimony applying to the time of the contract, and in connexion with corroborating circumstances, to show that the writing was misunderstood, or misrepresented, at the time of signature.

Ib.

3. The point in Vance v. Walker (3 H. & M. 288,) again solemnly determined.

Walker's Ex'r v. Aicklin, 357

4. In debt upon a bill penal, if, through a mistake of the clerk, the writ be issued for dollars, when it should be pounds; and (the plaintiff's declaration being filed, conformably with the bill penal) judgment by default be entered against the defendant and his appearance bail, for so many pounds; the bail, being informed of the mistake before he signed the bail-bond, and having made no defence at law, is not entitled to relief in equity.

Carter v. Cockrill and Rogers, 448

MONEY HAD AND RECEIVED.

1. Money levied by the sheriff upon a judgment which is afterwards reversed, cannot be recovered back by general indelbitatus assumpsit for money had and received, without proof that the money was actually received by the plaintiff, or applied to his use.

Isom v. Johns, 272

MORTGAGE.

1. Whether a contract is a mortgage or a conditional sale, "depends on the whole circumstances of the contract, and not the mere written evidence of it:" the great point to be considered being, whether the parties intended to treat of a purchase, and, contemplating the value of the commodity, fixed the price, or whether the object was a loan of money, and a security or pledge for repayment.

King v. Newman, 40

2. An action of covenant does not lie upon the proviso in a mortgage deed, "that upon payment of a certain sum of money, the deed shall be void," there being no express covenant for payment of the money.

Drummond's Adm'r's v. Richards, 337

3. If a mortgagee of lands (though not in his actual use or occupation) suffer them to be sold for taxes, quære, whether he shall be indemnified out of other property bona fide conveyed by the mortgagor to a mere volunteer?

Coutts and others v. Greenhow, 363

4. If a purchaser of land, subject to encumbrance by mortgage, apply to equity for relief against a judgment in ejectment, the decree ought not to be "that the injunction be dissolved, unless the complainant pay the sum due to the mortgagee;" but "that the mortgaged premises be sold, unless," &c.; and that, out of the proceeds of the sale, the sum due be paid to the mortgagee, and the surplus, if any, to the complainant.

Davison v. Waite, 527

5. In such case, if the dower interest of the mortgagor's wife has been relinquished to the complainant, but not to the mortgagee, the court, in directing the sale, ought to guard the complainant's right to such dower interest.

Ib., 527

6. Land encumbered by mortgage is liable (in possession of a purchaser with notice) for the sum intended to be secured by the mortgage, but not for other claims of the mortgagee against the mortgagor, especially if the purchaser has had no notice of such claims. It is, therefore, not liable for a deficiency of quantity in another tract of land for the title of which the mortgage is a collateral security, there having been no stipulation, known to the purchaser, that the mortgaged premises should be liable for such deficiency.

Ib., 527

MOTION.

1. On a motion against a clerk for the penalty incurred by failing to pay the taxes on law process, he may defend himself by showing that he used due diligence to get a commissioner of the revenue to compare his account with the books in his office, and certify thereupon as the law requires, and 590 was prevented "by the default of such commissioner from obtaining a quietus; and if he failed to make such defence, without a competent excuse, he cannot obtain relief in equity on the same ground.

The Auditor v. Nicholas, 31

2. See Summary Proceedings, No. 1, 2, 3.

Mayor and Commonalty of Alexandria v.

Hunter, 228

3. See Execution, No. 3.

Royster and others v. Leake, 280

NEW TRIAL.

1. The court of appeals will not reverse a judgment, on the ground that the court below refused to sign a bill of exceptions to its opinion overruling a motion for a new trial, if the weight of evidence exhibited supports the verdict.

Shanks and M'Rae v. Fenwick, 478

NOTICE.

1. A patent, though not registered, is good in equity against a purchaser having notice; and quære, is it not good at law?

Roberts's Widow and Heirs v. Stanton, 129

2. In such case, information of the existence of the patent, by neighborhood report, and from a person declaring he had seen it, together with knowledge of possession and cultivation by tenants of the patentee, is sufficient notice to bar the laying a warrant upon the land as waste and unappropriated.

Ib., 129

3. Quære, is a patent not registered good, either

at law or in equity, against a purchaser without notice, no proof appearing of visible possession or cultivation by the patentee in person, or by his tenants?

Ib., 129

4. A debtor holding an equitable title to land, may convey it, by deed of trust, to secure a creditor; and a court of equity, on a bill exhibited by the cestuy que trust, will compel another creditor (who, with notice of such deed, (though not recorded,) has obtained a conveyance of the legal title by means of an order from the debtor) to convey such legal title to the trustee, for the purpose of applying it to the object of the trust.

Lambert v. Nanny, 196

5. In such case the notice is binding if received at any time before the conveyance.

Ib., 196

6. On a motion by the mayor and commonalty of Alexandria to recover money due by assessment for paving the streets, the notice must state the true amount of the assessment due from the defendant; for, if the sum in proof be different from that in the notice, the court will not give judgment for the sum actually due.

Mayor and Commonalty of Alexandria v.

Hunter, 228

7. See Executions, No. 2.

Bronaugh's v. Freeman's Ex'r, 206

8. A failure to set forth in a commissioner's report, that notice was given to the parties, is not an error sufficient to reverse a decree, if no exception to the report appear in the record.

White's Ex'r's v. Johnson and others, 286

9. Want of notice of the time and place of a commissioner's taking an account, or the court's acting upon the report too soon, are not sufficient reasons for a bill of review: such objections not having been taken (as they ought to have been) before the rendition of the decree.

Winston v. Johnston's Ex'r's, 305

10. In the case of legal rights, the principle caveat emptor properly applies; but equitable rights may be lost by a sale to a bona fide purchaser without notice.

Taylor v. Stone, 314

11. See Lands, No. 7.

Edgar v. Donnelly and Jones, 337

12. See Equity, No. 40.

Ib., 337

13. See Mortgage, No. 6.

Davison v. Waite, 527

14. See Slaves, No. 15, 16.

Gay v. Moseley, 543

OBLIGATION.

1. The heir of an heir is responsible upon an obligation, in which the heirs are bound, provided he have assets by descent from the obligor.

Waller's Ex'r's v. Ellis and others, 88

2. In declaring against such remote heir, he should be charged as heir of the heir of the obligor, or as heir of the obligor, with a videlicet, setting forth the intervening descent; but it is not necessary to state how he is heir.

Ib., 88

OCCUPANCY.

1. It seems, that under the act of 1785, c. 61, a right of entry into land, by a person entitled as special occupant, is devisable by him, though he never was in actual possession, and another person held the land, with an adverse claim, at the time of the devise.

Hyer v. Shobe, 300

ONUS PROBANDI.

1. Where an act of assembly authorizes a judgment, by motion in a summary way, in the court of the county where the defendant resides, the plaintiff is bound to prove the defendant's residence, though no objection be made on his part; for the court will presume nothing in favour of a summary motion.

Mayor, &c. of Alexandria v. Hunter, 228

2. See Contract, No. 5, and Equity, No. 31.

Page's Ex'r v. Winston's Adm'r, 206

3. In a suit for freedom, a finding by the jury, from inspection, that the plaintiff is a white person, is conclusive in his favour, unless it be proved, on the other side, that he descended in the maternal line from a slave.

Hook v. Nanny Pagee and others, 370

PARTIES.

1. All the residuary legatees or distributees ought to be parties to a suit for division of a residuum.

Richardson's Ex'r v. Hunt, 148

But see note to Legatees, No. 2.

2. In tracing a title to land in controversy, a decree in a suit between other parties is not evidence,

against a person claiming under neither of them, that one of those parties was, in fact, as therein described, eldest son and heir of a former proprietor, it being incumbent upon the party wishing to avail himself of such fact, to prove it by evidence aliunde, but such decree may be received (as a link in the chain of evidence) to prove the fact that it was rendered.

Lovell v. Arnold, 107

3. A debtor holding an equitable title to land, having conveyed it by deed of trust to secure a creditor, and having afterwards caused a conveyance of the legal title to be made to another creditor, who had notice of the prior deed, need not be a party to a bill in equity exhibited by the cestui que trust, to compel a conveyance of the legal title, and performance of the trust.

Lambert v. Nanny, 196

PARTNERSHIP.

1. Freight (though by the terms of a charter-party payable monthly if required) is not to be recovered, where the voyage was never completed, but the vessel condemned by a foreign tribunal, in consequence of a fraud attempted by one of the owners intrusted by the rest with the care of the vessel, though no proof appear of their assenting to such fraudulent act.

Hadfield v. Jameson, 58

2. In such case, the copartners are not entitled to compensation for the loss, except against the fraudulent partner.

Ib.

3. It seems, too, that, moreover, the copartners collectively (as well as the fraudulent partner individually) are responsible to a third person for a loss occasioned by the fraud.

Ib.

4. A deed of lease from one of two copartners, sealed with his seal, and in terms binding himself only, is not admissible evidence in support of an avowry laying a demise by the copartners; notwithstanding the deed be expressed as "for himself and his partner," and it be proved that the other partner knew of the demise and was satisfied with it.

Tuttle v. Eskridge, 380

5. In a suit against a mercantile company, if the names of the partners be omitted in the writ and declaration, and the writ be served on a person not named in either, a judgment against the company, for that person's failing to appear, cannot be sustained.

Scott & Co. v. Dunlop, Pollock & Co., 349

6. Quære, in such case, whether any judgment by default could be sustained?

Ib.

7. Prior to the act of 1786, "concerning partitions, and joint rights and obligations," two men, who were partners in a drove of cattle, applied part thereof to a joint purchase of a settlement right to land, and one of them died; the survivor had the land surveyed by virtue of a land-office treasury-warrant, and sold it to a third person, who, having notice of the partnership right, obtained a grant of the whole from the commonwealth: a purchaser from the heir of the deceased partner was, nevertheless, entitled in equity to his share of the land.

Edgar v. Donnally and Jones, 387

8. In such case, the surviving partner and the purchaser from him being defendants to the bill, the heir of the deceased partner is not a necessary party; a deed from him conveying all his right to the plaintiff being produced.

Ib.

PATENT FOR LAND.

1. A patent, though not registered, is good in equity against a purchaser having notice: and quære, is it not also good at law?

Roberts's Widow and Heirs v. Stanton, 129

2. In such case information of the existence of the patent, by neighbourhood report, and from a person declaring he had seen it, together with knowledge of possession and cultivation by tenants of the patentee, is sufficient notice to bar the laying a warrant upon the land as waste and unappropriated.

Ib.

3. Quære, is a patent not registered good, either at law or in equity, against a purchaser without notice, no proof appearing of visible possession or cultivation by the patentee in person, or by his tenants?

Ib.

4. See Lands, No. 7, 8, 9, 10.

Ross v. Keewood, Hoofacre and Smith, 141

5. Under the 80th section of the act of 1748, c. 1, a judgment in favour of a petitioner for land forfeited by non-payment of quitrents, gave him a preferable right to a grant of the land, which right he could not lose by failing to apply for the grant,

but only by a judgment against him in favour of another petitioner.

Norvell v. Camm and Wife, 287

6. A treasury land-warrant cannot be laid upon land, as "waste and unappropriated," which is in the possession of a person holding under a patent and settlement.

Ib.

593

*PAYMENT.

1. Proof of a parol acknowledgment by a third person, that he received a sum of money from the plaintiff for the defendant's use, may with propriety be left to the jury, as a link in the chain of circumstances: such acknowledgment having been made at or about a time when the defendant, or some person for him, must have paid the money in question; and by a person competent to charge himself by an ordinary receipt. But the death of such person is not sufficient ground for admitting the evidence.

Holladay, Ex'r of Littlepage, v. Littlepage, 316

PENALTY.

1. On a motion against a clerk for the penalty incurred by failing to pay the taxes on law process, he may defend himself by showing that he used due diligence to get a commissioner of the revenue to compare his account with the books in his office, and certify thereupon as the law requires, and was prevented by the default of such commissioner from obtaining a quietus. And if he fail to make such defense, without a competent excuse, he cannot obtain relief in equity on the same ground.

The Auditor v. Nicholas, 81

PLAINTIFF.

1. Where a complainant is appellant from a superior court of chancery, the court of appeals has no jurisdiction, unless the subject in controversy be a freehold, or franchise, or amount to one hundred and fifty dollars, exclusive of all costs incident to the original judgment, or arising from injunctions, or appeals, subsequent thereto.

Cooke v. Piles, 151

2. Where a judgment is perpetually enjoined in part, the plaintiff in equity ought in general not to be decreed to pay costs.

Ross v. Gordon, 289

3. In such case, the error of awarding costs against the plaintiff is sufficient, upon his appeal, to reverse the decree, though right in every other respect.

Ib.

PLEADING.

1. See Heir and Ancestor, No. 1, 2, 3.

Waller's Ex'r's v. Ellis and others, 98

2. See Bonds, No. 5.

Ib.

3. Under the act of 1792, (1 Rev. Code, c. 66, s. 40,) the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence, notwithstanding such several matters be inconsistent with each other.

Ib.

4. If a defendant plead and demur to the whole declaration, and the demurrer be overruled, judgment ought not to be entered without first trying the issues joined on the other pleas.

Waller's Ex'r's v. Ellis and others, 98

5. In trespass quare clausum fregit, the declaration charging the trespass generally in a parish and county, if the defendant plead not guilty, and a justification "that the land in question was his freehold," the plaintiff must reply to the justification, as well as join issue upon the plea of not guilty.

Mangum v. Flowers, 205

6. It is too late after issue joined to object to the court's jurisdiction on the ground of non-residence of the defendant.

Monroe (Governor) v. Redman, 240

7. In an action of covenant upon articles by which the defendants authorized the plaintiff to take into his possession certain mills, to put the same in complete repair and to make such alterations in the construction thereof, as should, in his opinion, be best calculated to give them their full power and effect; engaging, that they, at all times, would be ready to pay the amount of the expenditures incurred, on the production of proper vouchers; and that the plaintiff should retain the possession of the premises for a term of years, paying a certain rent; provided that in all the repairs and improvements thus left to his discretion, he would not consider his own temporary accommodation only, but the permanent advan-

tage of the property also, and proportion the expenditures accordingly; "upon the plea of covenants performed," and issue, the question, whether the plaintiff had complied with the terms of the proviso, was properly before the jury.

Fenwick v. M'Murdo and Fisher. 244

8. The writ is part of the record, for the purpose of amendment only, where issue has been joined upon a plea to the action.

Payne and Fairfax v. Grim. 297

9. After issue joined on a plea to the action it is too late to move the court to dismiss the suit, on the ground of a defect in the writ, or for leave to file a plea in abatement.

Ib.

10. In detinue for slaves parol evidence to prove that a deed was executed for the purpose of defrauding creditors, and therefore void, is admissible upon the plea of non detinet, and issue.

Stratton v. Minnis. 329

11. When the appearance bail, having been admitted to defend the suit, afterwards waives his plea, judgment is to be entered against the principal as well as the bail.

Wallace and others v. Baker. 334

12. It is no answer to the bar set up by the plea of the act of limitations, that the plaintiff sued out a writ for the same cause of action, within the time prescribed by the act, which writ was executed and returned and went off the docket for want of formality.

Callis v. Waddy. 511

13. See Action, No. 10. Ib.

503 *POSSESSION.

1. A deed of above thirty years' standing requires no other proof of its execution than the bare production, where the possession has gone according to its provisions, and there is no apparent erasure or alteration.

Roberts's Widow and Heirs v. Stanton. 129

2. It seems, that under the act of 1786, c. 63, a right of entry by a person entitled as special occupant into lands is devisable, though the deviser never was in possession. See Entry, (Right of,) and Hyer v. Shobe. 200

3. It seems now settled that an absolute deed of slaves, or other personal property, the possession of which remains with the vendor, is fraudulent, per se, as to creditors.

Alexander v. Deneale. 341

4. Where the lessor of the plaintiff in ejectment dies pending the suit, judgment is to be rendered as if he were still living; and possession to be given under control of the court.

Mooberry and others v. Marye. 453

5. A case agreed in ejectment finding the lease, entry, and ouster, in the declaration mentioned, sufficiently admits that all the defendants who agreed the case are in possession of the land in controversy, unless there be an express finding to the contrary.

Ib.

6. A slave, lent either before or after the act to prevent frauds and perjuries, having remained, since the commencement of that act, more than five years, in the loaner's possession, without any demand made on the part of the lender, must be considered the absolute property of the person so remaining in possession, as to creditors of, and purchasers under him.

Gay v. Moseley. 548

7. And proof of notice of the loan, or of a deed of trust from the lender, recorded in the court of a county wherein neither of the parties lived, is not sufficient to do away the effect of such possession.

Ib.

POWER.

1. As far as circumstances will permit, a court of equity will supply any defect in the execution of a power given by a will to executors or trustees, to sell lands for payment of debts or legacies. A conveyance, therefore, by one executor or trustee only, (instead of three,) but in all other respects conformable to the intention of the testator in creating the trust, will be supported in favour of a purchaser for a valuable consideration, and this, notwithstanding it to be provided by the will, that, if one or more of the executors or trustees should die before the object of the trust was accomplished, others should be appointed, by the survivors, jointly with them to finish the execution of the trust.

Roberts's Widow and Heirs v. Stanton. 129

PRACTICE.

1. In the action on the case for conspiracy, as well as in the action for malicious prosecution, an averment in the declaration that the prosecution was false and malicious is not sufficient, but it must be averred to have been without probable cause.

Kirtley v. Deck and others. 10

2. Quære, whether an endorsement on a subpoena in chancery, without any previous order of court, and not by the clerk but the plaintiff's attorney, can operate as an attachment to stay the effects of one defendant in the hands of another?

Hadfield v. Jameson. 53

3. All the residuary legatees or distributees ought to be parties to a suit for division of a residuum.

Richardson's Ex'r v. Hunt. 148

But see note to Legatees, No. 2.

4. Quære, how far ought documents, referred to in a bill of exceptions, to be described, to make them properly part of the record?

Lovell v. Arnold. 167

5. See Action, No. 4.

Cave v. Shelor and Wife. 193

6. See Justification, No. 1.

Mangum v. Flowers. 205

7. It is too late, after issue joined, to object to the court's jurisdiction, on the ground of non-residence of the defendant.

Monroe (Governor) v. Redman. 240

8. A commissioner's report, if erroneous upon its face, may be objected to at the hearing of the cause, though no exception be previously filed; and also, in the appellate court, though no exception appears to have been taken in the court below; but, without such exception it cannot be impeached on grounds, and in relation to subjects, which may be affected by extraneous testimony.

White's Ex'rs v. Johnson and others. 285

9. A failure to set forth in a commissioner's report, that notice was given to the parties is not an error sufficient to reverse a decree, if no exception to the report appear in the record.

Ib.

10. If a bill of injunction, to stay proceedings on a judgment, charge the plaintiff at law with having failed to do an act on which the equity of his claim depends, and, in his answer, he take no notice of that allegation, the court, on the hearing, will consider this an admission that he has not done the act in question, and will decree against him finally, without any exception to the answer, or any interlocutory order, taking the bill for confessed in part.

Page's Ex'r v. Winston's Adm'r. 298

11. Where an appeal is admitted to be docketed (for good cause shown) after the time within which the record ought to have been sent up, and the appellant has been guilty of no neglect, the court will direct it not to lose its place on the docket.

Johnson v. Johnson's Adm'r. 304

12. Want of notice of the time and place of a commissioner's taking an account, or the court's acting upon the report too soon, are not sufficient reason for a bill of review; such objections not having been taken (as they ought to have been) before the rendition of the decree.

Winston v. Johnson's Ex'r. 305

13. New matter is no ground for a bill of review unless it was discovered since the decree was pronounced.

Ib.

14. Though specific legatees jointly sue, the decree ought to be several, conformably to their respective rights.

Quarles's Ex'r v. Quarles and others. 321

15. It is error sufficient to reverse an office judgment that the common order was entered before the plaintiff filed his declaration.

Waugh v. Carter. 333

16. The 1st section of the act "to reform the practice of the district, county, and corporation courts," which took effect the 1st of April, 1806, applies to suits instituted after that day, though upon writings of a previous date.

Wallace and others v. Baker. 334

17. Under that act, the clerk is to issue execution for interest, though not mentioned in the writing, and not demanded by the declaration.

Ib.

18. When the appearance bail, having been admitted to defend the suit, afterwards waives his plea, judgment is to be entered against the principal as well as the bail.

Ib.

19. When, upon the reversal of a county court judgment, a cause has been retained in the district court, by consent; if, at a subsequent term, the order for retaining the cause be set aside, an appeal cannot then be taken to the court of appeals, even by consent of parties; but the cause should be sent back to the county court for farther proceedings.

Norris v. Tomlin and Gray. 336

20. Judgment by default cannot be entered when the writ has not been returned.

Winchester and others v. The Bank of Alexandria. 339

21. Rule as to bond and security for prosecuting appeals, where the decree is partly against an executor as such, and partly against him in his own right.

Dunton v. Robins. 341

22. A guardian ad litem appointed to prosecute an

appeal on an infant's behalf, is not obliged to accept the appointment; a reasonable time ought, therefore, to be given him to consider whether he will accept, and to prepare for trial.

Wellis's Heirs v. Winfree and others. 842

23. In a suit against a mercantile company, if the names of the partners be omitted in the writ and declaration, and the writ be served on a person not named in either, a judgment against the company, for that person's failing to appear, cannot be sustained.

Scott & Co. v. Dunlop, Pollock & Co. 849

24. Quære, in such case, whether any judgment by default could be sustained? *Ib.*

25. In such case, the surviving partner, and the purchaser from him, being defendants to the bill, the heir of the deceased partner is not a necessary party; a deed from him, conveying all his right to the plaintiff, being produced.

Edgar v. Donnelly and Jones. 887

26. See *Equity*, No. 41, 42.

Marshall v. Thompson. 412

27. Where the lessor of the plaintiff in ejectment dies pending the suit, judgment is to be rendered as if he were still living; and possession is to be given under control of the court.

Mooberry and others v. Marye. 488

28. A case agreed in ejectment, finding the lease, entry and ouster in the declaration mentioned, sufficiently admits that all the defendants, who agreed the case, are in possession of the land in controversy unless there be an express finding to the contrary. *Ib.*

29. By a case agreed, the parties may rest the decision of the cause upon certain specified points of law, to the exclusion of all extraneous facts, or circumstances.

Royall v. Eppes, Adm'r of Royall. 479

30. On a motion to recommit a report of a commissioner in chancery, if the previous neglect or contumacy of the party render it proper to overrule his motion, so far as it goes to open the accounts anew, he may, nevertheless, be permitted to show himself entitled to credits not considered by the commissioner, if it appear probable, from the evidence in support of the motion, that he is entitled to such credits.

Snickers v. Dorsey. 506

31. See *Replication*, No. 3.

Callis v. Waddy. 511

32. If the defendant plead several pleas, on which issues in fact are joined, and moreover demur to a replication by the plaintiff, who joins in demurrer, a jury ought not to be sworn to try the facts, but the court should decide upon the issue in law in the first place; that, if the demurrer be adjudged insufficient, an issue in fact may be made up, upon the said replication to be tried by a jury.

Green v. Dulany. 518

33. A decree, though deciding the right to the property in controversy, and awarding the costs of suit, is still only interlocutory, if commissioners be appointed to carry it into effect, and the court have yet to act upon their report. Neither does it cease to be interlocutory, in consequence of an order, that the defendant be attached for failing to comply with it.

Mackey, Ex'r of Fuqua, v. Bell. 523

34. A bill of review lies, only, to a final decree. *Ib.*

35. An appeal which has been dismissed, or abated, by the court, shall not be reinstated, or revived, after the lapse of sixty days from such dismissal or abatement; except for good cause shown to the court, verified by affidavit, and upon reasonable notice, to the adverse party, of the time of making the motion; nor then, except in very special cases, unless such motion be made within one hundred and twenty days from the time of such dismissal or abatement.

But if the court be not in session on the day to which such notice shall be given, a further time of ten days shall be allowed the party, to exhibit his motion, after the next meeting of the court. 547

PRESUMPTION.

1. Under circumstances, the payment of the damages assessed in a mill case ought to be presumed, especially if a great length of time has elapsed, during which the owner of the land, to whom such damages were assessed, acquiesced in the building of the mill, without claim or objection on his part. *Young v. Price and others.* 584

PRINCIPAL AND SURETY.

1. See *Deputy Sheriff*, No. 1.
Royster and others v. Leake. 280

PROBATE.

1. The doctrine of implied revocations of wills discussed.
Hughes v. Hughes's Ex'r. 209

2. It seems that a deed of trust conveying all the property of the grantor to certain persons and their heirs "forever," with warranty; "nevertheless, upon the special trust, that they shall pay the profits to himself during his life;" concluding with declaring its "true intent and meaning to be that, at his death, every thing therein contained between the parties should become null and void," is a conveyance, to the trustees and their heirs, of an estate for the life of the grantor only, and not a revocation of a previous will. *Ib.*

3. A commission of lunacy against a testator is not a revocation of a will which he made when of sound mind. *Ib.*

4. Quære, whether parol testimony of declarations, by a testator, of his intention in making a deed, ought to be regarded, by a court of probate, as evidence to rebut an implied revocation of a will by such deed? *Ib.*

PROFITS.

See Rents and Profits.

1. It is not error in a court of equity to appoint commissioners, instead of a jury, to state and report an account of the profits of land.

Roberts's Widow and Heirs v. Stanton. 129

2. Rents and profits of land, the possession of which was unlawfully withheld by the ancestor in his lifetime, and by his heirs after his death, ought not to be charged against his executors and heirs jointly, but apportioned among them according to their respective interests. *Ib.*

3. Where slaves are specifically bequeathed to a child, when he or she shall have attained the age of 21 years, or shall marry, and no provision is made expressly for maintenance in the mean time, their intermediate profits, if not otherwise disposed of, do not pass by a general residuary clause, but go to the legatee.

Quarles's Ex'r v. Quarles and others. 321

4. In such case the legatee is also entitled to interest on the profits from the time of the receipt thereof by the executor, no good reason appearing for his failure to apply the principal to the use of the legatee. *Ib.*

5. A wife who lived with her husband and was maintained by him, cannot, after his death, demand an account of profits which he received, of a separate estate settled upon her, no such demand having been made by her in his lifetime.

Moore's Ex'x v. Ferguson and others. 421

PROMISE.

1. A father-in-law having promised his son-in-law that, if he would purchase a certain tract of land, he would assist him in paying for it by letting him have the amount of a particular bond, when collected; and the son-in-law having thereupon made the purchase, this promise was determined to be upon sufficient consideration, and obligatory in law.

Scott's Ex'r v. Osborne's Ex'r. 418

2. It was determined, also, that the son-in-law properly sued in chancery, to discover whether, and at what time, the money due on the bond was collected. *Ib.*

3. And since his claim did not accrue before such collection, the act of limitations did not begin to run against him until then. *Ib.*

4. A legacy to a wife, for her life, and afterwards to the children of the marriage, is no satisfaction of a promise to the husband of the amount of a specific debt, (when recovered,) to be applied to a particular purpose; there being no declaration in the will that the legacy was intended as satisfaction for the promise. *Ib.*

PROTESTANT EPISCOPAL CHURCH.

1. According to the spirit of the act "concerning the glebe lands and churches within this commonwealth," passed the 12th day of January, 1802, no glebe land was to be considered vacant, and, as such, liable to be sold, if there was any minister, who, in behalf of the protestant episcopal church, had been put into possession, and was the incumbent thereof, on that day; whether the persons acting as a vestry, by whom he was inducted, had been canonically elected or not.

Cloughton and others v. Macnaughton. 518

2. The vestry's order that the minister "be inducted into the parish as incumbent," is a sufficient delivery of possession of the glebes thereto attached, to prevent a sale of the same as vacant. *Ib.*

596

*PROVISO.

1. In an action of covenant, upon articles, by which the defendants authorized "the plaintiff to take into his possession certain mills, to put the

same in complete repair, and to make such alterations in the construction thereof, as should, in his opinion, be best calculated to give them their full power and effect, engaging that they, at all times, would be ready to pay the amount of the expenditures incurred, on the production of proper vouchers; and that the plaintiff should retain the possession and use of the premises, for a term of years, paying a certain rent; provided that in all the repairs and improvements, thus left to his discretion, he would not consider his own temporary accommodation only, but the permanent advantage of the property also, and proportion the expenditures accordingly;" upon the plea of "covenants performed," and issue, the question, whether the plaintiff had complied with the terms of the proviso, was properly before the jury.

Fenwick v. M'Murdo and Fisher, 244

2. An action of covenant does not lie upon the proviso, in a mortgage deed, "that upon payment of a certain sum of money, the deed shall be void;" there being no express covenant for the payment of the money.

Drummond's Adm'r v. Richards, 337

PURCHASE.

1. Whether a contract is a mortgage, or a conditional sale, "depends on the whole circumstances of the contract, and not the mere written evidence of it;" the great point to be considered being, whether the parties intended to treat of a purchase, and, contemplating the value of the commodity, fixed the price; or whether the object was a loan of money, and a security, or pledge, for repayment.

King v. Newman, 40

2. See Compensation, No. 1.

Duvals v. Ross, 290

3. A contract of sale is not considered, in equity, as binding on the parties by the execution of a bond for the purchase money, if it appear that the seller failed to perform what was to be done on his part in order to consummate the contract.

Page's Ex'r v. Winston's Adm'r, 298

4. See Equity, No. 30.

Ib.

5. See Vendor and Vendee, No. 10.

Trueheart v. Price, 468

6. See Injunction, No. 11.

Ib.

PURCHASE-MONEY.

1. An injunction, to a judgment for purchase-money, ought not to be dissolved, until a good and sufficient deed for the land be tendered by the vendor.

Grantland v. Wight, 179

PURCHASER.

1. If a bond be given without any consideration, but to be used as an article of traffic to raise money, the bona fide purchaser (though at a large discount) of such bond, without notice of the purpose for which it was executed, is entitled to recover the full amount.

Hansbrough v. Baylor, 86

2. A fair purchase of a bond, at any discount, is not usurious.

Ib.

3. As far as circumstances will permit, a court of equity will supply any defect in the execution of a power given by a will to executors or trustees to sell lands for payment of debts or legacies. A conveyance, therefore, by one executor or trustee only, (instead of three,) but in all other respects conformable to the intention of the testator in creating the trust, will be supported in favour of the purchaser for a valuable consideration, and this, notwithstanding it be provided by the will that if one or more of the executors or trustees should die before the object of the trust was accomplished, others should be appointed by the survivors jointly with them to finish the execution of the trust.

Roberts's Widow and Heirs v. Stanton, 129

4. A patent, though not registered, is good in equity against a purchaser having notice: and quære, is it not also good at law?

Ib.

5. In such case, information of the existence of the patent, by neighbourhood report, and from a person declaring he had seen it, together with a knowledge of possession and cultivation by tenants of the patentee, is sufficient notice to bar the laying a warrant upon the land as waste and unappropriated.

Ib.

6. Quære, is a patent, not registered, good, either at law or in equity, against a purchaser without notice, no proof appearing of visible possession or cultivation, by the patentee in person, or by his tenants?

Ib.

7. See Lands, No. 7.

Ross v. Keewood, Hoofacre and Smith, 141

8. See Settlement-Rights, No. 2.

Ib.

9. See Tender and Refusal, No. 1, 2.

Ib.

10. Quære, whether a deed to a purchaser at a sale directed by a decree, conveys any title, without a subsequent decree confirming the sale?

Lovell v. Arnold, 167

11. See Vendor and Vendee, No. 2.

Grantland v. Wight, 179

12. See Lands, No. 16, 17, 18.

Lambert v. Nanny, 196

13. It seems that voluntary purchasers of lands subject to the lien of a judgment are personally responsible, in equity, to the creditor (the goods and chattels of the debtor being exhausted) for half the profits (or so much of half as may be sufficient to satisfy the judgment) jointly, and not pro rata; notwithstanding they hold tracts of unequal values, and by distinct conveyances.

Winston v. Johnson's Ex'rs, 305

14. In the case of legal rights, the principle caveat emptor properly applies, but equitable rights may be lost by a sale to a bona fide purchaser without notice.

Taylor v. Stone, 314

15. The point in Vance v. Walker (3 H. & M. 288) again solemnly determined.

Walker's Ex'r v. Aicklin, 357

16. A marriage settlement by a husband on his wife and her children by him, (though born in fornication,) is a conveyance to purchasers for a valuable consideration, as to the children as well as the wife, and not void as to creditors, no fraudulent intention being proved.

Coutts and others v. Greenhow, 368

17. If a mortgagee of lands (though not in his actual use or occupation) suffer them to be sold for taxes, quære, whether he shall be indemnified out of other property bona fide conveyed by the mortgagor to a mere volunteer?

Ib.

18. Prior to the act of 1786, "concerning partitions and jointrights and obligations," two men, who were partners in a drove of cattle, applied part thereof to a joint purchase of a settlement-right to land, and one of them died; the survivor had the land surveyed by virtue of a land-office treasury-warrant, and sold it to a third person, who, having notice of the partnership right, obtained a grant for the whole from the commonwealth; a purchaser from the heir of the deceased partner was, nevertheless, entitled to his share of the land.

Edgar v. Donnelly and Jones, 397

19. In such case the surviving partner and the purchaser from him being defendants to the bill, the heir of the deceased partner is not a necessary party, a deed from him conveying all his right to the plaintiff being produced.

Ib.

20. If a purchaser of land, subject to encumbrance by mortgage, apply to equity for relief against a judgment in ejectment, the decree ought not to be "that the injunction be dissolved, unless the complainant pay the sum due to the mortgagee;" but "that the mortgaged premises be sold, unless," &c.; and that, out of the proceeds of the sale, the sum due be paid to the mortgagee, and the surplus, if any, to the complainant.

Davidson v. Waite, 527

21. In such case, if the dower interest of the mortgagor's wife has been relinquished to the complainant, but not to the mortgagee, the court, in directing the sale, ought to guard the complainant's right to such dower interest.

Ib.

22. Land encumbered by mortgage is liable (in possession of a purchaser with notice) for the sum intended to be secured by the mortgage, but not for other claims of the mortgagee against the mortgagor, especially if the purchaser has had no notice of such claims. It is, therefore, not liable for a deficiency of quantity in another tract of land for the title of which the mortgage is a collateral security, there having been no stipulation, known to the purchaser, that the mortgaged premises should be liable for such deficiency.

Davidson v. Waite, 527

23. See Slaves, No. 15, 16.

Gay v. Moseley, 543

QUITRENTS.

1. Under the 30th section of the act of 1749, c. 1, a judgment in favour of the petitioner, for land forfeited by non-payment of quitrents, gave him a preferable right to a grant of the land, which right he could not lose by failure to apply for the grant, but only by a judgment against him in favour of another petitioner.

Norvell v. Camm and Wife, 257

RECEIPT.

1. Proof of a parol acknowledgment by a third person, that he received a sum of money from the

plaintiff for the defendant's use, may with propriety be left to the jury, as a link in the chain of circumstances; such acknowledgment having been made at or about a time when the defendant, or some person for him, must have paid the money in question; and by a person competent to charge himself by an ordinary receipt. But the death of such person is not sufficient ground for admitting the evidence.

Holladay, *Ex'r of Littlepage, v. Littlepage*, 316

RECITAL.

1. The circumstance that a submission to arbitration contains a recital that one of the parties had warranted the title to a tract of land, (when, in truth, the writing signed by him had not that effect) is not a sufficient reason to disturb the award, no fraud or undue influence appearing, and it being possible that the contract was mutually understood as a warranty, though its legal construction was otherwise.

Kincaid *v. Cunningham*, 1

RECORD.

1. Quære, how far ought documents, referred to in a bill of exceptions, to be described to make them properly part of the record?

Lovell *v. Arnold*, 167

2. A writ of certiorari is proper where the transcript has been certified by the proper officer, and is suggested to be defective, but not where it is not authenticated at all.

Scott *v. Hall*, 239

3. In such case, even after the cause has been argued, the supersedeas will be quashed, as having been improvidently granted.

Scott *v. Hall*, 229

4. The writ is a part of the record for the purpose of amendment only, where issue has been joined upon a plea to the action.

Payne and Fairfax *v. Grimm*, 297

5. See Appeal, No. 19.

Hill *v. Harvey*, 536

RECORDING OF DEEDS.

1. If, before the time limited by law for recording a deed has expired, a bill be filed to impugn it as fraudulent, the court cannot afterwards declare it void as against the complainant, on the ground of its not having been duly recorded.

Gibson *v. Randolph*, 310

2. See Slaves, No. 15, 16.

Gay *v. Moseley*, 543

REHEARING.

1. See Infants, No. 1.

Roberts's Widow and Heirs *v. Stanton*, 129

REINSTATEMENT.

1. See Practice, No. 35.

547

RELIEF.

1. A court of equity will not relieve against a judgment on the ground of error in law only: it must appear that justice requires its interposition, and that the party was prevented from obtaining it by the legal forms of pleading, or by some fraud, accident, or mistake.

Kincaid *v. Cunningham*, 1

2. A party having a good ground of defence at law, but failing to make it, without a competent excuse, cannot obtain relief in equity on the same ground.

The Auditor *v. Nicholas*, 31

3. Where an injunction is perpetuated in part, the plaintiff in equity ought, in general, not to be decreed to pay costs.

Ross *v. Gordon*, 289

4. In such case the error of awarding costs against the plaintiff is sufficient, upon his appeal, to reverse the decree, though right in every other respect.

Ib.

5. Where a bill in equity is filed to stay proceedings upon a usurious deed of trust, on the ground that the complainant had no opportunity at law to plead the usury, and prays for no discovery, but, on the contrary, is ready to prove the fact, the court ought not to grant him relief against the usury, upon the condition of his paying the principal sum of money, (without interest,) but should altogether enjoin the trustee from selling until by some proper proceeding, to be instituted by the cestui que trust, he establish the validity of his contract, in which case the injunction should be dissolved, and, in the contrary event, perpetuated.

Marks *v. Morris*, 407

6. Upon the result of such proceeding, if the injunction be dissolved, the deed (being then cleansed of its usurious taint by the judgment of a competent tribunal) should be enforced as a security to compel the payment of the debt.

Marks *v. Morris*, 407

7. If a purchaser of land subject to encumbrance by mortgage, apply to equity for relief against a judgment in ejectment, the decree ought not to be that the injunction be dissolved, unless the complainant pay the sum due to the mortgagee," but "that the mortgaged premises be sold, unless," &c.; and that out of the proceeds of the sale the sum due be paid to the mortgagee, and the surplus, if any, to the complainant.

Davidson *v. Waite*, 527

8. In such case if the dower interest of the mortgagor's wife has been relinquished to the complainant, but not to the mortgagee, the court, in directing the sale, ought to guard the complainant's right to such dower interest.

Ib.

RENTS AND PROFITS.

1. It is not error in a court of equity to appoint commissioners, instead of a jury, to state and report an account of the profits of land.

Roberts's Widow and Heirs *v. Stanton*, 129

2. Rents and profits of land, the possession of which was unlawfully withheld by the ancestor in his lifetime, and by his heirs after his death, ought not to be charged against his executors and heirs jointly, but apportioned among them according to their respective interests.

Ib.

3. Where defendants holding lands by a joint title are decreed to surrender possession, and pay rents and profits, they are not jointly and severally, but only jointly liable.

Hite's *Ex'r v. Paul's Heirs*, 154

4. A decree against an executor, for rents and profits received by the testator, ought expressly to direct that he pay the sum in question out of the assets in his hands to be administered, otherwise it is to be understood as against him personally, and, therefore, erroneous.

Ib.

REPLEVIN.

1. Under the act of 1792, (1 Rev. Code, c. 66, s. 40,) the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence, notwithstanding such several matters be inconsistent with each other.

Waller's *Ex'r's v. Ellis and others*, 88

2. See Evidence, No. 23.

Tuttle *v. Eskridge*, 330

REPLICATION.

1. See Justification, No. 1, and

Mangum *v. Flowers*, 305

2. It is no answer to the bar set up by the plea, of the act of limitations, that the plaintiff sued out a writ for the same cause of action, within the time prescribed by the act, which writ was executed and returned, and went off the docket for want of formality.

Callis *v. Waddy*, 511

3. In an action on the case for a deceit, if the defendant plead that the cause of action did not accrue within five years next before suing out the writ, a replication, that the fraud came to the plaintiff's knowledge within that time is not good; and issue joined upon it should be set aside by the court as immaterial.

Ib.

RESIDENCE.

1. It is too late, after issue joined, to object to the court's jurisdiction, on the ground of non-residence of the defendant.

Monroe (Governor) *v. Redman*, 240

RESIDUUM.

1. All the residuary legatees or distributees ought to be parties to a suit for division of a residuum.

Richardson's *Ex'r v. Hunt*, 148

But see note to Legatees, No. 2.

RESTITUTION.

1. Money levied by the sheriff upon a judgment which is afterwards reversed, cannot be recovered back, by general indebitatus assumpsit for money had and received, without proof that the money was actually received by the plaintiff, or applied to his use.

Isom *v. Johns*, 372

RETURN OF WRIT.

1. A judgment cannot be entered against the defendant and sheriff, upon his return that the writ was executed, and the defendant escaped; the proper remedy against the sheriff, for an escape, being by a new suit.

Waugh *v. Carter*, 333

2. A writ cannot be legally executed after the term to which it was returnable.

Crews and Higginbotham *v. Garland*, 491

8. A judgment entered in the clerk's office before the execution and return of the writ is erroneous, and cannot be supported by the writ's being returned executed to the term when such judgment is made final. Ib.

4. See Writ. No. 10. Ib.

REVERSAL OF JUDGMENT.

1. Money levied by the sheriff upon a judgment which is afterwards reversed, cannot be recovered back by general indebitatus assumpsit for money had and received, without proof that the money was actually received by the plaintiff, or applied to his use.

Isom v. Johns, 372

2. When, upon the reversal of a county court judgment, a cause has been retained in the district court by consent, if, at a subsequent term, the order for retaining the cause be set aside, an appeal cannot then be taken to the court of appeals, even by consent of parties; but the cause should be sent back to the county court for farther proceedings.

Norris v. Tomlin and Gray, 336

3. See Writ. No. 10.

Crews and Higginbotham v. Garland, 491

REVIVOR.

1. Process of revivor is not necessary in the court of appeals, if the appellee died between verdict and judgment.

Buckner and Wife v. Blair, 536

2. See Practice, No. 35. 547

REVOCATION.

1. The doctrine of implied revocations of wills discussed.

Hughes v. Hughes's Ex'r, 209

2. It seems that a deed of trust conveying all the property of the grantor to certain persons and their heirs "forever," with warranty; nevertheless, "upon special trust, that they shall pay the profits to himself during his life," concluding with declaring its "true intent and meaning to be, that at his death, every thing therein contained between the parties shall become null and void," is a conveyance to the trustees and their heirs of an estate for the life of the grantor only, and not a revocation of a previous will. Ib.

3. A commission of lunacy against a testator is not a revocation of a will which he made when of sound mind. Ib.

SALE.

1. A decree empowering an executor, for payment of debts, to sell the lands of his testator, and report his proceedings in execution thereof to the court, is not final but interlocutory.

Goodwyn and others v. Miller and others, 42

2. Quære, whether a deed to a purchaser at a sale directed by a decree, conveys any title, without a subsequent decree confirming the sale?

Lovell v. Arnold, 167

3. A piece of ground being sold at public auction, expressly according to certain metes and bounds, (then and there shown to the purchaser before he became the highest bidder,) "be the same more or less;" he is not entitled to any compensation for a deficiency, although the previous advertisement "described the tenement as containing more than the actual quantity; neither is the case varied by subsequent articles of agreement under seal, (written by the purchaser and signed by the vendor, for the purpose of binding the vendor to make a title,) in which the terms of the sale are referred to, but the quantity of ground, mentioned in the advertisement, is specified, omitting the words "more or less." The vendor is not precluded by such articles from proving the terms of sale by parol testimony.

Grantland v. Wight, 179

4. In such case it seems, however, that if the chancellor decree a compensation to the purchaser, and the vendor does not appeal, the court of appeals will not correct the error to his injury upon an appeal by the other party. Ib.

5. See Bill of Sale, No. 1.

Hardaway v. Manson, 230

6. A contract of sale is not considered in equity as binding on the parties by the execution of a bond for the purchase-money, if it appear that the seller failed to perform what was to be done on his part in order to consummate the contract.

Page's Ex'r v. Winston's Adm'r, 298

7. G. having agreed to sell W. certain escape-warrants upon W.'s giving bond and good security for the purchase-money: W. executes a bond with a blank for the name of the surety to be filled up at a certain time and place, when and where the escape-warrants are to be assigned and delivered by G.: if

W. fail to give the surety, a court of equity will not permit G. to take advantage of the bond without proof of his assigning and delivering, or tendering the escape-warrants within a reasonable time, and before commencing suit upon it, as to which the onus probandi, in equity, lies upon him. Ib.

8. See Notice, No. 11.

Taylor v. Stone, 314

SATISFACTION.

1. A legacy to a wife for her life, and afterwards to the children of the marriage, is no satisfaction of a promise to the husband, of the amount of a specific debt, (when recovered,) to be applied to a particular purpose, there being no declaration in the will that the legacy was intended as satisfaction for the promise.

Scott's Ex'r v. Osborne's Ex'r, 413

SCRIVENER.

1. Quære, whether the evidence of a person employed by both parties as an attorney, or scrivener, to write a bond for a fraudulent purpose, be admissible to prove the fraud?

Clay v. Williams and others, 105

SECURITY.

1. The power of a court of equity to rule a tenant for life of slaves, or other personal property, to give security that the property shall be forthcoming at his or her death, is to be exercised, not as a matter of course, but of sound discretion, according to circumstances.

Holliday and Wife v. Coleman and Wife, 103

SETTLEMENT-RIGHTS.

1. The land commissioners appointed under the act of May, 1779, c. 12, had full power to determine without appeal the rights of persons claiming as settlers, or by purchase from settlers or others, under the authority of the Loyal and Greenbrier companies, and to direct patents to be issued from the land-office of the commonwealth to persons so entitled, and this as well before as after the decision of the court of appeals, in May, 1783, establishing the rights of those companies.

Ross v. Keewood, Hoofacre and Smith, 141

2. The remedy of persons aggrieved by decisions of those commissioners was by caveat in the general court to prevent the patent from emanating; and if a party had such an equity as would, on a caveat, have entitled him to a preference, it was no ground for a bill in equity to set aside the patent, unless he was prevented by fraud or accident from prosecuting a caveat. Ib.

3. Where a judgment of the commissioners was, that the claimant should obtain a patent upon paying the surveyor's fees, and purchase-money to the company, or their agent, on or before a subsequent day, with interest until payment, and that otherwise the land should revert to the company; a tender to the company's agent within the limited time, was sufficient to prevent the forfeiture. Ib.

4. In such case, upon refusal of the company's agent to receive the money, the person making the tender was not responsible to the company, or its assignee, for interest after the day. Ib.

SHERIFF.

1. The sheriff's fee for taking the forthcoming bond may be included in it.

Bronoughs v. Freeman's Ex'r, 205

2. A bond from the deputy to the high sheriff, conditioned for the faithful performance of his duty during his continuance in the office of deputy sheriff, is binding upon him and his sureties, for the second year, as well as the first, and until the winding up of the business lawfully committed to him as deputy.

Royster and others v. Leake, 230

3. A judgment cannot be entered against the proper remedy "and sheriff upon his return that the writ was executed, and the defendant escaped, the proper remedy against the sheriff for an escape being by a separate suit.

Waugh v. Carter, 333

4. See Execution, No. 6.

Eppes's Ex'rs v. Colley, 523

SLANDER.

1. In an action of slander, an averment in the declaration that the slanderous words were spoken "of or concerning the plaintiff," or "in some conversation or colloquium respecting him," is essentially necessary, unless the words, by fair construction, in themselves, plainly and necessarily relate to the plaintiff.

Cave v. Shelor and Wife, 193

SLAVES.

1. The power of a court of equity to rule a tenant for life, of slaves, or other personal property, to give security that the property shall be forthcoming at his or her death, is to be exercised, not as a matter of course, but of sound discretion, according to circumstances.

Holliday and Wife v. Coleman and Wife. 162

2. In detinue for several slaves, if their value be jointly assessed in the verdict, judgment ought not to be entered; but a writ of inquiry to ascertain their respective values should be awarded.

Cornwell v. Truss. 195

3. Where slaves are specifically bequeathed to a child when he or she shall attain the age of 21 years, or shall marry, and no provision is made expressly for maintenance in the mean time, their intermediate profits, if not otherwise disposed of, do not pass by a general residuary clause, but go to the legatee.

Quarles's Ex'r v. Quarles and others. 231

4. In such case the legatee is also entitled to interest on the profits from the time of the receipt thereof by the executor, no good reason appearing for his failure to apply the principal to the use of the legatee.

Ib.

5. In a suit for freedom, a finding by the jury, from inspection, that the plaintiff is a white person, is conclusive in his favour, unless it be proved, on the other side, that he descended in the maternal line from a slave.

Hook v. Nanny Pagee and others. 279

6. The proviso in the 4th section of the act of 1792, concerning importation of slaves from other states of the union, did not authorize such importation by citizens of this commonwealth returning thereto after a temporary residence elsewhere, without having made a permanent settlement in, or become citizens of, the state from which the slaves were imported.

Murray v. M'Carty. 293

7. In a will, dated in 1783, and recorded in 1784, the following clause occurred: "It is my will and desire that in case my son John should die without heir of his body lawfully begotten, that then and in that case, I give to my wife Lucy, and to her heirs forever, all the negroes which I had by her." This was determined to be a good executory devise in favour of Lucy, not on the ground that the word "then" was used, or the word "heir" in the singular number, but because the bequest was of the negroes which the testator had by her, (saying nothing of their issue,) and this was considered as evincing that he did not intend a return of them or their posterity to his wife at any remote period of time.

Royall v. Eppes, Adm'r of Royall. 479

8. And though Lucy died in the lifetime of John, who was her only son and heir, her contingent interest did not thereby accrue to him, but to her administrator, so that the latter became entitled to recover the slaves upon John's dying without issue living at the time of his death.

Ib.

9. An executor or administrator holding slaves in which his testator or intestate had only an estate for life, terminable upon his dying without issue living at the time of his death, (which event actually took place,) may be charged in detinue personally, and not as executor or administrator.

Ib.

10. It seems that if a declaration in detinue demand a negro woman by name, and her three children, without mentioning their names, and a case be agreed submitting that if the law be for the plaintiff upon certain other points, judgment may be entered in his favour, "for the slaves in the declaration mentioned," the court may insert the names of the negro children in the judgment.

Ib.

11. When a widow marries again, the slaves which she held for the term of her life, as part of the estate of her first husband, belong to her second husband, and his representatives until her death.

M'Cargo, Ex'r of Callcott, v. Callcott. 501

12. In detinue if a negro woman, by name, and her "issue" (without naming them,) be demanded in the declaration, and the jury find the names of the issue, the defect (if any) is cured, and judgment should be entered according to the verdict.

Holladay and Wife v. Littlepage. 539

13. The failing to lay a separate value, as to each slave demanded, is an error which would be fatal on demurrer, but is cured by a verdict severing the values.

Ib.

14. It is not error that the jury find general damages for detaining several slaves, but the alternative value of each slave ought to be separately found.

Ib.

15. A slave, lent either before or after the act to prevent frauds and perjuries, having remained, since the commencement of that act, more than five years in the loanee's possession, without any demand made on the part of the lender, must be

considered the absolute property of the person so remaining in possession, as to creditors of, and purchasers under him.

Gay v. Moseley. 543

16. And proof of notice of the loan, or of a deed of trust from the lender, recorded in the court of a county wherein neither of the parties lived, is not sufficient to do away the effect of such possession.

Gay v. Moseley. 543

STAMP ACT.

1. Construction of the act of congress "laying duties on stamped vellum, parchment and paper," with respect to charter-parties. Under that act a writing, altering or explaining a charter-party, was not to be considered as itself a charter-party, and, therefore, subject to the duty.

Ashley v. Cornwell. 268

SUBPENA.

1. Quære, whether an endorsement on a subpoena in chancery, without any previous order of court, and not by the clerk, but the plaintiff's attorney, can operate as an attachment to stay the effects of one defendant in the hands of another?

Hadfield v. Jameson. 58

SUMMARY PROCEEDINGS.

1. Under the act of 1796, c. 81, the mayor and commonalty of Alexandria are not authorized to recover, by motion, money due for the town taxes; but only for "paying the streets."

Mayor and Commonalty of Alexandria v. Hunter. 223

2. In such case the notice must state the true amount of the assessments, for paying the streets, due from the defendant; for, if the sum in proof be different from that in the notice, the court will not give judgment for the sum actually due.

Ib.

3. Where an act of assembly authorizes a judgment, by motion in a summary way, in the court of the county where the defendant resides, the plaintiff is bound to prove the defendant's residence, though no objection be made on his part; for the court will presume nothing in favour of a summary motion.

Ib.

4. Under the 51st section of the execution law, (1 Rev. Code, c. 151,) the remedy by motion is given against the sureties of a deputy sheriff, after a judgment against him for the same cause; such judgment not appearing to be satisfied. The motion also may be made against the sureties separately from their principal.

Royster and others v. Leake. 280

SUPERSEDEAS.

1. See Deed, No. 3.

Holliday and Wife v. Coleman and Wife. 162

2. Where the transcript of the record has not been certified by the proper officer, the *supersedeas*, even after the cause has been argued, will be quashed, as having been improvidently granted.

Scott v. Hall. 229

3. See Alexandria, No. 3.

Winchester and others v. The Bank of Alexandria. 339

SURETIES.

1. An action against the sureties in an administration bond cannot be sustained on the ground that, after a verdict, judgment, execution, and return of "no effects" against the executor or administrator as such, (the verdict being "that he had not fully administered, but had assets to satisfy the debt.") the defendant died, and, his estate having been committed to the sheriff, the county court allowed the judgment as a lawful claim against his estate, and directed the sheriff to pay it, if assets should be in his hands; and it appeared, by the sheriff's return, that no such assets existed.

Catlett and others v. Carter's Ex'rs. 24

2. It seems that the executor or administrator must be convicted of a *deceit* by a verdict in a second suit, finding that "he has wasted the assets;" or "has eluded, disposed of, and converted the same to his own use," before an action can be sustained against the sureties.

Ib.

3. A bond, from the deputy to the high sheriff, conditioned for the faithful performance of his duty, during his continuance in the office of deputy sheriff, is binding upon him and his sureties, for the second year, as well as the first, and until the winding up of the business lawfully committed to him as deputy.

Royster and others v. Leake. 280

4. Under the 51st section of the execution law, (1 Rev. Code, c. 151,) the remedy by motion is given against the sureties of a deputy sheriff after a judg-

ment against him for the same cause; such judgment not appearing to be satisfied. The motion also may be made against the sureties separately from their principal. Ib.

SURVIVOR.

1. In an action against the representatives of one of two joint obligors, in a bond dated in 1783, it is essential to state in the declaration that that obligor survived his companion.

Braxton's Adm'x v. Hilyard, 49

TAXES.

1. If a mortgagee of lands (though not in his actual use or occupation) suffer them to be sold for taxes; quare, whether he shall be indemnified out of other property bona fide conveyed by the mortgagor to a mere volunteer.

Coutts and others v. Greenhow, 368

608 *TAXES ON LAW PROCESS.

1. On a motion against a clerk for the penalty incurred by failing to pay the taxes on law process, he may defend himself by showing that he used due diligence to get a commissioner of the revenue to compare his account with the books in his office, and certify thereupon as the law requires, and was prevented by the default of such commissioner from obtaining a quietus; and if he fail to make such defence, without a competent excuse, he cannot obtain relief in equity on the same ground.

The Auditor v. Nicholas, 81

TENDER AND REFUSAL.

1. Where a judgment of the land commissioners was, that the claimant should obtain a patent upon paying the surveyor's fees and purchase-money to the company, or their agent, on or before a subsequent day, with interest until payment, and that otherwise the land should revert to the company, a tender to the company's agent within the time limited was sufficient to prevent the forfeiture.

Ross v. Keewood, Hooface and Smith, 141

2. In such case, upon refusal of the company's agent to receive the money, the person making the tender was not responsible to the company, or its assignee, for interest after the day. Ib.

TRESPASS.

1. In trespass quare clausum fregit, the declaration charging the trespass generally, in a parish and county, if the defendant plead not guilty, and a justification "that the land in question was his freehold," the plaintiff must reply to the justification as well as join issue upon the plea of not guilty.

Mangum v. Flowers, 206

TRUST, (DEED OF.)

1. A debtor holding an equitable title to land may convey it by deed of trust to secure a creditor, and a court of equity, on a bill exhibited by the cestuy que trust, will compel another creditor (who with notice of such deed, (though not recorded,) has obtained a conveyance of the legal title, by means of an order from the debtor) to convey such legal title to the trustee for the purpose of applying it to the object of the trust.

Lambert v. Nanny, 196

2. In such case the notice is binding if received at any time before the conveyance. Ib.

3. See Lands, No. 18. Ib.

4. It seems that a deed of trust conveying the property of the grantor to certain persons and their heirs "forever," with warranty, "nevertheless upon special trust that they shall pay the profits to himself during his life," concluding with declaring its true intent and meaning to be, "that at his death every thing therein contained between the parties should become null and void," is a conveyance, to the trustees and their heirs, of an estate for the life of the grantor only; and not a revocation of a previous will.

Hughes v. Hughes's Ex'r, 209

5. Where a bill in equity is filed to stay proceedings upon a usurious deed of trust, on the ground that the complainant had no opportunity at law to plead the usury, and prays for no discovery, but, on the contrary, is ready to prove the fact, the court ought not to grant him relief, against the usury, upon the condition of his paying the principal sum of money, (without interest,) but should altogether enjoin the trustee from selling, until, by some proper proceeding to be instituted by the cestuy que trust, he establish the validity of his contract; in which case the injunction should be dissolved, and in the contrary event, perpetuated.

Marks v. Morris, 407

6. Upon the result of such proceeding, if the injunction be dissolved, the deed (being then cleansed of its usurious taint by the judgment of a competent tribunal) should be enforced as a security to compel the payment of the debt. Ib.

7. See Slaves, No. 15, 16.

Gay v. Moseley, 543

TRUSTEES.

1. See Equity, No. 5.

Clay v. Williams and others, 106

2. See Powers, No. 1.

Roberts's Widow and Heirs v. Stanton, 129

USURY.

1. If a bond be given without any consideration but to be used as an article of traffic to raise money, the bona fide purchaser (though at a large discount) of such bond, without notice of the purpose for which it was executed, is entitled to recover the full amount.

Hansbrough v. Baylor, 36

2. A fair purchase of a bond, at any discount, is not usurious. Ib.

3. Where a bill in equity is filed to stay proceedings upon a usurious deed of trust, on the ground that the complainant had no opportunity at law to plead the usury, and prays for no discovery, but on the contrary is ready to prove the fact, the court ought not to grant him relief against the usury, upon the condition of his paying the principal sum of money, (without interest,) but should altogether enjoin the trustee from selling, until, by some proper proceeding to be instituted by the cestuy que trust, he establish the validity of his contract, in which case the injunction should be dissolved, and, in the contrary event, perpetuated.

Marks v. Morris, 407

4. Upon the result of such proceeding, if the injunction be dissolved, the deed (being then cleansed of its usurious taint by the judgment of a competent tribunal) should be enforced as a security to compel the payment of a debt. Ib.

5. T. being indebted to H. in the sum of 1,200l. payable by four equal instalments in little more than three years, an agreement took place between T. and W. that W., in consideration of 800l. cash, paid him by T. should exonerate T. from his debt to H.; this agreement is usurious and void, notwithstanding W. might have reaped advantage from it by buying the bonds of H. at a discount, or by selling him tobacco at a high price.

Watkins v. Taylor and Mewburn, 494

VARIANCE.

1. Where a judgment upon a forthcoming bond is obtained against a defendant, having legal notice, and appearing by attorney, but not moving to quash the bond, nor stating by plea, or bill of exceptions, any variance between it and the execution, the appellate court is not to reverse the judgment on the ground of such variance.

Bronaugh v. Freeman's Ex'r, 206

2. See Evidence, No. 23.

Tuttle v. Eskridge, 330

3. If a bond be payable to James Whitlow, jun. and the declaration describe it as payable to the plaintiff, after naming him as James Whitlow, jun. alias James Whitlock, this is not such a variance as should prevent it from being received as evidence in support of the declaration, on the plea of payment.

Whitlock v. Ramsey's Adm'x, 510

VENDOR AND VENDEE.

1. A piece of ground being sold at public auction, expressly according to certain metes and bounds, (then and there shown to the purchaser before he became the highest bidder,) "be the same more or less;" he is not entitled to any compensation for a deficiency, although the previous advertisement described the tenement as containing more than the actual quantity; neither is the case varied by subsequent articles of agreement under seal, (written by the purchaser and signed by the vendor, for the purpose of binding the vendor to make a title,) in which the terms of the sale are referred to, but the quantity of ground, mentioned in the advertisement, is specified, omitting the words "more or less." The vendor is not precluded by such articles from proving the terms of sale by parol testimony only.

Grantland v. Wight, 179

2. In such case it seems, however, that if the chancellor decrees a compensation to the purchaser, and the vendor does not appeal, the court of appeals will not correct the error to his injury upon an appeal by the other party. Ib.

3. An injunction to a judgment for purchase-money ought not to be dissolved, until a good and sufficient deed for the land be tendered by the vendor. **1b.**

4. Whenever it appears that the vendor's own title deeds must have disclosed to him the true quantity of land, he is bound to make compensation for a deficiency, though his deed to the vendee express a quantity "more or less." **290**

Duval v. Ross.
5. A contract of sale is not considered in equity as binding on the parties by the execution of a bond for the purchase-money, if it appear that the seller failed to perform what was to be done on his part in order to consummate the contract. **298**

Page's Ex'r v. Winston's Adm'r. **298**

6. See Equity, No. 30. **1b.**

7. See Notice, No. 11. **314**

Taylor v. Stone.
8. It seems now settled, that an absolute deed of slaves, or other personal property, the possession of which remains with the vendor, is fraudulent, per se, as to creditors. **341**

Alexander v. Deneale.
9. The point in *Vance v. Walker* (8 H. & M. 288,) again solemnly determined. **357**

Walker's Ex'r v. Aicklin.
10. If the vendor of land in a town assure the vendee (though not in writing) that a piece of ground, adjoining thereto is always to be kept open as an alley; by which assurance the vendee is induced to make the purchase, or to give a higher price for the property, a court of equity will perpetually enjoin the vendor from shutting up such alley. **463**

Trueheart v. Price.
11. Quære, in such case, whether the vendee, who has afterwards conveyed the premises with their appurtenances, but without warranty, to a third person, be a competent witness to prove that such verbal assurance was given to himself by the original vendor? **1b.**

VENIRE FACIAS DE NOVO.

1. See Intendment, No. 1.
Tunnell and Wife v. Watson and Wife. **283**

VERDICT.

1. It seems that the executor or administrator must be convicted of a devastavit, by a verdict in a second suit, finding that "he has wasted the assets," or "has eloiigned, disposed of, and converted the same to his own use," before an action can be sustained against the sureties. **24**

Catlett and others v. Carter's Ex'rs.
But see *Devastavit, No. 2*, and the quære thereto annexed. **24**

2. See Heir and Ancestor, No. 2. **88**

Waller's Ex'rs v. Ellis and others. **88**

3. See Description, No. 1. **67**

Lovell v. Arnold.
4. In detinue, for several slaves, if their value be jointly assessed in the verdict, judgment ought not to be entered; but a writ of inquiry, to ascertain their respective values, should be awarded. **196**

Cornwell v. Truss.
5. No material fact not found expressly, or by very evident implication, in a special verdict can be supplied by intendment. **283**

Tunnell and Wife v. Watson and Wife.
6. Process of revivor is not necessary in the court of appeals if the appellee died between verdict and judgment. **336**

Buckner and Wife v. Blair.
7. In a suit for freedom, a finding by the jury, from inspection, that the plaintiff is a white person, is conclusive in his favor, unless it be proved, on the other side, that he descended in the maternal line from a slave. **379**

Hook v. Nanny Pagee and others. **379**

8. See Appeal, No. 18. **478**

Shanks and M'Rea v. Fenwick.
9. In detinue if a negro woman by name, and her "issue" (without naming them) be demanded in the declaration, and the jury find the names of the issue, the defect (if any) is cured, and judgment should be entered according to the verdict. **539**

Holladay and Wife v. Littlepage.
10. The failing to lay a separate value, as to each slave demanded, is an error which would be fatal on demurrer, but is cured by a verdict severing the values. **1b.**

11. It is not error that the jury find general damages for detaining several slaves: but the alternative value of each slave ought to be separately found. **1b.**

VOYAGE.

1. Freight (though by the terms of the charter-party payable monthly if required) is not to be recovered, where the voyage was never completed,

but the vessel was condemned by a foreign tribunal, in consequence of a fraud attempted by one of the owners intrusted by the rest with the care of the vessel, though no proof appear of their assenting to such fraudulent act. **53**

Hadfield v. Jameson.
2. In such case, the copartners are not entitled to compensation for the loss, except against the fraudulent partner. **1b.**

WARRANTY.

1. The circumstance that a submission to arbitration contains a recital that one of the parties had warranted the title to a tract of land (when, in truth, the writing signed by him had not that effect) is not a sufficient reason to disturb the award, no fraud or undue influence appearing, and it being possible that the contract was mutually understood as a warranty, though its legal construction was otherwise. **1**

Kincaid v. Cunningham.

WAY, (RIGHT OF.)

1. If the vendor of land assure the vendee (though not in writing) that a piece of ground adjoining thereto is always to be kept open as an alley, by which assurance the vendee is induced to make the purchase, or to give a higher price for the property, a court of equity will perpetually enjoin the vendor from shutting up such alley. **468**

Trueheart v. Price.
2. Quære, in such case, whether the vendee, who has afterwards conveyed the premises with their appurtenances, but without warranty, to a third person, be a competent witness to prove that such verbal assurance was given to himself by the original vendor? **1b.**

WILLS.

1. As far as circumstances will permit, a court of equity will supply any defect in the execution of a power given by a will to executors or trustees to sell lands for payment of debts or legacies. A conveyance, therefore, by one executor or trustee only, (instead of three,) but in all other respects conformable to the intention of the testator in creating the trust, will be supported in favor of the purchaser for a valuable consideration, and this, notwithstanding it be provided by the will that if one or more of the executors or trustees should die before the object of the trust was accomplished, others should be appointed by the survivors jointly with them to finish the execution of the trust. **129**

Roberts's Widow and Heirs v. Stanton.

2. See Devise, No. 1. **200**

Hyer v. Shobe.
3. The doctrine of implied revocation of wills discussed. **200**

Hughes v. Hughes's Ex'r. **209**

4. It seems that a deed of trust conveying all the property of the grantor to certain persons and their heirs "forever," with warranty; "nevertheless, upon the special trust, that they shall pay the profits to himself during his life;" concluding with declaring its "true intent and meaning to be that, at his death, every thing therein contained between the parties should become null and void," is a conveyance, to the trustees and their heirs, of an estate for the life of the grantor, only, and not a revocation of a previous will. **209**

Hughes v. Hughes's Ex'r.
5. A commission of lunacy against a testator is not a revocation of a will which he made when of sound mind. **1b.**

6. Quære, whether parol testimony of declarations, by a testator, of his intention in making a deed, ought to be regarded, by a court of probate, as evidence to rebut an implied revocation of a will by such a deed? **1b.**

7. By a devise of a tract of land in fee-simple, together with all the crops thereon, whether gathered or growing at the time of the testator's death, not only the crops made the year the testator died, but those of the preceding year remaining on the land, and those brought thither from other plantations to be stored, will pass. **284**

Carnagy and Wife v. Martin's Ex'rs.
8. By a bequest of "all my household goods and furniture, except my plate and watch," every thing about the houses, that had been usually held and enjoyed therewith, and that would tend to the comfort and accommodation of the householder, will pass. **1b.**

9. When, in the context of a will, the testator has explained his own meaning in the use of certain words, the court should take that as their guide, without resorting to lexicographers to determine what those words ought to signify in the abstract, or to adjudicated cases to discover what they have been decided to mean under different circumstances. **1b.**

10. A testator, in February, 1770, devised to his four sons certain lands "to them and their heirs forever," desiring that "if any of them should die without heirs of their bodies, then the parts of them so dying should be equally divided among the survivors and their heirs." This was the devise of an estate in tail, which, by the act of October, 1770, was converted into a fee-simple.

Sydnor v. Sydnors, 268

11. Where slaves are specifically bequeathed to a child, when he or she shall attain the age of 21 years, or shall marry, and no provision is made expressly for maintenance in the mean time, their intermediate profits (if not otherwise disposed of) do not pass by a general residuary clause, but go to the legatee.

Quarles's Ex'rs v. Quarles and others, 321

12. In such case the legatee is also entitled to interest on the profits from the time of the receipt thereof by the executor; no good reason appearing for his failure to apply the principal to the use of the legatee.

Ib.

13. A legacy to a wife for her life, and afterwards to the children of the marriage, is no satisfaction of a promise to the husband, of the amount of a specific debt, (when recovered,) to be applied to a particular purpose, there being no declaration in the will that the legacy was intended as satisfaction for the promise.

Scott's Ex'r v. Osborne's Ex'r, 418

14. A devise of lands before the 1st of January, 1787, without words of perpetuity, will not be enlarged to a fee-simple on the ground of a general charge arising from a direction that all the testator's debts be first paid, especially if other funds be appropriated for payment of the debt.

Mooberry and others v. Marye, 458

15. Where a will is systematically composed, and the meaning plain, the court will not, for the purpose of enlarging the estates of devisees, or creating limitations in their favour, transpose expressions occurring in other clauses, and obviously relating to other subjects.

Ib.

16. In a will dated in 1788, and recorded in 1784, the following clause occurred: "It is my will and desire that in case my son John should die without heir of his body lawfully begotten, that then and in that case I give to my wife Lucy, and to her heirs forever, all the negroes which I had by her." This was determined to be a good executory devise in favour of Lucy, not on the ground that the word "then" was used, or the word "heir" in the singular number, but because the bequest was of the negroes which the testator had by her, (saying nothing of their issue,) and this was considered as evincing that he did not intend a return of them or their posterity to his wife at any remote period of time.

Royall v. Eppes, Adm'r of Royall, 479

17. And, though Lucy died in the lifetime of John, who was her only son and heir, her contingent interest did not thereby accrue to him, but to her administrator, so that the latter became entitled to recover the slaves upon John's dying without issue living at the time of his death.

Ib.

18. A testator "lent to his granddaughter, A. S. P., a negro woman, and one bed and furniture, for her, her heirs, executors and administrators forever, but if she should die without lawful heir of her body, then to return to his son and his heirs forever." This limitation over was adjudged to be upon an indefinite failure of issue, and, therefore, void.

Williamson, Ex'r of Mayes, v. Ledbetter and others, 521

WITNESS.

See Evidence.

1. The testimony of one witness is not sufficient to outweigh an answer denying the allegations of a bill.

Heffner v. Miller and others, 43

2. The widow of one of two joint obligors is a competent witness in support of the plea of infancy, in a suit against the other or his representatives, and this, notwithstanding her husband died intestate, her interest in such case being remote and uncertain, and either equal between the parties or against the party in whose favour her testimony operates.

Braxton's Adm'r v. Hilyard, 49

3. A person acknowledging that he considers himself interested in the event of a suit is not a competent witness, though, in fact, he was not interested.

Richardson's Ex'r v. Hunt, 148

4. It seems that a specific legatee is not a competent witness to disprove the claim of a creditor against the estate of the testator.

Temple's Ex'r v. Ellett's Ex'r, 452

WRIT.

1. The writ is part of the record for the purpose of amendment only, where issue has been joined upon a plea to the action.

Payne and Fairfax v. Grim, 297

2. After issue joined on a plea to the action, it is too late to move the court to dismiss the suit on the ground of a defect in the writ, or for leave to file a plea in abatement.

Ib.

3. A judgment cannot be entered against the defendant and sheriff, upon his return, that the writ was executed, and the defendant escaped; the proper remedy against the sheriff for an escape being by a separate suit.

Waugh v. Carter, 333

4. A judgment by default cannot be entered when the writ has not been returned.

Winchester and others v. The Bank of Alexandria, 330

5. The true construction of the 30th section of the act "for establishing a bank in the town of Alexandria," is, that the power of granting appeals, writs of error or supersedeas is taken away from the appellate court, in relation only to judgments rendered pursuant to that act, and upon writs of capias ad respondendum executed according to the directions thereof.

Ib.

6. In a suit against a mercantile company, if the names of the partners be omitted in the writ and declaration, and the writ be served on a person not named in either, a judgment against the company, for that person's failure to appear, cannot be sustained.

Scott & Co. v. Dunlop, Pollock & Co., 349

7. Quære, in such case, whether any judgment, by default, could be sustained?

Scott & Co. v. Dunlop, Pollock & Co., 349

8. A writ cannot be legally executed after the term to which it was returnable.

Crews and Higginbotham v. Garland, 491

9. A judgment entered in the clerk's office before the execution and return of the writ is erroneous, and cannot be supported by the writ's being returned executed to the term when the judgment is made final.

Ib.

10. In such case, the bail bond should be quashed by the court of error, all the proceedings back to the common order (inclusive) set aside, and the cause remanded for further proceedings.

Ib.

11. It is no answer, to the bar set up by the plea of the act of limitations, that the plaintiff sued out a writ for the same cause of action within the time prescribed by the act, which writ was executed and returned, and went off the docket for want of formality.

Callis v. Waddy, 511

12. It seems, that where an office judgment is reversed, on the ground that the declaration is radically defective, the appellate court, if the writ be correct, will not enter judgment for the defendant, but send the cause back to be proceeded in from the writ.

Hill v. Harvey, 526

WRIT OF ENQUIRY.

1. See Enquiry, (Writ of.) No. 1.

Cornwell v. Truss, 196

WRIT OF ERROR.

1. See Deed, No. 3.

Holliday and Wife v. Coleman and Wife, 163

WRIT OF RIGHT.

1. A count upon a writ of right describing the land demanded as a certain number of acres, part of a larger tract, and setting forth the boundaries of such larger tract, is sufficiently certain, after verdict.

Lovell v. Arnold, 167

REPORTS OF CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME III.

BY WILLIAM MUNFORD.

Southern District of New York, ss.

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TABLE OF CASES REPORTED.

Allen's Adm'r, Bell v.....	118-119	Hume v. Beale.....	226-237
Armistead and others v. Dangerfield & Wife.....	20-28	Hutchinson v. Kellam.....	203-218
Baird v. Bland and others.....	570-578	Jackson, Wells v.....	458-484
Baker v. Baker and others.....	222-224	Johns, Woodson v.....	280-282
Ball's Devises v. Ball's Ex'r and Widow.....	279-284	Johnson & Co., Davis v.....	81-82
Beale, Hume v.....	226-227	Jordans, Roberts v.....	488-492
Bell v. Allen's Adm'r.....	118-119	Kellam, Hutchinson v.....	202-218
Bennett, Wilkinson's Adm'r v.....	314-317	Lane, Curtis v.....	570-594
Beverley v. Lawson's Heirs.....	317-338	Laughlin v. Flood, Executor of Washington.....	255-274
Birbright, Lessee of Hall, v. Hall.....	536-548	Lawson's Heirs, Beverley v.....	317-338
Blakey v. West.....	75-76	Lee's Administrator v. Carter and Forbes.....	121-122
Bland and others, Baird v.....	570-578	Legrand, Executor of Anderson, v. Francisco.....	83-88
Booker's Adm'r, Branch's Adm'r v.....	48-51	Lewis v. Long.....	158-159
Bowden, Ex'r of Moore, v. Taggart.....	512-514	Lindenbergers, Dunbar v.....	160-170
Bowers and others, Justices of Southampton v. Millar.....	492-494	Long, Lewis v.....	158-159
Boykin's Devises v. Smith and others.....	102-112	Lusk v. Ramsay.....	417-457
Branch's Adm'r v. Booker's Adm'r.....	48-51	Lymbrick v. Seldon.....	202-218
Broadfoot v. Dyer.....	350-353	M'Call v. Peachy's Adm'r.....	288-308
Brooking, Meade and others v.....	548-550	M'Clenahan v. Gwynn.....	556-558
Brownlow, Stanard v.....	239	M'Cormack's Adm'r v. Obannon's Ex'r and Devises.....	484-487
Brumfield, Mortimer v.....	123-125	M'Neil, Webb, Executor of Osborne, v.....	184-187
Buck and Brander, Moseley's Adm'r and Heirs v.....	233-239	Maddox, Purcell v.....	79-80
Buford, Quarles v.....	487-488	Martin, Davis and Wife v.....	285-288
Bullitt's Executors v. Songster's Administrators.....	54-58	Mason and Peyton v. Williams and Carr's Adm'r.....	123-136
Butler and Wife, Geddy and Knox v.....	345-350	Mayo v. Murchie.....	358-417
Butler and others, Wilson and Trent v.....	550-565	Mayo v. Purcell.....	243-249
Campbell, Gray and Scott v.....	261-264	Meade and others v. Brooking.....	548-550
Campbell v. Price and others.....	227-228	Medley v. Medley.....	191
Carr and Wife, Shobe's Ex'r v.....	10-19	Melson and others, Phillips and Wife v.....	76-78
Carter and Forbes, Lee's Administrator v.....	131-123	Millar, Bowers and others, Justices of Southampton v.....	492-494
Cavendish v. Fleming.....	198-202	Milstead v. Redman.....	219-222
Chandler's Adm'r, Rogers's Adm'r v.....	65-66	Moore, Williams v.....	310-313
Chaney v. Saunders.....	51-53	Mortimer v. Brumfield.....	123-125
Cocke, Crawford & Co., Shelton v.....	191-197	Moseley's Adm'r and Heirs v. Buck and Brander.....	223-239
Cocke's Representatives, Freeland and others v.....	352-357	Moss v. Stipp.....	159-166
Coleman and Wife v. Holladay.....	510-513	Murchie, Mayo v.....	358-417
Cooke v. Pope's Adm'r.....	167-168	Murphy, Brown & Co. v. Staton.....	230-243
Cook, Stockton v.....	66-75	Newkirk and others, Foreman v.....	275-277
Cooper's Lessee, Throckmorton v.....	93	Newman v. Graham.....	187-189
Crenshaw's Ex'rs, Foster and Wife v.....	514-521	Norvell, Ross v.....	170-183
Custis v. Lane.....	579-594	Obannon's Ex'rs and Devises, M'Cormack's Adm'r v.....	484-487
Dangerfield and Wife, Armistead and others v.....	20-28	Overseers of the Poor of Augusta County, Fall v.....	495-509
Darby v. Henderson and Duncan, Adm'r's of Drummond.....	115-117	Patton, Adm'r of Page, v. Williams and Wife.....	59-64
Davidson, Garland v.....	189-190	Peachy's Adm'r, M'Call v.....	288-308
Davis v. Johnson & Co.....	81-83	Phillips and Wife v. Melson and others.....	76-78
Davis and Wife v. Martin.....	285-288	Pitts, Ex'r of Rowzee v. Tidwell.....	88-92
Dix v. Evans.....	308-309	Poindexter v. Wilton and others.....	183-184
Dunbar, Hollingsworths v.....	168-169	Pope's Adm'r, Cooke v.....	167-168
v. Lindenbergers.....	169-170	Price and others, Campbell v.....	227-228
Dyer, Broadfoot v.....	350-353	Purcell v. Maddox.....	79-80
Evans, Dix v.....	308-309	Mayo v.....	243-249
v. Freeland.....	119-121	Quarles v. Buford.....	487-488
EWELL, Robertson v.....	1-7	Ramsey, Lusk v.....	417-457
Fall v. The Overseers of the Poor of Augusta County.....	495-509	Randolph v. Randolph and others.....	99-102
Fleming, Cavendish v.....	198-202	Redman, Milstead v.....	219-222
Flood, Ex'r of Washington, Laughlin v.....	265-274	Richards & Co., Taylor's Administratrix v.....	8-10
Foreman v. Newkirk and others.....	275-277	Roberts v. Jordans.....	488-492
Foster and Wife v. Crenshaw's Executors.....	514-521	Robertson v. Ewell.....	1-7
Francisco, Legrand, Executor of Anderson v.....	83-88	Rogers's Administratrix v. Chandler's Administratrix.....	65-66
Franklin v. Wilkinson.....	112-115	Ross v. Norvell.....	170-183
Freeland and others v. Cocke's Representatives.....	352-357	Saunders, Chaney v.....	51-53
Freeland, Evans v.....	119-121	v. Gaines.....	225-226
Gaines, Saunders v.....	225-226	Seldon, Lymbrick v.....	202-218
Garland v. Davidson.....	189-190	Sexton v. Holmes.....	560-567
Garrett, Green v.....	330-344	Shelton v. Cocke, Crawford & Co.....	191-197
Geddy and Knox v. Butler and Wife.....	345-350	Sheppard's Ex'r v. Starke and Wife.....	29-43
Gibson v. White & Co.....	94-99	Shobe's Ex'rs v. Carr and Wife.....	10-19
Graham Newman.....	187-189	Smith and others, Boykin's Devises v.....	102-112
Gray and Scott v. Campbell.....	251-254	Smith, Young and Hyde, Hall v.....	550-555
Green v. Garrett.....	330-344	Songster's Administrators, Bullitt's Executors v.....	54-58
Gwynn, M'Clenahan v.....	556-558	Southampton Justices v. Millar.....	492-494
Hairston v. Hughes and others.....	568-569	Stanard v. Brownlow.....	239
Hall, Birbright, Lessee of Hall v.....	536-548	Starke and Wife, Sheppard's Executor v.....	29-43
Hall v. Smith, Young and Hyde.....	550-555	Staton, Murphy, Brown & Co. v.....	230-243
Hartshorne v. Whittles.....	357-358	Stipp, Moss v.....	159-166
Hencoek & Co., Wright v.....	521-536	Stockton v. Cook.....	68-75
Henderson and Duncan, Adm'r's of Drummond, Darby v.....	115-117	Taggart, Bowden, Executor of Moore v.....	513-514
Holladay, Coleman & Wife v.....	510-513	Taylor's Adm'r v. Richards & Co.....	8-10
Hollingsworths v. Dunbars.....	168-169	Taylor and Cochrane, Trustees, &c., of Miller, Thatcher and Herndon v.....	249-251
Holmes, Sexton v.....	506-507	Thatcher and Herndon v. Taylor and Cochrane, Trustees, &c., of Miller.....	249-251
Howard, Williams v.....	277-279		
Hughes and others, Hairston v.....	568-569		

Throckmorton v. Cooper's Lessee.....	98	Williams and Carr's Adm'rs, Mason and	
Tidwell, Pitts, Ex'r of Rowzee v.....	88-92	Peyton v.....	126-128
Turner v. Turner.....	66-68	Williams v. Howard.....	277-279
Webb, Ex'r of Osborne v. M'Neil.....	184-187	v. Moore.....	310-313
Wells v. Jackson.....	458-484	and Wife, Patton, Administrator of	
West, Blakely v.....	75-76	Page v.....	50-64
White & Co., Gibson v.....	94-99	Wilson and Trent v. Butler and others.....	550-555
Whittles, Hartshorne v.....	357-358	Wilton and others, Poindexter v.....	183-184
Wilkinson's Adm'rs v. Bennett.....	314-317	Woodson v. Johns.....	230-232
Wilkinson, Franklin v.....	112-113	Wright v. Hencock & Co.....	521-536

TABLE OF CASES CITED.

AMERICAN AUTHORITIES.

The cases in *italics* are such as are in manuscript, or have not been reported.

Alderson v. Biggars and others, 570	Catlett and others v. Carter's	Freeland, Vaughan v.,	316
Alexander, Birch v. (1 Wash. 37), 541	Ex'rs, 568	Fulgham v. Lightfoot,	250, 553
Alexander v. Deneale,	4	Gaines and others, Braxton v.,	122
Alexander v. Herbert (3 Call,	4	<i>Gale, Lee v.</i>	213
508), 211	Chandler's Administratrix,	Gaskins v. The Commonwealth,	
Ammonett v. Harris and Tur-	256	Rogers's Administratrix v.,	316
pin (1 H. & M. 483), 459	Chapman, Smith and Wife v.,	36, 544, 546	
Anderson and others, Banks v.,	87	Chichester v. Vass, 258, 259, 263, 273	
Anderson, Carr's Ex'r v.,	65	Chichester's Ex'r v. Vass's	50
Anderson and others, Fitz-	575	Adm'r, 59	
hugh v., 254	Chinn, Downman v.,	Ex'r, 430	
Anderson, Tinsley v.,	486	Clark v. Conn,	75
Archer and others, Tabb and	486	Clayborn v. Hill,	550
others v., 575	Cocke, Peter v.,	514	
Argenbright v. Campbell, 256,	575	Cocke, Crawford & Co., Shelton	
Armstrong, Booth's Ex'rs v.,	382	v., 240, 241	
65, 315, 316	Coles, Paynes v.,	241	
Atwell's Adm'rs v. Milton,	65	Collet v. Collet,	589
Atwell's Adm'rs v. Towles,	118	Colston, Long v.,	179
Auditor, Preston v.,	507	Commonwealth, Bedinger v., (3	
Aylett, Moore's Ex'r v.,	183	Call, 470-4), 210	
Baird & Co. v. Mattox,	314, 316	Commonwealth, Gaskins v.,	207, 314, 217
Baird, Tabb v.,	539	Commonwealth, Winslow and	
Baker, Wallace v.,	121, 225	others v., 168, 258, 257, 259	
Banks v. Anderson and others,	87	Conn, Clark v.,	45
Baring v. Reeder, 188, 177,	188, 177,	Cook v. Piles,	76
Barr v. Barr's Adm'r,	29, 59	Copland, Buck and Brander v.	
Bass v. Bass,	570	(2 Call, 218-230), 233, 234	
Basse, Gerard v.,	190	Copper, M'Lean v.,	553
Baylor, Pollard v., 173, 178, 180,	181	Craghill and others v. Page, 115,	539
Beale v. Edmundson,	9	Crutchfield, Roe v.,	553
Bedinger v. The Common-	210	Currie v. Martin,	214
wealth (3 Call, 470-4),		Darby v. Henderson and Dun-	
Benning, Meredith v. (1 H. & M.	231	can, Adm'rs of Drummond,	184, 550
585-601), 51, 87		Davis, Mackie's Ex'r v.,	553, 554, 555
Berkeley, Blincoe v.,	188, 189	Davison v. Waite,	66
Berkeley, Leftwich v.,	191	Dawson, Moore's Adm'r v.,	509
Beverley, Kinney v.,	249	Dawson, Glascock's Adm'r v.,	309
Bibb v. Cauthorne,	539	Deck, Kirtley v.,	314
Bibb, Duval v.,	541	Deneale, Alexander v.,	115, 553
Birch v. Alexander (1 Wash. 37),	124, 125	Diggs v. Norris,	201
Blakey, Newby's Adm'r v.,	115	Dillard v. Tomlinson,	814
Blane v. Sansum,	51, 87	Dixon, Kerr v.,	858, 381
Blincoe v. Berkeley,	65, 315, 316	Donnally, Hoover v.,	358
Booth's Ex'rs v. Armstrong,	159	Donnally & Jones, Edgar v.,	439
Bradley v. Welch,	229	Downman v. Chinn,	253, 258
Branch v. Burnley,	122	Downman v. Downman's Ex'r,	563, 568
Braxton v. Gaines and others,	114	Drummond's Adm'rs, Darby v.,	560
<i>Britton, Eastham v.</i> , 571,	578	Duval v. Bibb,	539
Brock, Robinson's Adm'rs v.,	194, 196	Duval, Meredith's Adm'r v.,	168, 187, 340, 342
<i>Brockenbrough v. Hackley</i> ,	8	<i>Eastham v. Britton</i> ,	141
Brooke's Adm'rs v. Shelly,	568	Eckhols v. Graham,	308, 439
Brooking, Meade and others v.,	330	Edgar v. Donnally & Jones,	358
Brown, Johnson v.,	609	Edmundson, Beale v.,	253
Browne's Executor, Gordon	559	Ellis, Waller's Ex'rs v.,	589
and others v.,	229	Elizy, Hepburn and Dundas v.,	579, 586, 589
Buck and Brander v. Copland	124, 125	Ellzey v. Lane's Ex'r,	589
(3 Call, 218-230), 233, 234		Eppe v. Randolph,	329, 486
Bullitt's Ex'rs v. Winstons,	174, 190, 256	Fairfax's Devises, Hunter v.,	9
Burnley, Branch v.,	177	Faulcon v. Harris,	179, 204, 278
Burnley v. Lambert,	227	Fendall, Turner v.,	175
Buster v. Wallace,	230, 389, 393	Ferguson, Moore's Ex'r v.,	20, 50, 508
Call v. Scott,	256, 382	<i>Finch, Thweatt's Adm'r v.</i> ,	114
Calloway, Wilcox v.,	256, 382	Fitzgerald v. Jones,	29, 198, 229
Campbell, Argenbright v.,	227	Fleming, Cavendish v.,	289
Campbell, Price v.,	65	Francisco, Winston's Ex'r v.,	302
Carr's Ex'r v. Anderson,	175	Frederick Justices, Gordon's	548, 568
Carrington and others, Smith	568	Administrators v.,	
and others v.,	191		
Carter v. Washington and			
others,			

Kerr v. Dixon.	814	Patrick and Hastie, Hackley,	196	Stone v. Patterson.	258
King v. Newman.	67	Survivor, &c. v.,	329	Stovall's Ex'r v. Woodson and	29
Kinney v. Beverley.	191	Patterson, Stone v.,	253	Wife,	564
Kirtley v. Deck,	814	Payne and Fairfax v. Grim, 159,	488	Stuart, Goodall v.,	566
Lacy, Quarles v.,	170	Paynes v. Coles,	96	Syme v. Griffin,	575
Lambert, Burnley v.,	124, 125	Peachy, M'Call v.,	75, 296	Tabb and others v. Archer and	539
Lane's Ex'r, Ellzey v.,	88	Pendleton v. Wyld,	177	others,	302
Latham v. Latham (8 Call, 181),	213	Perkins v. Saunders and Wade,	514	Tabb v. Baird,	314
Lee v. Gale,	175, 180, 812	Peter v. Cocke,	520	Taliaferro v. Minor,	283
v. Tapscott,	188, 189	Peter's Adm'r's, Mason's Dev-	191	Taliaferro, Stevens v.,	108
Leftwich v. Berkeley,	146, 155	isees v.,	454	Taliaferro, Wallace v.,	812
Lewis, Hepburn v.,	881, 882	Pickett v. Morris,	119	Tanner's Adm'r v. Saddler,	177
Lewis's Ex'r's, Smith's Ex'r's v.,	552, 562	Piles, Cook v.,	181	Tapscott, Lee v.,	314
Lightfoot, Fulham v.,	359, 553	Pitts v. Tidwell,	336	Tate, Meade v.,	112
Littlepage, Holladay and Wife	259	Pollard v. Baylor, 173, 178, 180,	507	Taylor v. Houston,	96
v.,	550	Pollard, Hampton's Ex'r's v.,	256	Taylor & Co. v. M'Clean,	114
Lomax v. Hord,	379	Pollard v. Rogers,	256	Thompson, Marshall v.,	486
Long v. Colston,	179	Pollock & Co., Shelton v.,	190, 191	Thweatt's Adm'r v. Finch,	201
Lyle v. Ronald,	75, 296	Preston v. The Auditor,	227	Tidwell, Pitts v.,	118
M'Call v. Peachy,	115	Preston v. Harvey,	191	Tinsley v. Anderson,	198
M'Clean, Taylor & Co. v.,	189, 195	Price v. Campbell,	49	Tomlinson, Dillard v.,	155
M'Dowell, The United States v.,	125, 126	Purcell, Nice v.,	258, 260, 269, 273	Towles, Atwell's Adm'r's v.,	273
M'Kenzie, Worsham v.,	555	Purvis v. Hill,	50	Triplet's Ex'r's v. Jameson,	175
Mackie's Ex'r v. Davis, 553, 554,	436	Quarles v. Lacy,	486	Turner v. Fendall,	180, 155
M'Lean v. Copper,	79	Quarles's Ex'r v. Quarles and	188, 177, 180	United States v. M'Dowell,	258
M'Robert and Wife, Kennon v.,	381	others,	29, 30, 48, 50, 79	Vass, Chichester v.,	258
Madison's Heirs, Lewis v.,	28, 118	Randolph, Eppes v.,	571, 578	Vass's Adm'r, Chichester's	50
Mantz v. Hendley,	51	Reeder, Baring v.,	553	Ex'r v.,	316
Marshall v. Frisbie,	214	Richardson's Ex'r v. Hunt,	25, 30, 48, 50, 79	Vaughan v. Freeland,	66
v. Thompson,	191	Robinson's Adm'r's v. Brock,	571, 578	Walker's Ex'r's, Smith v.,	258
Martin, Currie v.,	50	Roe v. Crutchfield,	553	Walker's Ex'r's v. Walker,	239
Marye, Mooberry v.,	214	Rogers's Administratrix v.,	316	Wallace and others v. Baker,	121, 235
Mason's Devises v. Peter's	520	Chandler's Administratrix,	329	Wallace, Buster v.,	174, 193, 255
Adm'r's,	814	Rogers, Pollard v.,	255	Wallace v. Taliaferro,	283
Mattox, Baird & Co. v.,	177	Ronald, Lyle v.,	316	Waller's Ex'r's v. Ellis,	258
Meade v. Tate,	568	Rose, Norton v.,	216	Walshall v. Johnston,	138
and others v. Brooking,	231	Ross v. Norvell,	16, 17, 96	Washington and others, Carter	191
Meredith v. Benning (1 H. & M. 585-601),	842	Rowton v. Rowton,	29, 79	v.,	150
Meredith's Adm'r v. Duval,	256	Royster and Wife, Hooper	108	Welsh, Bradley v.,	177
and others v. Benning,	66	and Wife v.,	76	Well's Heirs v. Winfree,	115, 553
Miller, Huffer v.,	140	Saddler, Tanner's Adm'r v.,	177	White, Stephens v.,	126
Milton, Atwell's Adm'r v.,	302	Sadler's Heirs, Wyatt v.,	177	Whitehorn and Wife v. Hines	136
Minor v. Goodall,	191	Sallee v. Yates and Wife,	240, 341	Wigglesworth v. Steers,	74, 256
Taliaferro v.,	182	Sansum, Blane v.,	190	Wilcox v. Calloway,	26, 289, 323
Mooberry v. Marye,	509	Saunders and Wade, Perkins v.,	50	Wilson, Newton v.,	278
Moore's Ex'r v. Aylett,	568	Scott, Call v.,	177	Winfree, Wells's Heirs v.,	177
Moore's Adm'r v. Dawney,	182	Shelly, Brooke's Adm'r v.,	240, 341	Winslow and others v. The	259
Ex'r v. Ferguson, 29, 59,	256	Shelton v. Cocke, Crawford &	190	Commonwealth, 168, 253, 267,	559
Morris, Alexander v.,	68, 191	Co.,	189, 190	Winston's Ex'r v. Francisco,	222
Pickett v.,	125	Shelton v. Pollock & Co.,	189, 190	Winston v. Johnson's Ex'r's,	155
Morton & Co., Skipwith v.	219	Sheppard's Ex'r v. Starke and	175	Wood, Newell v.,	174
Murdock v. Herndon,	254	Wife,	26, 544, 546	Woods and Bemis v. Young,	126
Nanny, Hook v.,	175, 179	Shobe, Hyer v.,	110, 236	Woodson and Wife, Stovall's	29
Nelson v. Anderson,	329	Skipwith v. Morton & Co.,	187	Executor v.,	126
v. Harwood,	124, 125	Smith and others v. Carrington	175	Worsham v. M'Kenzie,	8
Newby's Adm'r v. Blakey,	155	and others,	175	Wright, Adm'r of Hoskins,	8
Newell v. Wood,	155	Smith and Wife v. Chapman,	175	Hoskins v.,	76
Newman, King v.,	97	Smith v. Harmanson,	155	Wyatt v. Sadler's Heirs,	177
Newton v. Wilson,	278	Smith's Ex'r's v. Lewis's Ex'r's,	552, 554	Wyld, Pendleton v.,	218
Nice v. Purcell,	115, 553	Smith v. Walker's Ex'r's,	258	Yancey v. Johnson,	259
Norris, Digges v.,	69	Starke and Wife, Sheppard's	50	Yates and Wife, Sallee v.,	174
Norton v. Rose,	219	Executor v.,	129	Young, Woods and Bemis v.,	174
Norvell, Ross v.,	115, 553	Steers, Wigglesworth v.,	115, 553		
Page, Craghill and others v.,		Stephens, v. White,			

BRITISH AUTHORITIES.

Abel v. Heathcote, and another v. Sutton.	384, 193, 198, 196	Garbland v. Mayot, Gibbons, Coles v. (3 P. Wms. 290).	27, 129, 130, 129, 130, 340).	Northey v. Burbage (Preced. Chan. 470).	25, 27
Abrahams v. Bunn.	175, 179	Gibbs, Collins v. (3 Burr. 900).	256	Northey v. Strange (1 P. Wms. 340).	25, 27
Alston, Selby v.	181	Gifford, Nugent v.	5	Nugent v. Gifford.	5
Amies v. Stevens.	241, 242	Ginger v. White.	536	Omerod v. Hardman.	329, 332, 333
Andrew v. Wrigley.		Goodright v. Moss.	103	Ormond v. Fitzroy.	133
Andrews v. Fulham.		Goss v. Tracy.	175, 179	Orrery (Lord), Mead v.	5
Ashby v. White.	584	Graham, Mills v.	251	Paignon, Heathcote v.	129
Aspinall, Rushon v.	554	Grant v. Jackson.	194, 195, 256	Palmer v. Edwards.	558
Avery v. Hoole.	259	Gray v. Palmer and Hodgson.	193	Palmer and Hodgson, Gray v.	193
Aylett v. Lowe.	139, 148	Greenslate, Busby v.	177	Parsons and Cole v. Pruddock.	487
Ayray's (Doctor) Case.	475, 478	Grey, Thrustout, on the de- mise of Turner v.	191	Peto v. Hague.	193
Ball v. Dunsterville and an- other.	189	Hague, Peto v.	191	Phillips, Harvey v.	331
Barnardiston v. Soame.	584	Hardman, Omerod v.	329, 333, 338	Pigott's case.	471
Beake, Wiseman v.	133	Harrison v. Jackson.	190	Pillans and others v. Van Mie- rop and Hopkins.	558
Beattie, Evans v.	192	Hartwell v. Townsend.	329	Poole, Chancellor v.	558
Bell v. Harwood.	177	Harvey v. Phillips.	331	Pott and others, Doe, Lessee of Gibbons v.	181
Bernard, Coggs v.	241	Harwood, Bell v.	558	Proof v. Hines.	124
Bishop of Carlisle, Bolton v.	553	Hatch, Holford v.	193, 194	Pruddock, Parsons and Cole v.	487
Bishop, Freeman v.	134	Hawke, Helyear v.	384	Pyke, Croft v.	179
Bland v. Hazlerig.	192, 194	Hazlerig, Bland v.	129	Rann v. Hughes.	251
Bolton v. The Bishop of Carlisle.	553	Heathcote, Abel v.	193, 194	Rawson and others v. Johnson.	106
Bonafous v. Rybot.	158	Helyear v. Paignon.	5	Read, Fells v.	101
Bonny v. Rldgard.	5	Helyear v. Hawke.	329, 333	Reeve v. Long.	22
Bromsall, Kettle v.	125	Herring v. Yoe (1 Atk. 290).	376	Reeves, Walker v.	558
Brookes v. Gally.	134	Hiles, Jenkins v.	193	Rex v. Jackson.	441
Brown, Tindal v.	553	Hill v. Simpson.	558	Richardson, Thwaites v.	196
Bunn, Abrahams v.	175, 179	Hines, Proof v.	124	Rldgard, Bonny v.	5
Burbage, Northey v. (Preced. Chan. 470).	25, 27	Holford v. Hatch.	259	Rose v. Calland.	329, 333
Burke's case.	602	Horde and others, Taylor ex dem. Atkyns v.	285	Rush and Tillotson, Horsley v.	189
Burrows, Smith v.	184	Horner v. Moore.	187	Rushton v. Aspinall.	554
Burslem v. Fern.	461	Horsley v. Rush and Tillotson.	186	Rybot, Bonafous v.	158
Busby v. Greenslate.	177	Hughes, Rann v.	251	Selby v. Alston.	181
Cabell v. Vaughan.	168	Hyde and others v. The Naviga- tion Company from the Trent to the Mersey.	311	Shum, Taylor v.	558
Calland, Rose v.	329, 333	Jackson v. Fairbank.	192, 194, 196	Simpson, Hill v.	5
Campbell and others, Kitchen v.	186	Grant v.	194, 195, 236	Smith v. Burrows.	124
Carlisle (the Bishop of), Bolton v.	553	Harrison v.	194, 195, 236	Smith, Conyers v.	259
Carlton, Lowther v.	404	Rex v.	441	Soame, Barnardiston v.	584
Chancellor v. Poole.	558	Janssen, Chesterfield v.	129, 131	Somerset (the Duke of) v. Cookson.	101
Chesterfield v. Janssen.	131	Jaques, Eaton v.	558	Spencer's Case.	558
Chitty et al., Cooper et al. v.	441	Jenkins v. Hiles.	239, 333	Stevens, Amies v.	241, 242
Clark, Doe v.	28, 25	Johnson, Rawson and others v.	166	Strange, Northey v. (1 P. Wms. 340).	25, 27
Clerk v. Withers.	431, 433, 441	Jones, Da Costa v.	506	Sturt v. Mellish.	176
Coggs v. Bernard.	241	Jordaine v. Lashbrooke.	148	Sutton, Abel and another v.	193, 193, 196
Coles v. Gibbons (3 P. Wms. 290).	129, 130	Kettle v. Bromsall.	125	Sutton, Watson v.	341
Collins v. Collins.	143	Kitchen and others v. Campbell.	186	Taylor, ex dem. Atkyns, v. Horde et al.	285
Gibbs (3 Burr. 900).	256	Lancashire, Doe v.	23, 25	Thellusson v. Woodford.	15
Conyers v. Smith.	239	Lashbrooke, Jordaine v.	148	Thrustout, on the demise of Turner v. Grey.	191
Cookson, The Duke of Somers- et v.	101	Leach, Money and others v.	461, 463, 464, 473, 479, 482	Thwaites v. Richardson.	196
Cooper et al. v. Chitty et al.	441	Llewellyn v. Mackworth.	575, 576	Tindall v. Brown.	558
v. Denn.	333	Long, Reeve v.	22	Townshend v. Townshend.	575, 576
Dixon and others v.	177	Lookup, Frederick v.	259	Townsend, Hartwell v.	329
Cox, M'Quillin v.	139, 148	Lowe, Aylett v.	139, 148	Tracy, Goss v.	175, 179
Crane v. Drake.	5	Lowther v. Carlton.	404	Turner, Miller v.	23, 25
Croft v. Pyke.	179	Loyd v. Mansel.	87	Tyler, Scott v.	5
Curwin v. Milner.	183, 134	Loyd v. Maund.	195	Van Mierop and Hopkins, Pil- lans and Rose v.	558
Da Costa v. Jones.	508	Lydall v. Weston.	831	Vaughan, Cabell v.	108
Denn, Cooper v.	333	Lytton v. Lytton.	578	Walker's Case.	558
Dixon and others v. Cooper.	177	Mabank v. Metcalf.	175, 180	Walker v. Reeves.	558
Doe v. Clarke.	23, 25	Mackworth, Llewellyn v.	575, 576	Walker v. Witter.	139, 148, 558
v. Lancashire.	23, 25	M'Quillin v. Cox.	139, 148	Watson v. Sutton.	341
Lessee of Gibbons, v. Pott and others.	118	Mansel, Loyd v.	87	Weller v. The Governors of the Foundling Hospital	189
Drake, Crane v.	6	Marshalsea Case.	479	Weston, Lydall v.	331
Dunsterville and another, Ball v.	189	Maund, Loyd v.	195	Whitcomb v. Whiting.	192, 191
Eaton v. Jaques.	558	Mayot, Garbland v.	27	White, Ashby v.	556
Edwards, Palmer v.	558	Mead v. Lord Orrery.	5	White, Ginger v.	584
Evans v. Beattie.	192	Mellish, Sturt v.	175, 180	Whiting, Whitcomb v.	192, 194
Fairbank, Jackson v.	193, 194	Metcalf, Mabank v.	459, 461	Wightman v. Mullens.	341
Fells v. Read.	191	Milbank, Mitchell v.	459, 461	Wiseman v. Beake.	138
Fern, Burslem v.	461	Miller v. Turner.	23, 25	Witter, Walker v.	139, 148, 558
Finch's (Sir Moyle) Case.	475	Milner, Curwin v.	133, 134	Woodford, Thellusson v.	15
Fitzroy, Ormond v.	476	Mitchell v. Milbank.	459, 461	Wrigley, Andrew v.	5
Forward v. Pittard.	240, 242	Money and others v. Leach.	461, 463, 464, 473, 479, 482	Yoe, Herring v., (1 Atk. 290).	376
Foster's (Doctor) Case.	441	Moore, Horner v.	187		
Foundling Hospital (the Gov- ernors of the) Weller v.	180	Moss, Goodright v.	603		
Frederick v. Lookup.	259	Mullens, Wightman v.	341		
Freeman v. Bishop.	184	Navigation Company from the Trent to the Mersey, Hyde and others v.	311		
Fulham, Andrews v.	25				

CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Appeals of Virginia,

AT THE TERM COMMENCING IN OCTOBER, 1811,

IN THE THIRTY-SIXTH YEAR OF THE COMMONWEALTH.

Robertson v. Ewell.

Argued, Thursday, October 3d, 1811.

1. **Executors—Sale of Personality—Retention of Possession by Executor—Effect.**—An absolute bill of sale of slaves, by an executor, who is nevertheless permitted to retain the possession thereof, is fraudulent and void, as to legatees, as well as creditors and purchasers.
2. **Same—Sale of Slaves to Pay Personal Debt—Effect.**—Quære, whether a sale, by an executor, of slaves belonging to the estate of his testator for the purpose of paying a private debt of his own to the purchaser, be void as to residuary legatees, upon its appearing that the personal assets were sufficient (exclusive of slaves) for paying the debts and expenses, and that the purchaser knew in what right the executor held the property though he might not have known the state of the assets.
3. **Special Verdict—Fraud.**—It is not necessary in a special verdict, that fraud be found expressly, *eo nomine*; if facts amounting to fraud in legal construction be found.

This was an action of detinue, for a negro woman slave Hannah, and her child Billy, instituted in the year 1801, in the Northumberland District Court by James Ewell, senior, against Robert Monroe Robertson. Plea non detinet and issue. At the trial, the jury found a special verdict, the material parts of which were, in substance, that the said slave Hannah, was the property of Andrew Robertson, (father of the defendant,) who departed this life in the year 1795, having duly made his last will and testament, in which he appointed his widow executrix, and his son-in-law, James Ewell, jun., and the defendant, his executors, of whom the said Ewell and the widow qualified, that the said James Ewell, jun., being possessed of the said negro woman and her child, as executor "as aforesaid, did, on the 16th day of November, 1798, by a bill of sale, sell the said slaves, (and also one by the name of Peter, which he held by a gift from the testator in his lifetime,) to the plaintiff in this action, "to pay and satisfy

a debt or debts due from the said James Ewell, jun., to the said plaintiff;" that it "was well known to the plaintiff, at the time of his making the said purchase," "that the said Hannah and Billy had been the property of the said testator, and that the said James Ewell, jun., held the same as one of his executors; that the testator, at the time of his death, left personal property more than sufficient to pay his debts;" but whether this last-mentioned circumstance was known to the plaintiff was not found.

It was further found, by the verdict, that James Ewell, jun., at the time he made the said bill of sale, delivered the said negro Peter to the plaintiff in the name of all the negroes mentioned therein; but retained the said slaves Hannah and Billy in his possession until April, 1801, when he lost them, and they came into the possession of the defendant; that, in the year 1800, the defendant demanded the said negroes of James Ewell, jun., telling him that he understood he intended selling them out of the country, which the said James denied, and begged he might keep them till the end of the year, when they would be returned.

It was also found that James Ewell, jun., was possessed of a negro girl by the name of Peggy, delivered before the death of the testator; and also of a negro girl named Maria, who, at the testator's death, was a part of his estate; "which said Maria, he the said James Ewell, jun., carried off with him when he left this part of the country." The bill of sale (being found in *hæc verba*) conveyed two negro girls, Peggy and Maria, as well as the "slaves before mentioned: but the verdict did not state that the Peggy delivered to James Ewell, jun., before the death of the testator, and the Maria whom he carried off, were the same Peggy and Maria mentioned in the bill of sale.

It was found that the defendant was one of the legatees of the testator, by whose will, (which was found in *hæc verba*,) he was constituted one of four residuary legatees; the slaves in question being not specifically bequeathed.

Upon this special verdict, the District Court gave judgment for the plaintiff, to which a writ of supersedeas was awarded by this court; the grounds for reversal

*Sale of Personality—Retention of Possession by Vendor—Fraud *Per Se*.—On this subject, see *foot-note* to Davis v. Turner, 4 Gratt. 422, where the Virginia and West Virginia authorities in point are collected and it is shown that the so-called doctrine of fraud *per se* is repudiated by the later Virginia and West Virginia decisions. The principal case was cited on the subject in Williamson v. Farley, Gilm. 16; Land v. Jeffries, 5 Rand. 606, 608; Claytor v. Anthony, 6 Rand. 304; Davis v. Turner, 4 Gratt. 449, 457, 459; Howard v. Prince, 12 Fed. Cas. 651. See also monographic note on "Fraud" appended to Montgomery v. Rose, 1 Pat. & H. 5.

†Special Verdict—Inference by the Court.—Although it is an inflexible rule that the court upon a special verdict cannot infer other facts from those found, yet it is the province of the court to make all legal inferences from the facts found in the verdict. Henry v. Graves, 16 Gratt. 244, citing the principal case.

‡Note. The jury probably meant "personal property exclusive of slaves;" but this they omitted to express.—Note in Original Edition.

stated in the petition, being, 1. Because the sale of the slaves was illegal, and contrary to the duty of the said James Ewell, jun., and that with the knowledge of the plaintiff; Rev. Code, Vol. 1, ch. 170, sect. 2, p. 320; and, 2. Because the plaintiff's permitting the said James Ewell jun., to remain in possession of the said slaves, after his purchase, and contrary to the tenor of the bill of sale, was fraudulent as to the petitioner and those interested in the estate.

In support of the first point, Wickham observed, it is not found that the executor applied the money, for which the slaves were sold, to payment of the testator's debts, or that the estate was any way benefited by the sale, being not necessary for payment of debts, it was therefore void under the act of assembly. I do not contend, that if an executor sells slaves for ready money, or on credit, the purchaser is, in all cases, bound to see to the application of the purchase money; but if the sale be, expressly, to pay the executor's own proper debt, the purchaser buys at his peril, and ought to be liable, if it turn out that, in fact, it was not necessary. Even in England, where there is no such act of parliament, it has been held that, if an executor sells a specific legacy, to pay his own debt, the legatee may recover it back. (a)

4 *Another circumstance has great weight in this case. There were several executors, of whom my client was one. It was the business of the purchaser to inquire of the other executors whether they assented to the sale.

2. The purchase was a direct fraud upon the persons interested in the estate. The bill of sale was absolute, yet possession remained with Ewell, the executor. If the slaves had been his own, a sale in this manner would have been fraudulent per se against creditors.* We are his creditors for the negroes themselves. Here false colours were hung out. The negroes were demanded by the defendant, after the bill of sale; and the executor promised to deliver them at the end of the year.

Botts, contra. The plaintiff, who bought of the executor, was not to be presumed consant of the state of the assets. It is not found that he was; and, from the nature of things, the contrary is rather to be inferred. He had a right to presume that the executor had, out of his own funds, made advances to his testator's creditors, to the value of the slaves in question, beyond so much of the assets, (made liable by law before slaves,) as had come to his hands; in which case, he had a clear legal title to sell them for his reimbursement; or, indeed, to convert them to his own use as compensation. (b) A state of things might have existed to justify the sale. How was the purchaser to know it? Was he to call on the executor for a previous account of assets? The executor, if so disposed, might easily have imposed upon

him. If the principle now contended for should be established, no person would buy of an executor. Is suit to be brought by the executor against the legatee, for settlement of his administration account, before he can sell any slave belonging to his testator's estate? Was ever such a suit heard of?

5 *Why should the purchaser be the loser? Is it not the better rule to leave the executor and his securities responsible to persons injured, in case he sells improperly; but let the sale stand good, rather than hamper all sales by executors with such insuperable difficulties? Does the discount of the executor's private debt make any difference? If he had sold the slaves for cash, he might have paid away the money immediately in discharge of his own debt. Is a court of law, on the plea of non detinet, in an action of detinue depending on a sale by an executor, to examine his administration account, and this, too, when the residuary legatees are not parties to the suit? Is this laborious investigation to be made on the sale of every article of property?

All the cases in Sugden were in equity; and many of them turned on fraud committed by the purchaser: but such as were decided by Lord Hardwicke, (c) are in my favour. The case determined by Lord Kenyon (d) was on very different ground, and did not impeach the authority of Lord Hardwicke. The other overruling cases (e) are all since our revolution, and by judges of inferior talents to Hardwicke, or not touching the point decided by him.†

The provision in our Act of Assembly is only mandatory to the executor; making him responsible for disobedience; but not declaring the sale void.

2. As to the charge of fraud, it is not found in the special verdict, and is not to be presumed. The bill of sale could be considered fraudulent against creditors only. It is not found that Ewell was in debt; nor that his bond and security was not amply sufficient to indemnify the legatees.

Wickham, in reply. I said that, in general, the purchaser from an executor is not bound to see to the application

6 *of the purchase money; but the sales being for the express purpose of paying his own debt, makes the difference. A constituent part of this contract was, that the money should go, in the first instance, to pay the executor's private debt. This circumstance made the purchaser particeps criminis. Since the borrower is always slave to the lender, a door is open to frauds innumerable, if an executor may sell to pay his own debt; making that part of the contract of sale. If money had been paid by the purchaser, the executor would have had a choice, to pay it, afterwards, in discharge of his own debt, or not. This makes all the difference in the world.

(c) *Nugent v. Gifford*, 1 Atk. 468, and *Mead v. Lord Orrey*, 3 Atk. 226.

(d) *Bonny v. Ridgard*, 2 Bro. Ch. Cases, 438.

(e) *Andrew v. Wrigley*, 4 Bro. Ch. Cases, 185; *Hill v. Simpson*, 7 Vesey Jr. 152, and *Scott v. Tyler*, 2 Dick. 724.

†Note. But see *Crane v. Drake*, 2 Vernon, 616.

(a) *Sugden's Law of Vendors*, p. 348, and the authorities there commented upon.

*Note. See *Alexander v. Deneale*, 2 Munford, p. 341.

(b) *Toller's Law of Ex'rs*, p. 185.

There is no more difficulty in examining the administration account in detinue than in debt, in which it is often done upon the plea of plene administravit.

The modern authorities in England are in my favour, and entitled to more respect than the more ancient decisions. The science of jurisprudence is progressive, and daily receiving improvement. The modern judges have the advantage of Lord Hardwicke's knowledge, and their own too.

Fraud in the purchaser, where sufficient facts appear, may be examined at law, as well as in equity. Where the bill of sale is absolute, and possession remains with the grantor, the conveyance is void, not against creditors only, but against all persons having a legal or equitable title to the property.

3. The very act of selling the slaves, made the executor a debtor to the estate; and here the purchaser assisted him to deceive the legatees. We had a right to defend ourselves, by maintaining our possession, and ought not to be turned round to the executor's securities. Innocent persons ought not to be made to suffer, when the wrong may be prevented, or when the wrong doer himself may be made responsible.

Monday, March 9th, 1812, the President delivered the unanimous opinion of the Court, (consisting of Judges
7 *Fleming, Roane, Brooke, and Coalter,) "that the title of the appellee to the slaves in question, being under an absolute bill of sale by an executor, who was nevertheless permitted to retain the possession thereof, the same ought to be considered as fraudulent and void, as to the appellant, (a distributee,) under the true construction of the act 'to prevent frauds and perjuries;' that act not only being in affirmance of the principles of the Common Law, which equally extend to the case of distributees, as of creditors and purchasers, but the former description of persons being also equally comprehended, with the latter, under the provisions of the said statute. On this ground the Court is of opinion to reverse the judgment, with costs, and enter it for the appellant."

8 *Taylor's Administratrix, with the Will Annexed, v Richards and Co.

Argued Thursday. Oct. 17th. 1811.

1. **Executors*—Plea of "Fully Administered"—Evidence under.**—If an executor or administrator wish to prove, by a deed of trust, that certain property in his possession is not to be considered as assets, he must specially plead the deed, and cannot give it in evidence, under a plea of "fully administered," in which it is not mentioned.

2. **Statute of Limitations—Must Be Plead.**—A defendant cannot have the advantage of the act, imposing a limitation of one year upon actions on store accounts, without pleading it; the court not being directed to cause such items as have been of more than one year's standing, in such accounts to be expunged; or to instruct the jury to "disregard" them; and the jury not being required to "disallow and reject" them, without a plea.

*Executors.—See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

†Statute of Limitations.—See monographic note on "Limitation of Actions" appended to Herrington v. Harkins, 1 Rob. 501.

See Hoskins v. Wright, administrator of Hoskins, 1 H. & M. 377, and Brooke's administrators v. Shelly, 4 H. & M. 286.

The appellees instituted an action of assumpsit, against the appellant, in the district court of Fredericksburg. The declaration contained the usual counts for goods, wares, and merchandise, sold and delivered to the testator in his life time; leaving the time of delivery blank. The defendant pleaded "non assumpsit by the testator," and three pleas (special and general) of plene administravit; upon all which, issues were joined.

On the trial of the cause, the defendant offered in evidence, the account of her administration settled by commissioners, and confirmed by the Court of Probate; in which account sundry slaves conveyed by a deed of trust, executed by the testator to Doctor Charles Taylor, and duly recorded, to secure large sums of money, were excluded from the estimate of assets, and a balance of 433l. 0s. 8d. was stated in favour of the administratrix; also a copy of the said deed; but the court, on the plaintiff's motion, rejected the same, because it was not pleaded.

The defendant also moved the court to disallow and reject, from the account exhibited by the plaintiffs, all such items as were of more than one year's standing; (a) "which the court refused to do, because the limitation of store accounts was not pleaded." To which opinions of the court the defendant excepted. The jury found "that the said George C. Taylor deceased, did assume upon himself, as the plaintiffs have declared, and assessed their damages to 127l. 5s. 4d. They also found, "that the defendant had not fully administered;
9 and that she "had assets sufficient to satisfy the several judgments and debts, in her first plea mentioned, and to pay the balance stated in the second plea to be due to herself, and also goods and chattels to the value of 500l." Whereupon, judgment for the plaintiff was entered; and the defendant appealed.

Botts, for the appellant, insisted that, under the plea of fully administered, the first matter to be settled by evidence was the nature, extent, and kinds of assets received by the administratrix: of course, the deed in question was equally admissible: to prove that certain negroes were not assets, as a bill of sale to the testator, or the birth of a negro child would have been to increase the assets.

2. That as the dates of the items do not become part of the plaintiff's case, until he shows his account in evidence; so that it would be irregular for the defendant to anticipate, and meet, such evidence by a plea; and as the words of the statute (b) apply exclusively to the account when shown in evidence, there was error in principle, as well as upon authority, (c) in excluding the operation of the statute in this case.

Williams, contra. The District Court did right in rejecting the deed: since the defendant had not pleaded it, and thereby

(a) See Rev. Code, 1st vol. p. 108, ch. 76, sect. 7, 8, and 9.

(b) Id. sect. 9.

(c) Beale v. Edmunson, 3 Call, 515, 516, 517.

enabled the plaintiffs to reply, and prove its having been kept up by fraud, or that no such debts were justly due from the testator.

The court did, also, right, in refusing to strike out the items in the account of more than one year's standing. The act imposing the limitation of one year upon actions on Store accounts, is not like the act which makes it the duty of the court to cause to be expunged such items as appear to have been due five years before the death of the testator or intestate. (a) As the court is not directed in the first of these acts, to cause the items to be expunged; the limitation must be pleaded, as in other cases.

Saturday, March 7th, 1812, the opinion of this court was pronounced that the judgment be affirmed.

Shobe's Executors v. Carr and Wife.*

Argued Friday, November 15, 1811.

1. **Legacies—Interest Thereon.**—Interest allowed on a legacy, and (no certain time for payment being appointed,) from the end of one year from the testator's death; and to a legatee in remainder, from the end of the year in which the tenant for life died.
2. **Devises—Land Charged with Legacy.**—If a testator devise, to two of his sons, certain lands, rated at a certain sum, allowing them to pay his other children equal shares of that sum, by instalments; such devisees, and those claiming under them, are personally responsible, (in proportion to their respective estates,) for the payment of such instalments, with lawful interest from the times when payable; and (in aid of such responsibility,) the lands so devised are liable.
3. **Tender and Refusal.**—If a tender be made of a less sum than is justly due, a refusal to receive it is no bar to the subsequent recovery of interest, on the sum so tendered, from the time of the tender.
4. **Leasehold—Parol Gift of—Effect—Case at Bar.**—A testator having put his daughter's husband into possession of a leasehold tract of land, and delivered him the lease; permanent improvements, also, being made by the son-in-law, with the assistance of the family; and parol declarations, by the testator, that he had given him the land, in con-

(a) See Rev. Code, 1st vol. p. 167, ch. 92, sect. 56.

*For monographic note on Tender, see end of case.

†**Legacies—Interest on.**—The general rule is that interest on a general legacy is payable from one year from the testator's death. *Anderson v. Piercy*, 20 W. Va. 327, 328, citing the principal case. See further, monographic note on "Legacies and Devises" appended to Early v. Early, Gilm. 124.

‡**Specific Performance—Parol Gift of Land.**—It is settled law in Virginia and West Virginia that a verbal donee of land—a child, who under the verbal gift has taken possession of the land and improved it—has a right to demand in a court of equity, a specific performance of the contract by the execution of a deed by the father, thereby consummating his verbal gift. This was held in *Shobe v. Carr*, 3 Munf. 10, and repeatedly followed and recognized as law by numerous Virginia decisions ever since. *Frame v. Frame*, 32 W. Va. 476, 9 S. E. Rep. 906, citing *Darlington v. McCool*, 1 Leigh 36; *Reed v. Vannorsdale*, 2 Leigh 569; *Pigg v. Corder*, 12 Leigh 69; *Cox v. Cox*, 26 Gratt. 305.

In *Burkholder v. Ludlam*, 30 Gratt. 282, the court said that the principles of the decision in *Shobe v. Carr* had not been denied or questioned in any subsequent decision that had come to its knowledge; that, while in *Darlington v. McCool*, 1 Leigh 36; *Reed v. Vannorsdale*, 2 Leigh 569; *Pigg v. Corder*, 12 Leigh 69, and *Cox v. Cox*, 26 Gratt. 305, specific execution was denied, there was nothing in these cases in conflict or at all inconsistent with the decision in the principal case, but, on the contrary, the reasoning of the judges in some of these cases would seem rather to confirm the principles of *Shobe v. Carr*.

See principal case also cited on this subject in *Halsey v. Peters*, 79 Va. 68; foot-note to *Darlington v. McCool*, 1 Leigh 36.

See further, foot-note to *Burkholder v. Ludlam*, 30 Gratt. 282; monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 248.

sideration of his having married his daughter, and to prevent his moving to Kentucky, being proved; it was decided that the son-in-law had an equitable title to the land, for the time the lease had to run, and to a release of the legal title, from the heirs or executors, according as the interest conveyed by the lease might be greater, or less. It was also decided, that the legal title to the land, (which was not expressly mentioned in the will,) was not intended to pass by a residuary devise.

The appellees, Conrad Carr, and Magdaline, his wife, in February, 1794, filed their bill in Chancery, in the County Court of Hardy, against Rudolph Shobe and Leonard Shobe, executors, and the said Rudolph and Leonard Shobe, devisees of Martin Shobe deceased, stating that the said decedent, after having made and duly published his last will and testament, died, some time in the year 1792, leaving four sons and one daughter, to wit, Martin Shobe, Rudolph Shobe, Leonard Shobe, Jacob Shobe, and Magdaline, the wife of the complainant, Conrad Carr; that the testator, among other things, devised as follows; "I give and bequeath the one third of all my estate to my beloved wife Elizabeth, during her life, and at her decease, to be equally divided among my children; and as to my lands, I give and bequeath to my son, Rudolph Shobe, the place whereon he now lives; I also give and bequeath to my son, Leonard Shobe, all the rest of the land I own; (except a tract lying on Cheat River, which I give and bequeath to my son, Jacob Shobe; the above-mentioned lands to be rated at sixteen hundred pounds: the possessors of said land, after a division being made, shall be allowed four years to pay off the other legatees, paying a fourth part each year, till all is paid; and my moveable estate I devise to be added to the price of the lands, and each of my children to receive an equal share of the whole;" by which devises the complainants, Carr and wife, became entitled to one fifth of the aforesaid value of the said land, as also the one fifth of the said moveable estate, to be paid by the defendants, respectively, as devisees and executors: but Martin Shobe, junr., one of the devisees, (though mentioned in the bill,) was not made a defendant.

The bill further stated, that some years ago, the complainant, Conrad, being about to move to Kentucky, the testator promised him that, if he would not move to Kentucky, with his daughter, he would give him the lease-hold land which he (the said testator) leased of Lord Fairfax, and, accordingly, put the complainant in possession of the same, and delivered him the lease, which he thought was a sufficient transfer of the same: that, since the death of the said testator, Leonard Shobe, one of the defendants, had, by some means, got possession of the said lease, and claimed the said lease-hold land by virtue of the will. The complainants therefore prayed a decree, to compel the said Leonard to deliver up the said lease to them, with a proper assignment; and for general relief.

The defendants, Rudolph and Leonard Shobe, filed their answer, admitting the

§Note. Probably, this is a mistake in both bill and answer. See the subsequent statement of the answer.—Note in Original Edition.

will, the death of the testator in 1792, and the number and names of his children; but stating that Jacob Shobe died in the year 1791, shortly after his father; (omitting, however, to mention whether he left any children.) They denied any knowledge of the *promise, alleged in the bill, with respect to the leasehold land; averring that they did not believe that any such was ever made; or that the complainant ever had any such intention of going to the Western Country; as they never heard of it, although they lived in his immediate neighbourhood. Leonard Shobe insisted, that Carr delivered the lease to him, after the death of the testator, without mentioning any claim whatever to the same; that, about a month thereafter, he, the said Leonard, sent to the said Carr, (for the purpose of paying him the money due him under the will,) upwards of one hundred pounds, which he refused to receive.

To this answer the complainants replied generally; and several depositions were taken, proving parol declarations, at sundry times, by the testator, that he had given to Carr the lease-hold land, on which he lived, in consideration of his having married his daughter; and to prevent his moving away; and one of the witnesses said, he declared he had given it to him "for ever." It was also proved by a witness, that the defendant, Leonard Shobe, said, that he had promised the complainant to make him such a title to the said land as he had himself; and that he had heard his father say, that he had given the same land to the complainant. Another witness stated a conversation with the complainant, in which he gave an account of his right to the said land, corresponding, in substance, with the foregoing depositions, but expressing his fears that he should lose the land, "because he had not a scrap of a pen to show for it." It was also in evidence, that the complainant delivered the lease to Leonard Shobe, not because he did not conceive himself justly entitled to the land, but because he thought his title bad in law, without a deed. A tender was also proved, of eighty pounds, by the defendant, Leonard Shobe, to the complainant, which he refused to receive. The County Court decreed, "that the defendants pay unto the complainants the sum of eighty pounds, (being that proportional part of the product of the estate of Martin Shobe, deceased, that, under the will

13 *of the said Martin, the said complainants were entitled to, at the time of the exhibition of the bill,) without costs; and that so much of the said bill as prays for a delivery of the lease, and for a deed of assignment thereof, be dismissed."

From that decree, the complainants appealed to the Superior Court of Chancery for the Staunton District.

The Chancellor, (Brown,) without affirming or reversing the decree, in the first place, appointed commissioners to inquire, and report, "what other lands, and of what estate, was the appellee, Leonard Shobe, entitled to, by the devise to him; and of what value were such lands; what was the value of the lands devised to Ru-

dolph and Jacob Shobe; what children had the testator living at the time of making his will, and death; what permanent improvements (if any) did the appellant, Carr, make on the lands in controversy, during the testator's life; and what was the amount of his personal estate?"

The commissioners reported that Leonard Shobe was in possession of land, (including five acres, of which Carr forcibly held possession,) to the value (at the death of the testator) of 951l. 15s.; that Conrad Carr continued in possession of lands amounting to 240l.; the permanent improvements thereon being valued at 60l.; which improvements were made by him, with the assistance of Leonard Shobe, and the testator's family; that since the death of the testator, Carr had removed a grist-mill from the premises to an adjoining survey; that a tract of land, belonging to the testator, in Harrison County, was worth 100l.; that they valued the tract in Rudolph Shobe's possession at 500l., of which he, the said Rudolph, had paid 40l.; that the tract devised to Jacob Shobe, (said to lie on Cheat River,) was an entry for which no title had ever been obtained; and that the whole personal estate of the testator, after discharging his debts, amounted to 422l. 10s. 9d., to one third of which his widow was entitled. They stated, more-

over, that the widow was still living; 14 that Jacob Shobe died *some time in January, 1794; that the complainant was his administrator, and retained his personal estate, unsettled.

The Chancellor, at July Term, 1806, pronounced his opinion, "that the appellants, (Carr and wife,) are entitled to the original lease, under the agreement with the testator, Martin Shobe, and to a release from the appellee, Leonard Shobe of his rights to the lease-hold estate, mentioned in the proceedings, on their paying unto the appellees, all taxes and quit rents which they, or any of them, have paid, in respect of said lease-hold lands, since the testator's death; and also paying to such of the appellees, as may have paid the same, all such costs and charges of suit, or such proportion thereof, as the appellants are, in justice, bound to refund, for defending the said lease-hold estate against the Greens and others.* And that the appellants are now entitled, under the will of said Martin Shobe, to one fifth of two thirds of the real and personal estate of the testator; and, at the death of the widow, to one fifth of her one third of said estate real and personal; (she not having renounced the will, so as to give her an absolute right to one third of the personal estate;) that the appellants are, moreover, entitled to an interest, to be computed after the rate of five per centum per annum, on the money, from the time the several payments ought to have been made, according to the direction contained in the said will; except as to the 80l. which they might have received, but refused so to do; (on that sum no interest

*Note. The report of the Commissioners stated that Leonard Shobe had paid the manor rent and taxes, as well as costs of suits brought by the Woods and Greens, to recover the lands now in possession of the legatees; which suits were not finally decided.—Note in Original Edition.

is to be allowed, after the time it was tendered;) that, to ascertain, as well the amount of the value of the said real and personal estate as the amount of the taxes and quit rents paid, by the appellees, in respect of the said lease-hold lands, since the testator, Martin Shobe's death, 15 and the amount of costs *and charges paid by the appellees for defending the said lease-hold lands against the Greens and others, and whether any of the estate hath been recovered by any claimant, or otherwise lost or abandoned since the death of the said testator, and also what payments have been made by the appellees to the appellants, on account of their legacy, commissioners ought to be appointed to examine and state an account of the several matters and things above mentioned; but, in taking such estimate, and stating such account, the value fixed on the land by the testator is not to be altered; and if any part of the same has been lost, not its real value, but its comparative value, with the testator's other lands, is to be ascertained, to show in what proportion each legatee is bound to contribute, under the direction of the will of the testator, Martin. The Chancellor was moreover of opinion, that the appellants were entitled to their costs, expended in prosecuting their suit in the said County Court; and that the decree is erroneous, in not having given the said costs; and also in not deciding the other matters in controversy agreeably to the principles and opinions above expressed." He therefore reversed the decree, with costs, and remanded the cause for further proceeding; whereupon the defendants appealed to this Court.

Williams, for the appellants. Be the fact as it may, in relation to the gift of the lease-hold land, the appellees cannot claim, both against, and under the will;(a) and therefore, if they claim the legacy left to the female appellee, they cannot recover that land; but must take their fifth part of the value of the lands as fixed by the testator, and one fifth part of the personal estate, subject to the rights of his widow. It may be said, that it does not appear, explicitly, from the will, that the land in question was in contemplation of the testator; but the bill admits it was devised by the will; for it admits that Leonard Shobe is entitled to this land under the 16 devise, *by praying that he may be decreed to make the conveyance. Again; the commissioners make the value of all the lands in the possession of the testator's children, (including the tract held by Carr,) to be about 1791l. 15s.; which is not widely different from the sum of 1,600l. estimated by the testator himself as their value.

2. The proof is not sufficient to entitle the appellees to the land. None of the witnesses were present at conversations between Carr and the testator; for all of them testify, only, as to what they said when apart from each other. It does not appear that Carr, in the lifetime of the testator, ever claimed a title. If there was a

gift, it may have been for the term of the testator's life only.

Munford, for the appellees. There is no clashing between Carr's claim, and the dispositions made by the will; for it does not appear from the will that the testator intended to devise the lease-hold land at all. The difference between the estimates by the commissioners, and by the testator, of the value of all the lands collectively, (say 191l. 15s.) is sufficiently near to the 240l., which they suppose to be the value of that tract, to authorize a conclusion that it may not have been comprehended in his estimate. Besides, in the opinion of a witness, the value of the lease-hold land was far inferior to 240l.

2. The proof of the contract is certainly strong enough to give the complainant an equitable title to the land. The consideration for the testator's making the gift, was sufficient; viz. the preventing his son-in-law from removing, with his daughter, to Kentucky, by which he would have lost the comforts of her society in his old age. In *Rowton v. Rowton*, (b) the majority of the Court was against establishing the title of Joseph Rowton, jun. to the land; because the evidence was contradictory, and the agreement between him and his father was not sufficiently proved: but it was agreed by all the judges, that if the agreement had been fully proved, it would have been supported, as founded on adequate consideration;

17 *and its being parol only, would not have overthrown it. It is admitted on all hands that Carr was put in possession of the land; and that the lease was delivered to him. He says, it was delivered as the evidence of the title. This is denied on the other side. But if the lease was not given to him by Martin Shobe, for the reason assigned in the bill, what other reason can be assigned? If there was any other, the defendants ought to prove it.

The incorrectness of Carr's opinion, at first, that the delivery of the lease was sufficient to give him a title, or his subsequent fears that he should lose the land for want of a deed, can neither of them affect his equitable right, or vary the facts upon which it is founded.(c) The depositions prove repeated declarations by Martin Shobe, that he had given him the land, without expressing any limitation as to time; and one of the witnesses says, "for ever." This testimony, coupled with the other circumstances, particularly, with his having made permanent improvements to the value of 60l., (with the assistance, too, of one of the defendants, and the testator's family,) is conclusive to establish his title, in equity, to a conveyance of such title as Martin Shobe had by virtue of the lease.

Williams, in reply. The testator's intention was, evidently, to make an equal division among his children. No reason can be assigned for his giving his daughter the leasehold land, and, moreover, an equal share of the rest of the estate. The circumstance, that Carr was in possession, has no weight; for Leonard Shobe and the other

(b) 1 H. and M. 91.

(c) See JUDGE CARRINGTON'S observations, in *Rowton v. Rowton*, 1 H. and M. 108.

(a) *Thelluson v. Woodford*, 13 Vesey, jun. 210.

sons were also in possession of the lands given them by the will. The witness who mentions the word "forever," must have been mistaken; because the testator himself had not a fee-simple.

18 *Thursday, January 16th, 1812.

JUDGE ROANE pronounced the following opinion of the Court, consisting of Judges Roane, Brooke, and Cabell.

"The court is of opinion, that, under the will of Martin Shobe, in the proceedings mentioned, the appellees were entitled to one fifth part of two thirds of the estate of the said Martin Shobe, (exclusive of his lands,) with interest thereupon from the end of one year from the death of the said testator; as also to one fifth part of the remaining third of the same estate, (which was bequeathed to the wife of the said Martin Shobe,) from and after the time of her death, with interest thereupon, in like manner, from the end of the year in which she shall have died;* that they were also entitled to one fifth part of the value of the testator's lands devised to his sons Rudolph, Leonard, and Jacob Shobe; rating the same at the price of sixteen hundred pounds; and holding each of the devisees aforesaid, and those claiming under them, chargeable to the appellees, in the proportion that their several dividends, under the will aforesaid, respectively bear to the said sum of sixteen hundred pounds; with interest on the respective quotas, from the expiration of one, two, three, and four years from the testator's death; to the payment of which (in aid of the personal responsibility of the said several devisees and those claiming under them) the lands aforesaid ought to be held severally liable."

"The court is further of opinion, that it appears, from the testimony in this cause, that the appellee, Conrad Carr, was equitably entitled to the leasehold land in the proceedings mentioned; the legal title whereof was not contemplated by the testator in the residuary devise of his lands to his son, Leonard Shobe, but descended upon his four sons, Leonard, Rudolph, Martin, and Jacob Shobe, and the appellee, Mrs. Carr, or passed to the executors *of the said testator, according as the interest of that lease might be greater or lesser; (a fact which is not disclosed to the court by the present proceedings;) and that the parties aforesaid, respectively, as the case may be, should be decreed to release the legal title aforesaid to the said appellee, Conrad Carr. On this ground, the court is of opinion that the County Court should have decreed in favour of the appellees, according to the principles above stated, had there been proper and sufficient parties before the court; which this court is of opinion is not the case: both because all the heirs of the testator are not before the court, so as to be decreed, eventually, to release as aforesaid; and because all the other distributees under the will of the said Martin Shobe, are not also parties; so as to avoid circuity, and make an

end of the distribution of the said estate, in, and by one suit or action; and that the said decrees are erroneous, both because of the want of proper parties as aforesaid, and, also, because the principles, now stated to be correct by this court, have not been observed in and by either of the said decrees."

Both decrees were therefore reversed, with costs; and it was ordered that the cause be remanded to the said Court of Chancery, and from thence to the County Court, to be finally proceeded in, pursuant to the principles of this decree.

TENDER.

A. What Constitutes a Valid Tender.

1. Willingness to Pay.
2. When Actual Production of Money Dispensed with.
 - a. Necessity for Counting Out the Money.
3. Tender Must Be of Exact Amount Due.
4. Tender Must Be Unconditional.
5. Time of Tender.
6. Medium of Payment.
- B. To Whom Tender Should Be Made.
- C. Keeping Tender Good.
- D. Effect of Tender.
- E. Waiver.
- F. Conflict of Laws.
- G. The Plea of Tender.
- H. Payment of Money into Court.
 1. In General.
 2. Identical Money.
 3. Tender of Deed with Bill.
 4. Waiver of Payment into Court.
 5. Statutory Provisions.

A. WHAT CONSTITUTES A VALID TENDER.

As a general rule, the legal incidents of a valid tender are the actual production and proffer of the precise sum due, so as to relieve the creditor of anything on his part to be done so as to reap the full fruition of his contract. But these the creditor may dispense with either expressly or impliedly. *Lohman v. Crouch*, 19 Gratt. 331; *Koon v. Snodgrass*, 18 W. Va. 320.

1. WILLINGNESS TO PAY.—But a willingness to pay the amount admitted to be due is not the equivalent of a legal tender of the amount, though followed by bringing the money into court to make the tender good, when no such tender was ever actually made. *Norfolk, etc., R. Co. v. Mills*, 91 Va. 613, 22 S. E. Rep. 556.

2. WHEN ACTUAL PRODUCTION OF MONEY DISPENSED WITH.—The actual production of the money will be dispensed with when the party to whom the offer is made refuses to receive the money before it is actually produced, and bases his refusal, not on the ground that it is not produced, nor on the ground that the amount produced is not the exact amount offered, but on some collateral and entirely distinct ground. *Koon v. Snodgrass*, 18 W. Va. 320; *Lohman v. Crouch*, 19 Gratt. 331.

Limitation of Rule.—It must be observed, however, that although in a tender an actual, visible production of money is dispensed with where the party denies all right to pay any sum, yet it must appear that there was an actual offer to pay, and that the tenderer had the money, and was about to produce it, and would have done so if he had not been prevented by such denial of right to pay. *Shank v. Greff*, 45 W. Va. 543, 32 S. E. Rep. 248.

*Note. There is no evidence in the record of the death of the widow, who was living March 14th, 1805, when the commissioners made their report.—Note in Original Edition.

Thus, it has been held that an offer by a purchaser of land to pay the purchase money a short time after it fell due, was not a good tender, where he did not show any money. *Moore v. Harnsberger*, 26 Gratt. 667.

a. NECESSITY FOR COUNTING OUT THE MONEY.—But if the debtor has the actual money in hand and offers it, he is not bound to count it out, if the creditor refuses to receive it. *King v. King*, 90 Va. 177, 17 S. E. Rep. 894.

3. TENDER MUST BE OF EXACT AMOUNT DUE.—Tender made and refused, to stop interest, must be of the exact amount due, and must be kept good and ready at all times to be paid to the creditor at his demand, which must be shown by the tenderer. Therefore, if a tender be made of a less sum than is justly due, a refusal to receive it is no bar to the subsequent recovery of interest on the sum so tendered, from the time of the tender. *Shank v. Groff*, 45 W. Va. 543, 32 S. E. Rep. 248; *Shobe v. Carr*, 3 Munf. 10.

Declaration Does Not State When Debt Fell Due.—Where a declaration demands a particular sum without stating when it fell due or from what time it bore interest, a plea of tender alleging that ever since the bond became due and payable the defendant had been and still was ready to pay the said sum, and that he tenders it to him, is not insufficient on the ground that it does not aver the tender of a sufficient sum. *Shepherd v. Wysong*, 3 W. Va. 46.

4. TENDER MUST BE UNCONDITIONAL.—Tender of payment of a debt conditioned on the surrender of collaterals held for that and other debts, is not a good tender. *Fidelity Loan, etc., Co. v. Engleby*, 99 Va. 168, 37 S. E. Rep. 957.

5. TIME OF TENDER.

Tender before Maturity of Debt.—As a general rule, where one party contracts to pay another money on a certain day, the tender, in order to be available, must be made on the day it falls due. It is believed, however, that a tender will generally be held valid that is made before the debt was due, provided the debt did not draw interest, or if, when the debt did draw interest, the tender included interest to the maturity of the debt. *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. Rep. 812.

For example, where a bond is payable "on or before" a certain date, a tender before maturity of principal and interest to the date of tender is good. *Sanders v. Burk*, 2 Va. Dec. 175.

And where a bond falls due at a stated time, a special plea of tender at that time, in discharge of subsequently accrued interest, may be filed. *Shepherd v. Wysong*, 3 W. Va. 46.

6. MEDIUM OF PAYMENT.

Confederate Money.—Where a debtor borrowed confederate notes during the civil war, payable at a certain time, and in full compliance with his contract, made tender in such money as he borrowed, the only money then in circulation in the country where both parties lived, the tender was held to be valid. *King v. King*, 90 Va. 177, 17 S. E. Rep. 894. See *Lohman v. Crouch*, 19 Gratt. 331.

But a tender of confederate money in payment of a confederate debt after the day of payment, is not sufficient. *Sanders v. Branson*, 22 Gratt. 364.

In an early Virginia case in which paper money was tendered, it was held that the plea ought to state specially the sort of money which was offered, and that the defendant was always ready to pay that very money which he brings into court. *Downman v. Downman*, 1 Wash. 26.

Tender of Check Not Good.—But an offer to give to a receiver of the court a check upon a bank, without proof that the party had the money in the bank at the time, though that was not doubted

by the receiver, is not a good and valid tender. *Poague v. Greenlee*, 22 Gratt. 724.

B. TO WHOM TENDER SHOULD BE MADE.

To Receiver of Court.—A purchaser at a judicial sale cannot make a good and valid tender of the money due for his purchase, to the receiver of the court appointed to collect it. *Poague v. Greenlee*, 22 Gratt. 724.

Tender to Joint Obligees.—But as a payment to one is a payment to all the joint obligees, so a tender to one is a tender to all, for if this were not the case, it would be almost impossible to make a valid tender where there were many obligees. *Warder v. Arell*, 2 Wash. 282, 1 Am. Dec. 488.

C. KEEPING TENDER GOOD.

Moreover, a tender, to be available, must be kept good. In other words, the debtor must be willing and prepared to make payment at any time after the tender, and until the money is paid into court, in case the creditor should conclude to receive it. *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. Rep. 812; opinion of JUDGE DENT; *Shank v. Groff*, 45 W. Va. 543, 32 S. E. Rep. 248.

A tender of money is not sufficient to stop interest, where it does not appear that the money was kept in readiness to be paid whenever it might be called for. *Lohman v. Crouch*, 19 Gratt. 331.

For example, one making a tender and then using the money, and afterwards failing to pay the money into court, with a pleading relying upon such tender, loses its benefit, and will not be released from interest by it. *Shank v. Groff*, 45 W. Va. 543, 32 S. E. Rep. 248.

So also, a tender of money in payment of a judgment will not authorize a court of equity to stop the execution, where there is neither allegation nor proof that the defendant in the execution kept the money on hand for the discharge of the judgment. *Shumaker v. Nichols*, 6 Gratt. 592.

Where the debtor tendered paper money to his creditor, who refused to receive it, whereupon the money was carried back to the debtor without being deposited anywhere for safe-keeping, so that it could not be used, but might always be forthcoming, it was held that the tender had no effect either at law or in equity. *Call v. Scott*, 4 Call 402.

D. EFFECT OF TENDER.

General Rule.—The general rule is that the effect of a tender in proper time is merely to relieve the debtor from subsequent interest and costs, if the money is unqualifiedly refused, and does not extinguish the obligation. 4 Min. Inst. (3d Ed.) 735; *Cary v. Macon*, 4 Call 605; *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. Rep. 812; *Ross v. Austin*, 4 Hen. & M. 502.

Tender of Goods.—But where the tender is of goods (not money), if the tender is established, the goods belong to the creditor, and the party in possession of them is regarded as his bailee. 4 Min. Inst. (3d Ed.) 736; *Glikeson v. Smith*, 15 W. Va. 44.

E. WAIVER.

A strictly legal tender may be waived by an absolute refusal to receive the money, on the ground that no man is bound to perform a nugatory act. *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. Rep. 812.

F. CONFLICT OF LAWS.

If a person be discharged from a debt by a tender and refusal made in a foreign country by force of the laws of that country, he may defend himself elsewhere by relying upon such tender and refusal and the laws under which he was discharged. *Warder v. Arell*, 2 Wash. 282, 1 Am. Dec. 488.

Q. THE PLEA OF TENDER.

A plea of tender should be that the defendant was always ready from the time when the payment should have been made, and not from the time of the tender. *Downman v. Downman*, 1 Wash. 26.

Time When Made.—Besides, a plea of tender ought to state particularly the day when it was made. Instead of pleading that he offered the principal and all the interest due, the defendant ought to compute the interest, add it to the principal, and say that he offered a certain sum. *Downman v. Downman*, 1 Wash. 26.

H. PAYMENT OF MONEY INTO COURT.

1. IN GENERAL.—The rule is well settled that a party, who in a court of law or equity, relies on the tender of money for the satisfaction of a debt, must bring into court, when he files his pleading setting up such tender, the amount of money so tendered, unless this production of the money is waived by the other side; and if he fails to do this, the evidence of tender will be disregarded by the court. *Gilkeson v. Smith*, 15 W. Va. 44; *Downman v. Downman*, 1 Wash. 26; *Robinson v. Gaines*, 3 Call 243; *Shank v. Groff*, 45 W. Va. 548, 32 S. E. Rep. 248; *Ross v. Austin*, 4 Hen. & M. 502.

But a payment made to the plaintiff after action brought, is equivalent to bringing the money into court, in reference to the costs of the plaintiff. *Hudson v. Johnson*, 1 Wash. 10.

The plaintiff may sign judgment if the defendant does not bring into court that which is money at the time of the plea pleaded. *Downman v. Downman*, 1 Wash. 26.

As upon a plea of tender the money must by law accompany the plea, the defendant in a subsequent suit may plead the tender of the money into court in the first action, and prove the payment to the clerk, which, if found in his favor, judgment will be entered for him. *Robinson v. Gaines*, 3 Call 243.

It was held in *Campbell v. Braxton*, 4 Hen. & M. 446, that a report showing a balance due from an executor was not sufficient ground for ordering the money to be brought into court, but that the plaintiff should proceed to a decree.

Quashing Execution on Judgment.—It has been held that a tender of money in payment of a judgment will not authorize the quashing an execution issued thereon, unless the tender is followed by the payment of the money into court, and a motion to enter satisfaction on the record. *Shumaker v. Nichols*, 6 Gratt. 592.

2. IDENTICAL MONEY.—To constitute a legal tender, however, it is not necessary that the identical money tendered be kept and brought into court. *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. Rep. 812.

Depreciated Currency.—But when by the contract the debt may be paid in money or notes, which are uncurrent, depreciated or not legal tender when the defense of tender is set up, the debtor may then bring into court the identical money or notes which he tendered. *Gilkeson v. Smith*, 15 W. Va. 44, citing *Downman v. Downman*, 1 Wash. 26.

3. TENDER OF DEED WITH BILL.—A bill by a vendor for the specific performance of a contract for the sale of land, which does not tender a deed of conveyance, and allege the ability and willingness of the vendor to convey a sufficient title, is bad on demurrer. *Wood v. Walker*, 93 Va. 24, 22 S. E. Rep. 523. *Contra*, *Vaught v. Cain*, 31 W. Va. 424, 7 S. E. Rep. 9. See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 243.

Bill to Redeem Mortgage.—And a bill to redeem a mortgage must allege and rely upon tender if one is claimed, and the money must be paid into court. *Shank v. Groff*, 45 W. Va. 543, 32 S. E. Rep. 248.

4. WAIVER OF PAYMENT INTO COURT.—In an action of debt, when a plea of tender is filed, it is the right of the plaintiff to have the money paid into court before he takes issue on the plea, but if he fails to accept money so paid, or tendered to be paid into court as part satisfaction of the debt, and takes issue on the plea, he waives his right. *Shepherd v. Wysong*, 3 W. Va. 46.

5. STATUTORY PROVISIONS.—The statutes provide that in any personal action, the defendant may pay into court, to the clerk, a sum of money on account of what is claimed, or by way of compensation or amends, and plead that he is not indebted to the plaintiff, or that the plaintiff has not sustained damages to a greater amount than the said sum. Va. Code 1887, § 2296; W. Va. Code, ch. 126, § 2.

Payment to Clerk in Vacation.—When the law requires money to be paid into court, it cannot be paid to the clerk without the court's order. For example, it is held that the payment of money to the clerk in vacation is not equivalent to the payment of money into court, and if the clerk fails to return such money into court, the sureties on his official bond cannot be held responsible for its loss. *State v. Enslow*, 41 W. Va. 744, 24 S. E. Rep. 679, citing *Stuart v. Madison*, 1 Call 481.

20 *Armistead and Others v. Dangerfield and Wife.*

Argued, Nov. 4th and 5th, 1811, decided, Nov. 12th, 1812.

1. **Devises—Construction—"Children"—Posthumous Child.**—A devise in general terms, to the testator's "children," does not comprehend a posthumous child, so as to prevent it from claiming, under the act of assembly, as pretermitted by the will.
2. **Same—Same—Same—Same.**—Quære, does the testator's knowing, at the time of making the will, that his wife is pregnant, make any difference in the case?
3. **Wills—Rights of Pretermitted Posthumous Child.**—A posthumous child unprovided for by settlement and pretermitted by the last will of its father, is entitled to a share of the real estate, notwithstanding such child be a daughter, and it appears, from the will, that the testator intended to give all his lands to his sons.
4. **Same—Same.**—Such posthumous child is entitled to such share of the real and personal estate, as it would have been entitled to, if the father had died intestate; including profits of lands, hires of negroes, and interests and profits of other personal estate.
5. **Same—Same—How Portion Raised.**—The portion of such posthumous child is not to be raised by a division of the estate into equal parts, but by a proportionable contribution by the devisees and legatees and those claiming under them.
6. **Same—Same—Same—Liability of Purchasers from Devises.**—Purchasers from the devisees and legatees are not exempted, from contributing to make up the portion of such posthumous child, by their having purchased without notice of such claim.

John Armistead, of the county of Caroline, by his last will, dated June 25th, and proved July 21st, 1788, after sundry devises of his lands to his widow and sons, directed "the slaves which should remain after paying his debts, to be equally divided between his widow and 'children,' share and share alike, but to be kept together, and worked on his lands, or part hired out, at the discretion of his executors, for the general support and maintenance of his widow and 'children;' and that, as his sons respectively came of age, and his daughters married or came of age, his or her share or proportion thereof be allotted and given up

*The principal case is cited in *Hansford v. Elliott*, 9 Leigh 99.

to them, and the residue to be considered as undivided, until his son Addison arrived of age, when he desired a division of his slaves to be made between his widow, and such of the children as had not had their dividend or proportion of them. Item, he gave to his children his personal estates (slaves not included) in the counties of Prince William and Loudoun, equally, and to be kept together, and allotted, as directed in the case of his slaves; except that, when his son Addison should come of age, and had taken his share thereof, the residue be sold, and the money divided equally between those 'children' who had not had a share of the personal estate."

At the time of making this will, the testator had six sons, and two daughters, namely, John Baylor, William, Addison, George, Lewis, Walker, Frances, and Mary, of whom, Mary was not mentioned by name, in the will.

21 *He had also a daughter in ventre sa mere, who was born after his death, baptized by the name of Eleanor, and became the wife of John Dangerfield, who, thereupon, filed his bill, in her right, in the Superior Court of Chancery for the Richmond District, against Lucy Armistead, the widow and executrix, John B. Armistead, and others, devisees and legatees, of the said testator, and William Herndon, and others, purchasers, of sundry lands from the said devisees; claiming, by virtue of the act of assembly in favour of posthumous children, (a) as for a child pretermitted in the will, such portion of the real and personal estate of the decedent as she would have been entitled to if her father had died intestate. The prayer of the bill was that the said devisees and executrix should, severally, set forth what parts of the said estate had come to their hands and possession respectively; that the other defendants should set forth, and discover, what portions they respectively held, and from whom their titles were derived; that a division and partition be made, "so as to compel each legatee and devisee to abate proportionably for the purpose of making up the portion of the plaintiff."

Lucy Armistead, the widow, in her answer, averred, that "her late husband was not informed that she was enscint of that child, at the time of making his will." Her deposition was also taken, in which she swore that he left home in an extreme bad state of health, in March, 1788, for Philadelphia, accompanied by their son, John B. Armistead: that the account of his funeral expenses, transmitted to her from Philadelphia, was dated, June 27th, 1788; and that, on the 3d day of September, 1788, the plaintiff Eleanor was born.

John B. Armistead, in his answer, said, that he accompanied his father to Philadelphia, and was with him at the time of his death; and, from what was said by him during the journey, and in Philadelphia, "this defendant is certain his father was acquainted with the pregnant state of

22 *this defendant's mother, at the time he published and declared his said

last will and testament." The respondent also swore that he was himself a duly certificated bankrupt, and, therefore, had no interest in the event of the present suit.

In the answers of William Herndon and others, purchasers of lands of which the testator died seised, it was alleged, that they severally purchased without notice of the plaintiff's claim. Thomas Newman, one of them, said, that "he had been advised that the said Eleanor had no right to any share of the said lands under the last will of her said father, whose intention appears to have been to devise his landed property to his sons, in exclusion of his daughters, and to provide for all his daughters out of his other estate, being possessed of many slaves and other personal estate. At the time of making his said last will, this defendant believes, and so he alleges, that the said testator well knew that his wife Lucy was far advanced in pregnancy, and, in case a daughter should be born, that the expressions used in his will did include her, as well as his daughter Mary, who is not named therein; but, in case a son should be born, that he would share, under the law of Virginia, a part of his lands, with his brothers."

The cause came on to be heard the 12th of February, 1811, when Chancellor Taylor was of opinion, that "this case presents the naked question of a posthumous child, who was neither provided for, nor disinherited, but only pretermitted by the testator's will, and is the very case contemplated by the Act of Assembly; and, notwithstanding the case of Reeve v. Long, reported in 1st Salkeld, p. 227, the rule is this, that, where a testator speaks of children, generally, he is to be understood as referring to those either living, and in case, at the time of making the testament, or at his death, as circumstances, to be collected from his will, may justify; and not of those who are in ventre sa mere." He therefore decreed that certain "commissioners do divide the slaves

and other personal estate, late of 23 John Armistead, deceased, (after *the payment of his debts,) and the lands whereof he died seised and possessed, into nine equal parts, and allot and assign to the plaintiffs, in right of the plaintiff, Eleanor, one of those parts, for her share of the said estate; and that the defendants do respectively make up an account of the rents and profits of the said real estate, from the periods they severally came into the possession thereof." From which decree the defendants, on their motion, were allowed an appeal. (b)

Botts, for the appellants, contended that the plaintiff, Eleanor, was not disinherited, or pretermitted, but actually provided for by the will, under the word "children," which comprehended a child in ventre sa mere; in support of which position, he cited *Miller v. Turner*, 1 Vesey, sen'r. 86, *Doe v. Clarke*, 2 H. Bl. 399, and *Doe v. Lancashire*, 5 T. R. 61. From these cases it appears that such a child is, in general, considered as born for all purposes which are for his benefit. It may be said, that,

(a) See Acts of 1785, ch. 61, sect. 3, and Rev. Code, 1st vol. ch. 92, sect. 3, p. 161.

(b) See Rev. Code, 1st vol. d. 375, ch. 233, sect. 1.

in the case now before the Court, it is more beneficial for the infant to claim under the statute than under the will: but the question is concerning the fair intention of the testator. The right under the will cannot be altered, but the rule of construction must be the same as if the statute had not passed.

There is a class of cases where the devise is not to the children of the testator, but of some other person, in which it has been decided, that not only posthumous children, but all born after the making of the will, have been excluded. There are other cases conflicting with these. But there is no case establishing such a rule, where the devise is to the children of the testator. His reason for devising to his brother's children, may be particular affection for those living at the time of making the will; but it would be unnatural and preposterous to make a distinction between a posthumous child of his own and his other children. Besides, if a devise to a brother's children were to be construed as extending to

24 all after-born *children, the distribution might be delayed for many years: but, in the case of a posthumous child of the testator, it can be only for nine months.

I anticipate the only argument on the other side; that this testator might not contemplate his having a posthumous child. But this is not to be presumed, and the contrary, indeed, must be inferred in this case; Mrs. Armistead having gone three months with child when he went to Philadelphia. The assertion, in her answer, being contrary to the nature of things, is not to be regarded; especially, when pointed out contradicted by the answer of John B. Armistead.

2. I contend that the testator intended his personal estate only, and not his lands, or any part thereof, for his daughters. Frances and Mary were excluded from participating in the lands; and, surely, the posthumous daughter ought not to be preferred to them. The act of Assembly is founded on the presumption that the testator would revoke so much of the will as pretermits his posthumous child. It ought, therefore, to be applied to revoke it, only so far as he would have revoked it.

3. The purchasers of the legal title to the lands ought not to be disturbed by the decree.

4. The Chancellor has erred in giving Mrs. Dangerfield one ninth, without directing that each devisee and legatee shall contribute proportionally to make up her portion.

Williams, and Wickham, for the appellees. The question turns on the intention of the testator. If he did not intend to provide for the posthumous child, this court cannot make a will for him. The court, in construing a will, is not to regard the obligations of natural affection, or what will the testator ought to have made, but only what children he had actually in contemplation when he made it. This will, especially, was made in prospect of speedy death; not to provide for future occurrences which might take place in his life-time. From

the will itself, it may be inferred, 25 that he intended to provide *only for

children then in esse. A distinction is made between sons and daughters. If, then, he meant to provide for a posthumous child, would he not have adhered to his rule, and kept up his distinction? He would have said, that if a son, it should share with the sons; if a daughter, with the daughters. This circumstance distinguishes this will from all the cases, and shows he meant by "children," generally, only the children then living; so that, even if other children had been afterwards born in his life time, they would not have been provided for without a new will.

But, according to the authorities, where the devise is to "children," generally, without using words, *de futuro*, such as "to all the children who shall be living at his death," the will is to be understood as speaking at the time when it was made, and none born afterward are to be let in. (a) It is laid down in 2 Stra. 1093, *Andrews v. Fulham*, that a devise, *per verba de futuro*, to an infant *en ventre sa mere*, will take effect; and in *Powell on Devises*, p. 332, that, "where any express words are used, or facts adverted to by a testator exercising his bounty toward such infant, from whence an implication or inference can be drawn, that he was aware the devisee could not take immediately," the devise will be good. But, without such words, or facts, it would seem that an infant *en ventre sa mere* could not take by devise. The cases referred to by Mr. Botts do not contradict this position. *Miller v. Turner*, 1 Vezey, sen. 86, is a case of a marriage settlement; in construing which, children are considered as purchasers; and children to be born after the settlement are always in contemplation of the parties. In *Doe v. Clark*, 2 H. Bl. 399, *verba de futuro* were used; the devise being, "to such child, or children, of B. as shall be living at the time of his death." The posthumous child of B. was considered as living for the purpose of receiving the benefit of this devise. But that case is not like this, and *Doe v. Lancashire*, 5 T. R. 61, is yet more dissimilar; the only point decided being, that a subse-

26 quent *marriage and birth of a posthumous child amount to an implied revocation of a will of lands.

In this case, if the testator had intended to provide for the posthumous child, he would have done it in *verba de futuro*. But he failed to provide for it, because he was not informed of his wife's pregnancy; or, perhaps, because he knew that the law provided for it. According to the case of *Smith and wife v. Chapman*, 1 H. and M. 240, every man making a will must be supposed to be influenced by the existing laws.

2. Mr. Bott's second point cannot be supported, if he fails in his first. We insist that the posthumous child is altogether pretermitted by the will. If so, she must take under the act of Assembly, and not under the will; and therefore must take a share of the real as well as the personal estate.

3. We are not going, in this case, against purchasers without notice. They were bound to take notice of the plaintiff's legal title; for they bought of devisees; and, at

(a) 4 Bac Abr. 341, citing *Dyer*, 177. Co. Litt. 112 b; *Preced. Chan.* 470; 1 P. Wms. 346; 2 Vez. 84.

their peril, were to see that the devise was sufficient in law to enable the vendors to sell. But, as to legal rights, want of notice does not protect a purchaser. (a)

4. The chancellor's decree is to be understood with reference to the act of assembly; so as to be carried into effect conformably to it. There is, therefore, no error in that part which gives the plaintiff one ninth part of the real and personal estate.

Botts, in reply. The construction contended for by the gentlemen amounts to this, that when a testator provides, expressly, for his children, without restriction, he does not mean to provide for all his children! They would even make the legislature guilty of the absurdity of making a law to provide for posthumous children, leaving all the children born after the making of the will, except posthumous children unprovided for; since Mr. Wickham contends, that children born, after the making of the will, in the lifetime of the testator, cannot take under a devise to children generally! He was right,

27 however, in taking *this ground; for there can be no distinction between a posthumous child, and such children as are born after the making of the will.

The authorities cited in 4 Bac. 341, do not even touch the subject. There is nothing concerning it in Dyer, 177, and Co. Litt. 112, b; Preced. Chan. 477, (Northey v. Burbage,) applies to real estate only. In 1 P. Wms. 340, (Northey v. Strange,) the devise was not to children, simply, but also to grandchildren; giving each grandchild an equal share with the children, per capita, and not per stirpes: that was, therefore, a compound case, not resembling this. And in 2 Vern. 105, (Garbland v. Mayot,) cited in the same page of Bacon, it was determined, when A. devised 20l. a piece to all the children of his sister, that a child born after the making of the will, and before the death of the testator, should take; the word "children," comprehending all.

The plain question is, whether Mrs. Dangerfield was provided for by the will at all. If she took any thing under the will, she can take nothing under the statute.

November 12th, 1812. JUDGE ROANE pronounced the following opinion of the court.

"The court is of opinion that there is no error in so much of the decree, rendered in this case, as considers the female appellee to have been a pretermitted child of the testator, John Armistead, according to the true construction of the act in such case made and provided; nor in so much thereof as decrees to the appellee, John Dangerfield, in right of his wife, one ninth part of the real and personal estate (after the payment of his debts) of which the said testator died seised and possessed, together with the rents and profits of the said real estate; but that the same is erroneous in not having provided that the said portion, or ninth part, should be raised by a proportionable contribution by the devisees and legatees in the said

28 *testator's will mentioned, and those claiming under them, as, in, and by,

the said act, is further provided and required; and, also in this, that no provision is made, in and by the said decree, in favour of the appellees, for the hires of negroes, and interest and profits of the personal estate, which may eventually be found due to them under the principle of this decree. The said decree is therefore reversed, but without costs, the appellees being the party substantially prevailing,* and remanded to the Court of Chancery, be reformed, and finally proceeded in, pursuant to the principles of this decree."

29 *Sheppard's Executor v. Starke and Wife.

Friday, Nov. 22, 1811.

1. Decree!—Amendment—Motion—Bill of Review. †—A decree which is final in all respects, except that "liberty is reserved to the parties, or either of them, to resort to the Court for its further interposition, if it should be found necessary," may be amended, on motion, in a summary way, or by bill of review.

2. Chancery Practice—Want of Proper Parties—Effect in Appellate Court. §—If it appear, on the face of the record, that proper parties to the suit are wanting, the decree will be reversed, unless the objection was expressly relinquished in the Court below. See Hooper and wife v. Royster, 1 Munford, 119, pl. 8.

*Note. See Mentz v. Hendley, 2 H. & M. 318.

†Decree—Reservation for Future Interposition of Court—Effect on Finality.—In subsequent cases, it is said that, though the decree in the principal case contained a reservation for the future interposition of the court, it must have been regarded as a final decree, else the court could not have entertained a bill of review as regular and proper. See Harvey v. Branson, 1 Leigh 123, 124; Cocke v. Gilpin, 1 Rob. 38, 44.

As to proceeding by notice, the principal case is cited in Jones v. Hobson, 2 Rand. 487; Dabney v. Smith, 5 Leigh 19.

See further, monographic note on "Decrees" appended to Evans v. Spurgin, 11 Gratt. 615.

Same—Final—What Constitutes.—On this subject, see the notes referred to in foot-note to Templeman v. Steptoe, 1 Muf. 389. The principal case was cited on the subject in Royall v. Johnson, 1 Rand. 427.

§Bill of Review.—A bill of review forms no part of the proceedings in the original cause. It is allowed only after the suit is completely ended. It differs in this from a petition for a rehearing which may be allowed before the signing and enrolling of the decree, as it does also from a supplemental bill in the nature of a bill of review which supposes the cause to be still existing, and is received and incorporated into that cause as a part of it; and the orders made upon it are taken and considered as orders in the original pending cause. Claytor v. Anthony, 16 Gratt. 526, citing principal case; Bowyer v. Lewis, 1 Hen. & M. 554; Ellzey v. Lane, 2 Hen. & M. 588.

See further, monographic note on "Bills of Review" appended to Campbell, 32 Gratt. 649.

Chancery Practice—Want of Proper Parties—Effect in Appellate Court.—It is a general rule in equity that all persons interested in the subject-matter involved in the suit, who are to be affected by the proceedings and result of the suit, should be made parties; however numerous they may be, and if they are not made parties, and their interest appears upon the face of the bill, the defect may be taken advantage of either by demurrer or upon the hearing; and if it appears on the face of the record that the proper parties are wanting, the decree will be reversed by the appellate court unless the objection was waived in the court below. Pappenheimer v. Roberts, 24 W. Va. 708, citing the principal case, Clark v. Long, 4 Rand. 451, and Hill v. Proctor, 10 W. Va. 59.

To the point that, if it appear on the face of the record that proper parties to the suit are wanting, the decree will be reversed, unless the objection was expressly waived in the court below, the principal case is also cited in Clark v. Long, 4 Rand. 453; Armistead v. Gibbons, 25 Gratt. 376; Dabney v. Preston, 25 Gratt. 842; Sillings v. Bumgardner, 9 Gratt. 275; Lynchburg Iron Co. v. Tayloe, 79 Va. 676; foot-note to Clayton v. Henley, 32 Gratt. 66;

(a) Wilcox v. Calloway, 1 Walsh, 41.

3. **Same—Suit for Division of Residuum of Estate—Parties.**—All the residuary legatees or distributees, together with the executors or administrators of such as have died since the testator or intestate, ought to be parties to a suit for division of a residuum. See *S. P. Richardson's Executor v. Hunt*, 2 Munford, 148. See post, Branch's administratrix v. Booker's administrator.
4. **Chancery Practice—Distribution—Parties.**—The Court cannot decree a distribution, in favour of persons not parties to the cause.
5. **Same—Prayer for General Relief.**—Under the prayer for general relief, the plaintiff in equity cannot recover a claim distinct from that demanded, or put in issue, by his bill. See the Note to *1 Munford*, 554.
6. **Executors—Decree against—Form.**—A decree, against an executor or administrator, for a balance due on his administration account, ought not to be, "that he pay the same out of the estate in his hands to be administered;" but as his own proper debt. See *Moore's executrix v. Ferguson*, 2 Munford, 421, and *Barr v. Barr's administrator*, 2 H. & M. 26, S. P.
7. **Same—Compensation—Commissions.**—In this case, a commission of five per cent. on the moneys received by the executor was allowed him, in lieu of all expenses: such commission to be deducted from the balance due the estate at the end of each year. See *Fitzgerald v. Jones*, 1 Munford, 150, pl. 3.
8. **Same—Accounting and Settlement—Interest on Annual Balance.**—When interest is charged, against an executor or administrator, (in settling his administration account,) on balances due at the end of each year, it ought not to be carried to the accounts of the succeeding years so as to convert it into principal and make it bear interest; nor to be deducted from the payments made in such succeeding years. See *S. P. Granberry's executor v. Granberry*, 1 Wash. 249.
9. **Same—Distribution of Residuum—Refunding Bond.**—An executor ought not to be compelled to make distribution of a residuum, until bond and security be given by the distributees, as required by the act of Assembly in the case of an administrator. See *Rev. Code*, vol. 1, p. 166, sec. 51, and *Stovall's Executor v. Woodson and wife*, 2 Munford, 308.
10. **Acknowledgment by Feme Covert—Effect.**—An acknowledgment by a feme covert is not sufficient to establish an account against her husband,

Hinchman v. Ballard, 7 W. Va. 187; *Hill v. Proctor*, 10 W. Va. 78; *Dower v. Church*, 21 W. Va. 50; *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. Rep. 796.

1 Same—Suit for Division of Residuum of Estate—Parties.—In general one distributee cannot maintain a suit to recover his distributable share without making the other distributees parties. *Sillings v. Bumgardner*, 9 Gratt. 274, citing the principal case. See the principal case also cited in *Rexroad v. McQuain*, 24 W. Va. 35; *foot-note* to *Sillings v. Bumgardner*, 9 Gratt. 278, quoting from *Rexroad v. McQuain*, 24 W. Va. 35; *Snider v. Brown*, 3 W. Va. 146.

1 Same—Prayer for General Relief.—Under a prayer for general relief, the plaintiff cannot recover a claim distinct from that demanded or put in issue by his bill. *Piercy v. Beckett*, 15 W. Va. 458, citing the principal case. See principal case also cited in *Hanby v. Henritze*, 85 Va. 184, 7 S. E. Rep. 204.

2 Executors—Decree against—Form.—It is a settled rule in equity that wherever a balance is found in the hands of an executor or administrator, the decree shall be *de bonis propriis*, and, in such case, a decree *de bonis testatoris* will be reversed. *Templeman v. Fauntleroy*, 3 Rand. 446, citing the principal case. To the same effect, the principal case was cited in *Franklin v. Depriest*, 13 Gratt. 272. See also, *Barr v. Barr*, 2 Hen. & M. 26; monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

3 Same—Accounting and Settlement—Payments to Be Applied to Discharge of Principal.—In executory accounts, both in Virginia and West Virginia, the payments are applied to the discharge of principal and not of interest, so long as any principal is due; and the interest is brought into the account only at the close of the transaction. *Anderson v. Percy*, 20 W. Va. 326, citing the principal case. See further, *foot-note* to *Handly v. Snodgrass*, 9 Leigh 484; *foot-note* to *Burwell v. Anderson*, 3 Leigh 348; monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

4 Same—Distribution of Residuum—Refunding Bond.—The statute, 1 Rev. Code 889, § 58, declaring that an administrator should not be compelled to make distribution without a refunding bond has been extended by judicial construction to executors. *Mosby v. Mosby*, 9 Gratt. 569, citing principal case.

though it be for articles furnished her before the marriage.

11. Legatees—Division of Slaves among—To Whom Payment of Surplus Made.—In a division of slaves among legatees, if those allotted to some of them be valued at more, and to others at less, than their respective shares; and the Commissioners making the division direct, that each person whose allotment is too large shall pay a surplus, without designating to whom; it seems, that such payments are to be made to the executor, and by him to the other legatees, so as to make the division equal; and he is accountable if he deliver the slaves allotted to any legatee, without receiving the surplus payable from him or her. §§

John Starke and Elizabeth his wife, filed their bill, in the Superior Court of Chancery for the Richmond District, against Philip Sheppard, executor of Joseph Sheppard, deceased, for settlement of his administration account, and division of a residuum of the estate of his testator, among his brothers and sisters; their names (as set forth in the bill) being Elizabeth, the plaintiff, Philip, the defendant, Polly, the wife of Austin Morris, Susanna, the wife of Edmund James, Lucy, the wife of Austin Leake, Mosby Sheppard, John Sheppard, an infant, and Anne Sheppard, an infant; amounting to eight; William Sheppard (the ninth) having died since the death of the testator, intestate, and without issue.

The defendant, by his answer, made no objection to the plaintiffs' having failed to make the other brothers and sisters parties to the suit, but declared himself ready to render an account of his administration; holding himself at liberty to charge the plaintiffs with a negro of the value of 251., with certain articles furnished for the said Elizabeth before her marriage; and with 100 dollars received, (as he alleged,) by the plaintiff John, as his proportion of the houses and lots belonging to the estate.

The Court referred the accounts between the parties to Commissioners, who reported a balance of 8021. 2s. 10d., in favour of the estate, after giving the executor credit for sundry expenses, in the course of administration, amounting to 371. 14s. for which no vouchers were produced, and as to which the Commissioners expressed doubts, being of opinion that commissions ought to be allowed on all moneys received by the executor. The Court, on the 25th of May, 1804, confirmed the report, (except

§§Note by the Reporter. In such case, if the Commissioners were to designate the legatees whose allotments are deficient, as the persons to whom the payments are to be made by those responsible for surplusses; would it still be the duty of the executor to withhold the slaves, until payment of the money? or would the legatees be compelled to look to each other for satisfaction? and if any of them should make away with the property, and prove insolvent, what would be the remedy? It seems to me, that, in all such cases, the slaves ought not to be delivered to any legatee, from whom a surplus is due, until it be paid, or secured, to the satisfaction of the legatee or legatees, to whom the same is payable; unless such legatee or legatees, assent to such delivery without security. But if the Commissioners themselves deliver the slaves according to their allotment, without requiring the money, or security, and without the assent of the legatees to whom the surplus sums are payable, I conceive the executor would not be responsible. But the remedy for the injured legatees would be by excepting to the report of the Commissioners, and preventing a confirmation of the division made by them; or by moving the Court to compel the other legatees to pay the money, or to give security, as might seem equitable.

as to the said sum of 37l. 14s.) and allowed the defendant commissions in lieu thereof; but, inadvertently, *did not deduct the said commissions from the above-mentioned balance; the decree being, "that the said executor distribute the 839l. 2s. 10d. appearing to be now due from him, to balance the account reported by the Commissioners, among the testator's brethren and sisters, upon their giving security against future demands of creditors; and liberty was reserved to the parties, or either of them, to resort to the Court for its further interposition, if it should be found necessary."

To this decree the defendant exhibited a bill of review, on three grounds, viz. 1st. That, before distribution, his commissions, at five per cent., ought to be deducted from the balance of 839l. 2s. 10d.; 2dly. That the decree had not stated, precisely, how the distribution was to be made; or, in other words, into how many parts the balance should be divided; that the testator had nine brothers and sisters, and the part of William, (who died intestate, and without wife or child,) having devolved on his father, Benjamin Sheppard, who survived him, the distribution should, therefore, be into nine parts; 3dly. That, against the ninth part, to which Starke and Wife were entitled, the executor should have had credit for 57l. 7s. 11d. with interest; being the amount of his account for articles furnished the said Elizabeth before her marriage. In this bill of review, (which was received by the Chancellor, July 12th, 1804,) nothing is said of the negro, valued at 25l. and the 100 dollars claimed in the answer to the original bill. With respect to the latter, there was no evidence in the record; no account having been taken, by the Commissioners, relative to the houses and lots devised by the testator, except as to the rents thereof; and no division of such houses and lots appearing to have been made. In obedience to an order of the high Court of Chancery, (a copy of which, without a date, was in the transcript of the record,) the slaves whereof the testator died possessed, were divided into eight parts; in which division, a negro boy, at the price
32 *of 25l. was allotted to Elizabeth Sheppard, and she was to receive the sum of 19l. 10s. to make up her share.

In answer to the bill of review, Starke and wife did not admit that the executor had really incurred the expenses amounting to 37l. 14s.; and alleged that his demand of commissions, if allowed, would be far short of the interest on the large balance in his hands, which interest ought to have been decreed against him. They admitted that the testator left nine brothers and sisters, but alleged that William Sheppard's share was to be equally divided among the eight survivors; because their father, Benjamin, who inherited that share, was since dead, and had, by his last will, directed the residue of his estate, (in which his right to the said share was included,) to be so divided. They did not admit the account exhibited by the executor, for 57l. 7s. 11d. as aforesaid, to be just; except 17l. 11s. for wedding clothes;

part of the remaining charges in the said account being dated at a time when the said Elizabeth was about 12 or 13 years of age, and while her father was living; and the whole of them before she attained the age of 17; alleging, that she had a guardian after the death of her father, who left her property for her maintenance; that she lived with her mother, with whom Philip Sheppard, the executor, also lived, &c.

A general replication was filed, and Commissioners to take depositions were awarded, in October, 1801. In October, 1805, on the motion of Starke and Wife, the Court directed one of its Commissioners to examine, state, and settle, and to the Court report, all accounts between the parties. In obedience to this order, the Commissioner, being prevented, by the executor's refusing to produce his vouchers, from going into the administration account de novo, contented himself with reforming the same, by giving the executor credit for commissions, (as a compensation for his trouble and expense,) to the amount of 173l. 12s.; (not allowing the 37l. 14s.) by making a just debit to the estate for
33 money paid in "satisfaction of a legacy to the widow; and by charging the executor with interest on the balances which annually remained in his hands, "not from the respective dates at which he received the moneys of the estate, but from dates at which he closed his annual accounts; whereby he had the use of considerable sums, during the greater part of each year, without interest:" whereupon it appeared, that a balance of 910l. 15s. 11d. was due from the executor to the estate. The Commissioner conceived it unnecessary to divide the said balance into nine parts; "there being a sufficiency of personal estate of Benjamin Sheppard, the father, to discharge his debts; the part to which he was entitled by inheritance from William, his son, being therefore not wanting to pay them; and the widow of the said Benjamin relinquishing her claim." He therefore proceeded to state the claim of Starke and wife, as entitled to one eighth part in her right, and to another eighth by an assignment or order, in their favour, drawn by Edmund James, in right of his wife Susanna.

In stating the first of these claims, the Commissioner gave Philip Sheppard credit by 17l. 11s., being so much of the account, annexed to his bill of review, as was for wedding clothes furnished by him to Starke's wife; and disallowed the rest of the said account; he charged him, as executor, with the sum of 19l. 10s., to make up her share of the slaves as aforesaid; with interest on that sum from the 3d of November, 1795; with 113l. 17s. as one eighth part of the above-mentioned 910l. 15s. 11d.; and with interest thereon from the 3d of April, 1801; making the balance due to Starke and Wife, in their own right, amount to 147l. 10s. 2d., on the 3d of January, 1806; bearing interest on 118l. 14s. 6d. (part thereof) from that day.

In stating the administration account, the interest due upon the balances of the respective years, was carried into the ac-

count of the succeeding years, so as to increase the "amount of the subsequent balances, on which interest was charged. And payments were applied to the discharge of the interest in the first place. A balance of 56l. 14s. 9d. was stated as due on account of Edmund James's assignment; of which 45l. 17s. carried interest from the 3d of January, 1806.

To this report sundry exceptions were filed, but overruled. And, on the 6th of September, 1807, the Chancellor decreed, "that the said executor, out of the estate of his testator in his hands to be administered, pay, to the said Starke and Wife, 204l. 4s. 11d., with interest on 164l. 11s. 6d., part thereof, from the said 3d day of January, 1806, and costs; without directing bond and security to be given to answer future claims against the estate:" to this decree, a writ of supersedeas was awarded by a Judge of this Court.

Wirt, for the appellant, (after observing that none of the legatees, except Elizabeth Starke and Philip Sheppard, were parties to the original bill, and that the plaintiffs claimed, in that bill, only Elizabeth's eighth part, saying nothing of the assignment by Edmund James, or of their right to William Sheppard's share,) proceeded to rely on the following points:

I. Proper parties to the suit were wanting.

1. The other claimants on the residuary fund should have been parties, for the purpose of avoiding multiplicity of suits; the rule being, that, although the claimant of a pecuniary legacy may sue alone, all the residuary legatees must be parties to a bill for a share of the residuum. (a)

2. William Sheppard's personal representative should have been a party. It is true that Philip Sheppard (the defendant) was his administrator; but he was not sued as such; and it was certainly wrong to draw out of his hands William's dividend, without giving him an opportunity to establish his set-offs, (which, according to his *exceptions to the Commissioner's report, appeared considerable,) against the estate of the said intestate.

3. Austin Morris, executor of Benjamin Sheppard, who was heir of William, is also a proper party. In his deposition filed in this cause, he claims, in his capacity as executor, the balance due from Philip Sheppard, as administrator of William.

II. The decree is wrong in confirming the Commissioner's last report.

1. The dividend of Edmund James ought not to have been decreed, upon his assignment. The executor had a right to demand bond and security from Edmund James, to answer debts accruing thereafter. Besides, James was himself a debtor to the executor.

2. Mrs. Starke was not entitled to draw her own dividend, without paying what she owed on account of the articles furnished her before her marriage. The executor maintained and clothed her three years after her father's death. She lived with him, and, in consideration of the services, she rendered by needlework, he

charged her nothing for food and raiment generally, but only for money advanced for substantial and necessary purposes; such as cash paid for inoculation, to a midwife for attending a negro woman, &c. The deposition of Austin Morris says, she admitted (since her marriage) the account to be just. In a case like this, her acknowledgment (though made by a feme covert) ought to be received as evidence; because they who are seeking equity ought to do equity.

3. Interest is not properly charged on the balances from the end of each year; since the executor was continually paying current claims, as appears from the account.

4. The Commissioner ought to have opened the administration account again; the order being only to settle the accounts between the parties.

Munford, for the appellees. The objection, for want *of proper parties, ought not to be supported, when it is made, for the first time, in the appellate Court, and it does not appear that additional parties are requisite to the justice of the case. Such objection might have been made, in the Court below, by demurrer, (b) or by plea. (c) But this was not done. The defendant to the original bill consented to render the account of his administration, and to have a settlement with the parties now before the Court; and even in his bill of review he made no complaint that proper parties were wanting. The Chancellor's decree directed a division among all the legatees, in the same manner as if they had been parties; evidently, regarding them as such; probably, because they were all named in the bill. It appears probable, too, that they considered themselves parties to this suit; since they brought no other for satisfaction of their claims. The appellate Court ought, therefore, to presume that the executor on the one side, and the several legatees on the other, were content to abide by the settlement of the administration account, intended to be had, in this suit, for the benefit of all parties interested. The maxim that consent takes away error, emphatically applies in this case. Philip Sheppard had every opportunity he could have desired of establishing, before the Commissioner, his set-offs, as administrator of William Sheppard; but he exhibited no proof. His exceptions, on that ground, were therefore properly disallowed. The claim of Austin Morris, as executor of Benjamin Sheppard, was considered by the Commissioner; but, very correctly, he was of opinion, that the money ought not to be paid over to him, merely for the purpose of his paying it back to the legatees; there being no debts of his testator to which it should be applied; and the widow relinquishing her claim. Surely, in such a case, there can be no reason for withholding the money from the legatees in the first instance.

2. As to the allowance of Edmund James's assignment; the prayer, for general relief, at the conclusion of *the original bill, was sufficient to comprehend

(b) Coop. Eq. 185.

(c) Id. 289.

(a) Coop. Eq. 186, 8 Bro. Ch. cases, 365.

it. If not, it will, nevertheless, appear in the record, that that claim was demanded and recovered by Starke; and this will be a bar to any future suit for the same thing, by James himself, or his assignee. A Court of Equity ought to regard the substantial merits of the case, and not to sacrifice justice to formal and captious objections. There could be no reason for requiring bond and security to be given by Edmund James, or the other legatees; because the executor did not require it in his answer to the original bill. He might, therefore, be considered as waiving such demand.

The set-off claimed by him, on account of a bond given by James, for property purchased at the sale of the estate, is allowed by the Commissioner in his report; after deducting which, the balance of \$61. 14s. 9d. appears to be due; so that Mr. Wirt is mistaken in saying that James was a debtor to the executor.

The claim of the executor, for articles furnished Mrs. Starke before her marriage, was rejected by the Commissioner for very good reasons set forth in the report. Mr. Wirt is mistaken in supposing that she lived in his house. The fact, as stated, is, that she lived with her mother; and the advances made were such as an affectionate brother would naturally make, as presents, to his sister, who was then a young girl. The wedding clothes were allowed on the ground of the admission of her husband; but evidence of her acknowledgment when a feme covert, that the account was just, could no more bind him, than her assumption would.

3. The mode of charging interest, in the administration account, on the balances due at the end of each year, was, in this case, highly favourable to the executor; since it appears, that "he had the use of considerable sums, during the greater part of each year, without interest;" and, if it was not strictly correct to carry the interest, due upon each balance, into the accounts of the ensuing year, it will be

38 found, on calculation, that this *error of the Commissioner, (if it was one,) makes so slight a difference in the amount due, that it ought not to be regarded as sufficiently important to shake a decree, by which a controversy, so tedious and troublesome, will be settled.

4. The executor, having filed a bill of review to set aside the original adjustment of his account, in some respects, in which he considered it injurious to himself, was bound, by the principle, that he who seeks equity must do equity, to permit such alterations as were necessary to do justice to the other party. The Commissioner therefore rightly understood the order as authorizing him to go into the accounts, generally; as well between the executor and the estate of his testator, as between him and Starke and Wife. But, in fact, the obstinacy of the executor, in refusing to produce his vouchers, prevented the order from being carried fully into effect. The account was not opened *de novo*, but only reformed in some particulars.

It may be said, however, (as the executor, in his exceptions, contends,) that he

should not have been charged with the sum of 19l. 10s., to make up Mrs. Starke's share of the slaves; part only of which share she received. He insists, that he was not responsible for the surpluses, payable from certain distributees who received too much, to others who received too little. But this cannot be right. It was his duty, as executor, to make the division equally, and, therefore, not to deliver to any one a negro valued at more than his share, until such legatee should have paid the surplus, either to, or for the benefit of, the legatee, or legatees, to whom the same was payable. The object of the application to the Court of Chancery, for a division, was to settle the controversy, and not to give birth to a multiplicity of other suits, which might be necessary, if the legatees were to have recourse against each other for parts of their respective shares; especially, in this case, in which the Commissioners did not

39 designate any particular person, or persons, *to whom the legatees, who received too much, were, respectively, to make payment. Of course, it was intended by them, that payment of the several surplus sums should be made to the executor, and by him to the legatees respectively entitled to satisfaction for deficiencies. Of this, in his answer to the original bill, he seems sensible; for he holds himself at liberty to charge the complainants with the negro they received; from which it is evident that he considered them as having received that negro of himself.

Hay, in reply. Objections for want of parties may be made in the appellate Court, though not suggested in the Court below. (a) Mr. Munford says, that a defendant may waive this objection. I admit he may, if he please; but the question is, whether Sheppard's executor has waived it, or not. There is nothing in this record showing that he has. The decree, therefore, must be reversed for the want of proper parties.

But the Court may examine the record to settle other points.

The plaintiff must recover, according to the allegations in his bill. (b) Here, the plaintiffs recover the share of Edmund James, and part of the share of William Sheppard; neither of which is mentioned in their bill. Their claim, as to William's share, is not against the executor of Joseph Sheppard, but of Benjamin, who was heir of William. Benjamin Sheppard might have died largely indebted; and whether such was the case or not, does not judicially appear; the mere assertion of the Commissioner being not satisfactory.

The mode of charging interest, adopted in this case, is wrong in principle. It is a hardship that an executor should be made liable for interest, when he has not made use of the money. (c) The only cases, in which he ought to pay it, are where he appears to have made it, or has retained money, for a length of time, when he might have put it to interest for the benefit of the estate. But, at any rate, if

(a) Richardson's Executor v. Hunt, 2 Munford, 148.

(b) Coop. Eq. p. 5. Wyatt's pr. reg. 57.

(c) 2 Fonb. 184, note (p.)

charged against him on the balances at the *end of each year, it "ought to be carried to the account of the succeeding years, in order to deduct the same from the payments made in such succeeding years." (a)

Friday, March 6th, 1812, the president pronounced the following opinion of the Court, consisting of Judges Fleming, Roane, Brooke, and Coalter.

"The Court is of opinion, that although either of the parties to the original decree pronounced in this cause, might, in a summary way, have resorted to the Court of Chancery for its further interposition, if deemed necessary, (under the special reservation in the said decree contained,) they might also proceed by bill, as was done in the present instance; that mode being equally justified by the terms of the reservation aforesaid, and beneficial to the parties; and that a final decree having been pronounced in, and upon, the charge made in the bill aforesaid, it was competent to the appellant to evoke the same, by way of appeal to this Court. But the Court is of opinion, that both the said decrees of the Superior Court of Chancery are erroneous, in the following particulars: first, In proceeding to decree in the cause without making the other distributees of the estate of Joseph Sheppard, deceased, including the appellant, in his character of administrator of William Sheppard deceased, (one of those distributees,) as also the executors of Benjamin Sheppard, the father and heir, as is suggested, of the said William Sheppard, parties to the said suit; the same being necessary, not only on the ground of doing complete justice between all parties, and of avoiding a multiplicity of suits, but also, for the purpose of enabling the appellant to establish his just discounts, if any, against such last-mentioned parties respectively: secondly, In decreeing to the appellees a sum of money, in the character of assignee of Edmund James's share of the said Joseph Sheppard's estate, and in that of distributee of William Sheppard, deceased, when neither of the said claims are demanded, or put in issue, by the

41 bill: *and, thirdly, in confining the recovery, in the said decrees, to the goods of the said Joseph Sheppard, the intestate, instead of making it the proper debt of the appellant, his administrator; the sum so decreed being established as due by him on account of his administration of the estate aforesaid."

"The Court is further of opinion, that the said first decree is also erroneous; first, in decreeing the sum therein mentioned to be distributed in favour of persons not parties to the said cause; secondly, in not ascertaining, particularly, into how many parts, or portions, the said sum was to be distributed; and, thirdly, in not allowing the appellant his commissions for administering the estate aforesaid, at the same time that it refused payment of an account for his necessary expenses concerning the same. And the Court is further of opinion, that the said last decree is also

erroneous; first, in carrying the interest, due upon the balances of the respective years, into the accounts of the succeeding years, thereby converting that interest into principal, and making it bear interest, instead of letting the balances due at the end of each year, as aforesaid, (exclusive of such interest,) carry interest up to the time of payment; and also in applying the payments to the discharge of the interest, and not of the principal, contrary to the rule settled by this Court in the case of Granberry against Granberry; which interest, the Court is of opinion, ought to be paid by him, because it appears there were considerable balances in his hands at the end of each year, which, under the circumstances of this case, it was improper in him to have retained; and, secondly, in omitting to compel the appellees to give bond, to refund, in cases of debts afterwards appearing against the estate, according to the provisions of the act in such case made and provided."*

42 "It was therefore decreed, &c. that both decrees be reversed with costs, and that the cause be remanded, for the purpose of making the parties, deemed necessary as aforesaid; of amending the bill, so as to embrace, and be commensurate with, the whole subject now decreed as aforesaid; and to be finally proceeded in pursuant to the principles before declared.

"And, for the purpose of preventing further litigation, in a cause already much protracted, the Court is induced to add, that it approves the principles of the last decree; except as is before excepted; and, particularly, of the rejection of all the articles contained in the appellant's account against the female appellee, while an infant and unmarried, (except the items for wedding clothes, admitted by the other appellee;) the same being neither established by testimony, nor, probably, of a character, under all the circumstances of the case, to form a just charge in the present instance. The Court also approves the allowance in this case of a commission of five per cent. in lieu of all expenses; as allowed in the report made in this cause; the same being properly charged, upon the sum received in each year, and deducted, in stating the balances at the end thereof."

43 *Branch's Administratrix, and Others, v. Booker's Administrator.†

Monday, March 9th, 1812.

1. *Chancery Practice—Division of Testator's Estate—Parties.*—Where the division of a testator's estate in pursuance of his will is not to be made at one and the same time, but at the several periods when any one or more of his children shall separate from the family, it is not necessary that all the legatees be made parties to each suit in Chancery for a division; but only those entitled to participate in the division then in question.
2. *Will—Construction—"Child's Share."*—Where, if a testator direct that each of his children upon separating from the family shall have a "child's share" of the personal property, is it to be such part as he or she would have been entitled to in case

*Note. The words of the act of Assembly apply only to an administrator, not an executor.—Note in Original Edition.

†For monographic note on Bigamy, see end of case. ‡The principal case was cited with approval in *Buck v. Pennybacker*, 4 Leigh 8.

(a) *Granberry's Executor v. Granberry*, 1 Wash. 249.

of the father's intestacy? or is the whole to be divided among the children excluding the widow? or among the children and the widow, in such manner as to give her a child's part?†

3. **Same Construction—"Separation from Family"—What Constitutes.**—In such case the marriage of a daughter, (with the widow's consent, if such consent be requisite under the will,) is, ipso facto, such a separation from the family, as entitles her husband to demand her share of the estate; and this, although she continue, until her death, to reside with the widow, and no demand of an allotment of her share be made, during her life. He is also entitled to the profits received upon such share, from the day of the marriage, or a reasonable time thereafter; with interest thereupon; and is, in like manner, chargeable with her proportion of the expense of maintaining such slaves as produce no profit.

William Branch, sen., of the county of Chesterfield, by his last will and testament, having devised to his son William, a tract of land, and certain slaves and stock, then in his, the said William's, possession, "barring all claims in future against the testator's estate," and to his sons Joseph, Henry, Thomas, and Francis, and his daughters Judith and Martha, certain lands; lastly, "to his beloved wife Judith, he gave the land on which he resided, her natural life, as, also, all other his lands and other property, so long as the family should live entire with her, but when any one of his children should wish to separate from the family, and should obtain her consent, then they should have a right to demand the land above devised them, as also a child's share of the slaves and personal property, which child's lot should be ascertained by his neighbours, Thomas Watkins and George Evans, or the survivor, should either of them die. It was his wish, that there be no appraisement or inventory, and that his wife Judith have power to act, as to the personal property, as he should himself, were he in being, in all respects."

44 "George Evans and Thomas Watkins were called on, by Mrs. Branch to allot to three of his children, to wit, Henry, Joseph, and Judith, who had married Thomas Liggon, their proportions of the slaves left by her deceased husband. This they proceeded to do, on the 3d of January, 1799. The negroes were valued by them to 1410l. which, when divided into six equal parts, gave to each 235l.

Martha, the other daughter of the testator, having intermarried with James Booker, and afterwards departed this life, the said James qualified as administrator of his deceased wife, and, in that character, filed his bill, in the Superior Court of Chancery for the Richmond District, against Judith Branch, administratrix, with the will annexed, of the said William Branch, deceased, and Thomas Branch and Henry Branch, defendants; charging that he had married the said Martha, with the consent of the defendant, Judith, and thereby became entitled, in right of his wife, to the said "child's part," as the marriage of said Martha was, itself, a

separation of her from the family: that, some time after the marriage, he proposed moving his residence from the house of the said Judith, which was assented to by her, and she appeared quite willing that he should have his wife's proportion of the personal estate of William Branch allotted to him; but before this took place, his wife was taken sick and died, and then Mrs. Branch refused to let him have any part of said estate, of which she, together with Thomas Branch and Henry Branch, (who were the only defendants to the bill,) held possession.

The bill further stated, that Francis Branch, son of the testator, died, an infant, under the age of 18 years, and without issue; that the division and allotment, by Evans and Watkins, was made after the death of the said Francis, when the testator had but five children, who were alive, or had left issue;† and of course 45 the mode of division "resorted to by those gentlemen was perfectly correct, during the life of the defendant Judith."‡ The plaintiff prayed the court to decree him such proportion of the personal estate of the testator "as he was entitled to by virtue of the premises."

The defendant, Judith Branch, in her answer, denied having consented to her daughter's marriage with the plaintiff, previously thereto; "further than this; that, when her consent was asked, before it took place, she positively refused it, and endeavoured to persuade both the parties to think no more of it, and to break it off; but, they having persisted in it, she told them, that if such was their determination, they ought not to run away, but be married at her house." She also alleged, "that the said Martha never separated herself from the family of the defendant; they having continued to live in the house of this defendant, from the time of the said marriage, for eight or nine months, until her death; that they never proposed to separate from her family, nor ever demanded any share of the said testator's estate upon the idea of such separation."

The defendant, Henry Branch, by his answer, denied his having possession of any of the estate, "for which the plaintiff is now suing." Thomas Branch declared that he continued to live with his mother, and had never received his share.

Many depositions were taken; the result of which was, that Mrs. Branch appeared, for some time, to have objections to the marriage, but, at length consented, and gave the parties a wedding.

It was also proved, by a witness, that, in the fall of 1802, after the marriage had taken place, the deponent was at the house of Mrs. Branch, and heard her express a wish that the plaintiff would let his negroes, that he got by his wife, remain on

*Note. The last of these modes of division was adopted in this case, and sanctioned by this court, on the ground of acquiescence and consent of parties: no exception to the report of the commissioners having been taken in the court below; and a previous division, on the same principle, having been made without objection by any party interested.—Note in Original Edition.

†Note. There appear to have been six living, after the death of Francis, if William were included in the number; but it seems, that he was not counted, having received his full share in the lifetime of the testator.—Note in Original Edition.

‡Note. The dividing of the slaves, &c. into six parts, when there were only five children, seems to have been for the purpose of leaving one sixth part, to the widow: under the supposition that she was entitled to a child's part for life.—Note in Original Edition.

the plantation she lived on another year; that the estate was somewhat embarrassed, from which another crop would probably relieve them." But no demand, by the plaintiff, or his wife, to have her share allotted, was proved.

The cause was heard June 19th, 1809; whereupon the chancellor decreed, that "Thomas Watkins and George Evans do, forthwith, proceed to allot to the plaintiff, in right of his late wife, one sixth part of the slaves and other personal estate of the testator, with the profits thereof, since the plaintiff's marriage; and make report, &c. for a final decree."

In obedience to this decree, the commissioners reported that the twelve slaves, formerly left, (when they made the first allotment,) in the possession of the administratrix, had increased to twenty-five, which they now valued at 900l.;—of which they allotted to the plaintiff one third; that (three sixth of the cattle having before been allotted to Henry, Joseph and Judith, children of the testator,) they now gave the plaintiff one third of the cattle remaining on hand; that the hogs, together with the furniture and plantation utensils, not having been divided before, they allotted to the plaintiff one sixth part thereof;—that of the horses, the plaintiff admitted he had already received his full proportion;—and there remained none of the sheep to allot to him. As to the profits of the slaves, and other personal estate of the testator, since the marriage of the plaintiff, they reported that, from the first of January, 1803, which was the commencement of the year succeeding the marriage, (the same having taken place in August, 1802,) up to the first of January, 1810, the said profits amounted, with interest thereon, to 292l. 15s. They credited the plaintiff, in account with the defendant, Judith, by one third of that sum,

being 97l. 11s. 8d.; and by his share of the furniture and plantation utensils, (left in her hands by consent of parties,) amounting to 8l. 16s. 8d. They stated the expense attending the raising of negro children, including every charge for food, clothing, fees to physicians and midwives, with the interest thereon, 310l. 1s. 1d. They debited the plaintiff with one third of that sum, viz. 103l. 7s. 4d. To which they added, "excess in his allotment of slaves,"

5l. 0s. 0d.

And amount of sundry sums of money paid by the defendant for the benefit of the plaintiff, with the interest thereon, (which was admitted by the plaintiff, and requested by the parties to be made a part of the report)

92l. 11s. 2½d.

200l. 18s. 6½d.

So that, after deducting the aggregate of the credits above mentioned, viz. 106l. 8s. 4d. A cash balance appeared due from the plaintiff to the defendant amounting to 94l. 10s. 2½d. Chancellor Taylor approved and confirmed this report, "to which there was no exception," and decreed, that upon payment of the sum "appearing, thereon, to be due, by the plaintiff to the defendant Judith, or, if she will not receive it, then, upon the payment thereof, into the Bank of Virginia, to the credit of the clerk of this court, for her use, that she forthwith deliver to the plaintiff that portion of the estate of her testator allotted to him by the said report." And he further decreed, "that she pay the costs of suit out of the estate of her testator, if, &c.—if not, out of her own estate."

From this decree the defendants appealed.

Wickham, for the appellants, in the first place, contended, that, under the will, the plaintiff, James Booker, was not entitled to any part of the estate; at least during the life of the widow; since his wife never separated from the family. There is no other devise of the slaves, but in the 48 "clause in which the widow is authorized to hold possession of all the property, until the event of the removal of a child with her consent. As that event, with respect to Martha, the plaintiff's wife, never happened, it may be said that her share of the slaves sunk into the residuum. But, if that be the case, it cannot be claimed during the life of the widow.

2. If the plaintiff be entitled to his wife's share immediately, he can claim (under the words "a child's part") only one sixth part of two thirds of the whole.

Any other construction would, when the last child goes away, deprive the widow of the whole;† which could not be the testator's intention. He certainly meant, by a child's part, such part as each child would be entitled to in case of intestacy; which always leaves the widow's third undisturbed.

3. All the children should have been made parties to the suit. This may be supposed unnecessary, because some of them have received their shares: but that may be a point in controversy, and is not to be taken for granted. In Richardson's Executor and Hunt,(a) it appeared that some of the children had received their shares: yet it was determined, that they ought to have been parties, for the purpose of ascertaining whether they agreed to that division; and that they might be bound by the decree.

4. Profits, in this case, ought not to be allowed; nor,

5. Interest on profits.

Williams, contra. It seems to me that each daughter was entitled, on her marriage, to her share. The object the testator had in view was, that all his children

*Note.—This was complying with the spirit of the decree, as nearly as practicable; by giving the plaintiff one third of the slaves remaining after the first allotment, instead of one sixth of the whole, there being only three persons (including the widow) among whom the division, in this instance, was made.—Note in Original Edition.

†Note. This seems a mistake. There being only five children, among whom the division was made, by giving them each a sixth part, the widow would retain a sixth part.—Note in Original Edition.

(a) 2 Munford, 148.

should live together; that his widow should be the head of the family, and manage every thing for their joint benefit. Whenever, therefore, the widow became no longer bound *for a daughter's support the contingency contemplated by the testator arrived.

2. The intention of the testator was to give his children his slaves and other personal estate, equally among them, but to postpone the separate enjoyment until certain events. Though the wife is entitled to a third part, in case of intestacy, yet the husband, by a will, may deprive her of it; in which case, her only remedy is to declare her intention not to abide by the will.

3. As to parties. The division here was not to take place at once, but at different times; and the testator appointed the two men who were to allot to each child his or her share. The testimony proves that the shares of three of them have been allotted; that they have long acquiesced, and have no interest in the subject now in controversy. There is no reason, then, for making them parties: if they were, they would recover costs.

4. Instead of any profits arising to the plaintiff from the decree, he is made to pay the widow for raising young negroes. If the profits be not allowed, neither ought the charge for raising negroes to be made, which amounts to more than the profits; at least, one ought to stand against the other.

5. The same observation applies to the interest on the profits. If both, added together, do not exceed the sum charged for maintaining young negroes, the court ought not to disturb the decree on that account. But according to the decision in *Quarles' Executor v. Quarles and others*, (a) Mrs. Booker, from the time of her marriage, when her right to maintenance, out of the estate, generally, ceased, was entitled to the profit, received by the administratrix, on the share which should have been allotted to her, and also to interest on the profits from the time of the receipt thereof by the administratrix.

Wickham, in reply. I admit the will is to be followed; but I contend that the plaintiff and his wife were not entitled to profits from the time of the marriage, nor from *the first of January thereafter, but from a demand made; and no demand is proved.

2. A "child's part" has a legal technical meaning; signifying such proportion as each child is entitled to in case of intestacy.—Otherwise, it would be altogether uncertain.

3. The circumstance, that the children were to take at different times, does not prevent its being necessary to make them all parties. There seems to be some plausibility in Mr. Williams's argument; but it has been repeatedly overruled. *Richardson's Executor v. Hunt*, is exactly like this case, or rather stronger. The failing to make the objection in the answer makes no difference. (b) The commissioners swearing, that the first allotment was a

fair one, does not bind the parties who are not before the Court. They might file a bill to set it aside, and if it should appear not to have been fair, they would be compensated out of the part now in controversy.

4 and 5. It is a most unreasonable doctrine that charges for maintenance of negroes, where no profit could be received from them ought not to be allowed. The circumstance then, that the expense of maintaining the young negroes exceeds the profits of all the slaves collectively, with interest, does not weaken my objections to the allowance of such profits and interest.

Friday, March 20th, the Judges pronounced their opinions.

JUDGE BROOKE. The general rule, that all persons interested in the division of the same subject ought to be parties in a suit brought by one or more of them, does not apply to the present case: the division here could not be made at one and the same time, in pursuance of the will of the testator, but at the several periods when any one or more of his children should separate from the family with the consent of the mother; nor will I, after a division has been made, as to one or more of the children, without complaint on their 51 part, presume that they *are dissatisfied, or have received an unequal share. A contrary rule, in the present case, would tend to harass the persons interested by a multiplicity of suits; inasmuch as, under its operation, they would all be made parties whenever any one of the children separated from the family, and claimed its share under the will. For these reasons, and because all parties appear to have acquiesced in, and consented to, a division of the estate into six equal parts, according to the number of children, (without deciding on the effect of the words, "child's part," in the will, which, probably, would have produced a different rule of division from the one adopted by the parties,) I am of opinion the decree of the chancellor is correct, and ought to be affirmed.

JUDGES COALTER and ROANE were of the same opinion.

Decree unanimously affirmed.

BIGAMY.

- I. Statutory Provisions.
- II. Elements of the Offence.
 1. Prior Valid Marriage.
 2. Subsequent Marriage.
- III. Evidence.
 1. To Prove Prior Marriage.
 - a. Admissions of Accused.
 - b. Cohabitation.
 - c. Testimony of Witness Present at Marriage.
 - d. Certificate of Celebrant.
 - e. Decree in Divorce Proceedings.
 - f. Evidence of License without Production of License Itself.
 2. Evidence to Show Invalidity of Prior Marriage.
 3. Sufficiency of Evidence.

1. STATUTORY PROVISIONS.

The Virginia and West Virginia statutes regarding the crime of bigamy are identical, and provide as follows: "If any person, being married, shall,

(a) 3 Munford, 321.

(b) *Sheppard's executor v. Starke and wife*, ante.

during the life of the former husband or wife, marry another person in this state, or if the marriage with such other person take place out of the state, shall thereafter cohabit with such other person in this state, he shall be confined in the penitentiary not less than three nor more than eight years." Va. Code, § 3781; W. Va. Code, ch. 149, § 1. By a subsequent section it is provided that: "The preceding section shall not extend to a person whose former husband or wife shall have been continually absent from such person for seven years next before marriage of such person to another, and shall not have been known by such person to be living within that time; nor to a person who shall, at the time of the subsequent marriage, have been divorced from the bond of the former marriage, or whose former marriage shall at that time have been declared void by the sentence of a court of competent jurisdiction." Va. Code, § 3783; W. Va. Code, ch. 149, § 2.

II. ELEMENTS OF OFFENCE.

1. **PRIOR VALID MARRIAGE.**—In order for a second marriage to constitute the crime of bigamy it is, of course, essential that the first marriage should have been a valid marriage, and that the marital relation should have been subsisting between the parties thereto at the time the defendant entered into the second marriage. *Oneale v. Com.*, 17 Gratt. 582. If the defendant was already lawfully married at the time the first marriage alleged in the indictment took place, such marriage is a nullity, and the second marriage laid in the indictment cannot constitute the offence of bigamy. *State v. Goodrich*, 14 W. Va. 834.

2. **SUBSEQUENT MARRIAGE.**—The subsequent marriage of the accused is of course another essential element of the crime. *State v. Goodrich*, 14 W. Va. 834. See also, the statutes, *ante*, this note, "Statutory Provisions."

III. EVIDENCE.

1. TO PROVE PRIOR MARRIAGE.

a. **ADMISSIONS OF ACCUSED.**—On a trial for bigamy, the admission of the prisoner and his acts are competent evidence to prove the prior marriage, without producing the record, or a witness who was present at the marriage. *Oneale v. Com.*, 17 Gratt. 582; *State v. Goodrich*, 14 W. Va. 834; *Bird v. Com.*, 21 Gratt. 800; *Warner v. Com.*, 2 Va. Cas. 95.

b. **COHABITATION.**—It has been held that in a prosecution for bigamy, defendant's cohabitation with the woman as his wife is proper evidence of the first marriage. *Warner v. Com.*, 2 Va. Cas. 95; *Bird v. State*, 21 Gratt. 800.

c. **TESTIMONY OF WITNESS PRESENT AT MARRIAGE.**—Although the testimony of a witness present at the marriage may not be as conclusive or satisfactory as the confession of the party, there is no solid reason for rejecting it as incompetent. There is no technical rule forbidding the reception of such evidence. When a witness testifies to a marriage in a foreign state, solemnized in the manner usual and customary in such state, by a person duly authorized to celebrate the rites of marriage, and the parties afterwards lived together as man and wife, this is as satisfactory evidence of a valid marriage as could be expected or desired, and in such case it is not necessary to prove the laws of such state, or to offer further evidence of a compliance with its provisions. *Bird v. Com.*, 21 Gratt. 800. In another case, it appeared that the first marriage took place in Pennsylvania, where a marriage could be solemnized by the parties taking each other for husband and wife before twelve witnesses, one of whom was a justice of the peace, a certificate of the marriage

under the hands of the parties and the twelve witnesses being brought to the register of the county, and recorded. It was held, that the parol testimony of one of the witnesses who was present at the marriage was sufficient to establish that one of the number was a justice of the peace, and the fact of marriage. *Warner v. Com.*, 2 Va. Cas. 95.

d. **CERTIFICATE OF CELEBRANT.**—The certificate of the party who performed the ceremony at the first marriage is admissible, in connection with other evidence, to show the prior marriage, even though it is not stated in the certificate that the celebrant was a person authorized by law to perform the ceremony. *Moore v. Com.*, 9 Leigh 639.

e. **DECREE IN DIVORCE PROCEEDINGS.**—Where a decree of divorce is introduced merely for the purpose of showing that up to the time of the decree the parties to the case were husband and wife, it is unnecessary to introduce other parts of the record in such divorce proceeding. *State v. Goodrich*, 14 W. Va. 834.

f. **EVIDENCE OF LICENSE WITHOUT PRODUCTION OF LICENSE ITSELF.**—On a trial for bigamy, evidence may be given of the prisoner's marriage under a license purporting to have been issued by the clerk of the proper court, and of the fact that such a license was issued to the prisoner, without producing the license itself, though it be within the power of the commonwealth. *Moore v. Com.*, 9 Leigh 639.

2. **EVIDENCE TO SHOW INVALIDITY OF PRIOR MARRIAGE.**—On a trial for bigamy, where the defendant claims that the previous marriage on which the charge is based was invalid because at the time of such previous marriage he had a wife living, evidence is admissible to show that he had a wife living a year before such previous marriage, as from such evidence there would arise a presumption that she was living at the time of the previous marriage charged. *State v. Goodrich*, 14 W. Va. 834.

3. **SUFFICIENCY OF EVIDENCE.**—A verdict against the defendant will not be set aside on the ground that it is not warranted by the evidence, where the prior marriage is proved by the celebrant and the second marriage by the admission of the accused. *State v. Goodrich*, 14 W. Va. 834; *Bird v. State*, 21 Gratt. 800.

Channey v. Saunders.

Wednesday, Oct. 2d, 1811.

1. **Appellate Practice—Reversal of Judgment—Evidence Contradictory.**—Where the evidence spread on the record is contradictory, and the point in dispute depends on the credibility of witnesses, the Appellate Court (not having the witnesses personally before it) ought not to reverse the judgment of that court which had lights, (from the manner of giving in the testimony, and other extraneous circumstances,) which the Superior Court, in its appellate character, does not possess.

2. **Depositions—Notice of Taking—Sufficiency.**—If two actions be pending between the same parties, and in the same court, quære, whether a deposition, taken by virtue of a notice in which the particular action is not distinctly specified, can be read as evidence in either action?

3. **Same—Same—Time.**—If the time appointed for taking a deposition "be between the hours of twelve and one;" quære, whether it can be read

***Appellate Practice—Reversal of Judgment—Evidence Contradictory.**—See the principal cases cited in *Brugh v. Shanks*, 5 Leigh 649; *Vass v. Com.*, 3 Leigh 794; *Green v. Ashby*, 6 Leigh 147; *Miller v. Insurance Co.*, 12 W. Va. 127. See further, monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268.

†**Depositions.**—See monographic note on "Depositions" appended to *Field v. Brown*, 24 Gratt. 74.

upon a certificate stating, merely, that it is taken "after 12 o'clock." See *Blincoe v. Berkeley*, 1 Call. 405, and *Marshall v. Frisbie*, 1 Muf. 247.

At the trial of an action of trespass, in the County Court of Wythe, on behalf of Stephen Saunders against Hezekiah Chaney, the plaintiff, to support the issue on his part, attempted to introduce the deposition of a certain John Rose, to which the counsel for the defendant objected, 1st.

52 "Because there appeared two *suits on the docket, ready for trial, brought by the plaintiff against the defendant; and it did not appear that the defendant (who resided at the distance of fifty miles from the place of taking the deposition) had notice in which action the evidence was to be read; and, 2dly, Because the notice stated that the deposition was to be taken at Abingdon in the court house, in Mr. Russell's room, between the hours of twelve and one in the afternoon, and the deposition stated it to have been taken in the court house of Washington County after the hour of twelve o'clock." The court overruled these objections; whereupon the defendant excepted, and a bill of exceptions was signed and sealed.

A further objection to the reading of the deposition was then taken, on the ground that Nicholas Smith, the maternal grandfather of the said John Rose was a negro. A number of witnesses were introduced to support and repel this objection, and the whole of their testimony spread on the record; on considering which, the court refused to permit the reading of the deposition. The plaintiff then excepted, and his bill of exceptions was signed and sealed. A verdict was found, and judgment entered for the defendant, which, upon an appeal to the District Court, was reversed, and the cause, by assent of parties, retained there for a new trial. In the District Court, (the original papers in the cause having been brought up by a writ of subpoena duces tecum,) the same deposition was again offered as evidence to the jury. The defendant again objected, and a great variety of viva voce and written testimony was introduced to impugn, or support, the competency of John Rose to be a witness against a white man. The District Court was of opinion that he was a competent witness, and directed the deposition to be read to the jury, who, thereupon, found a verdict for the plaintiff for 450 dollars damages, and judgment was entered accordingly. The defendant appealed to this court.

Wickham, for the appellant.

53 *Hay, for the appellee.

Wednesday, November 9th, 1811.

The president pronounced the following opinion of the court.

"This court, not deciding whether the opinion of the County Court, mentioned in the first bill of exceptions, overruling an exception to the deposition of John Rose, on the ground therein stated, was correct or not, (the effect thereof being done away by the decision stated in the second, by which the deposition aforesaid was withheld from the jury,) and not deciding, absolutely, upon the weight of the evidence stated in the said second bill of exceptions,

which (to say the least) is extremely contradictory, and emphatically involved the credibility of the witnesses, is of opinion to affirm the decision of the County Court therein contained; that court, in examining the witnesses aforesaid, having had lights, arising from the manner of giving the testimony, and other extraneous circumstances, which neither this court, nor the District Court, in its appellate character, possessed in an equal degree.

"On these grounds, the judgment of the District Court is reversed, and that of the County Court affirmed."

54 *Bullitt's Executors v. Songster's Administrators.

Wednesday, Nov. 27th, 1811.

1. *Sale of Land—Bond for Purchase Money—Premature Suit on—Equitable Relief.*—If, by an agreement under seal, between the vendor and purchaser of a tract of land, it be covenanted, that if any part thereof should be recovered by law from the purchaser, the vendor will abate, or refund, in proportion; and that he will not bring suit, upon the bond for the purchase money, until the quantity of land which the purchaser is to get be ascertained, provided the purchaser prosecutes a suit for that purpose in reasonable time; a court of equity will give relief, by injunction, against a premature suit on the bond; and if it appear that the purchaser prosecuted his suit in reasonable time, and could not recover the land, the court will decree that the injunction be perpetual: that whatever money has been paid be refunded: that the bond be surrendered and cancelled, and the contract rescinded.
2. *Same—Same—Same—Same.*—In such case, if the purchaser assigned to the vendor a bond of a third person, in part payment, the court will decree that such bond be returned, or (if he fail to return it) the vendor pay the purchaser the amount thereof, with interest; no equity, in favour of the vendor, appearing to exempt him from such responsibility.
3. *Same—Same—Same—Same.*—The executor or administrator, and not the heir, of the purchaser, is entitled to relief, in case the suit on the bond be against the executor or administrator.

An agreement under seal, dated April 13th, 1791, between Cuthbert Bullitt and Thomas Songster, stated, "that the said Bullitt having sold the said Songster one thousand acres of land in Nelson County, (Kentucky,) upon the waters of Ash's and Simpson's creek, for the sum of 300l., of which sum the said Songster had paid the said Bullitt 33l., and assigned Sampson Turley's bond for 117l. some shillings, and given him, the said Bullitt, his own bond, with John Kincheloe security, for 150l., towards the payment for the same; now the said Bullitt agreed, that if any part of the said lands should be recovered by law from the said Songster, he, the said Bullitt, would abate or refund, in proportion, for the land so recovered; and that he would not bring suit upon the said bond given by the said Songster and Kincheloe, until the quantity of land be ascertained that he was to get; provided he prosecutes a suit for that purpose in a reasonable time; and the said Songster agreed to be at all the legal expenses for the said suit, let it terminate as it might."

In the year 1793; Songster brought a suit in chancery, in Kentucky, against William Black and others, charging that Bullitt had made two entries, and obtained an inclusive patent for the said one thousand acres of land, and conveyed the same to him,

the plaintiff, and that the defendants, 55 *&c. had improperly obtained patents founded on surveys, comprehending parts thereof; which surveys, as he alleged, were not justified by their locations; and that they threatened, at a future day, when he should be deprived of the testimony of his witnesses, to institute suits against him; praying therefore that they be decreed to convey and release to him so much of the said land as they held under the said patents; but not charging that they had interrupted his possession; or that their patents comprehended the whole of the said thousand acres.

In 1801, the District Court, in Kentucky, pronounced an opinion, "after examining the bill, answers, connected plat, and other exhibits, that the complainants' claim could not be supported, against older grants, by any rational rule of construction;" and therefore dismissed the bill with costs. Songster's widow and heirs (in whose behalf the suit had been revived upon his death) having appealed, the Court of Appeals of Kentucky, in April, 1803, concurred in opinion with the District Court, "that the entry, under which the complainants claim, and the entry, on which it depends, are too vague to be established against the title claimed under older grants," and affirmed the decree.

In April, 1804, the administrators of Songster filed a bill in the Superior Court of Chancery for the Richmond District, setting forth the agreement and proceedings aforesaid,* and alleging that, before the quantity of the said land was ascertained, according to the terms of the said agreement, Bullitt's executors had commenced a suit at law against the said administrators, upon the bond given by him and John Kincheloe for 150l.—

56 The *complainants, therefore, prayed that the said defendants be decreed to refund to them all the money the said Bullitt received in his life time, or which the defendants, or either of them, had received since his death, in part payment of the said bond; that the same bond, and all other papers in their possession relative to the said contract, for the sale of the said land, be surrendered and cancelled, and the said contract be set aside; that they be perpetually enjoined from proceeding any further in the suit at law, &c.

Bullitt's executors, by their answer, said, "they are ignorant of the facts stated in the bill, but are advised, that if the case be as stated therein, the complainants can avail themselves of the same in a defence at law to the said suit; and for that cause in particular, pray to be dismissed with their costs."

The Court of Chancery, on the 11th of June, 1808, decreed the injunction to be perpetual, the bond in suit to be delivered

up to be cancelled, the money paid to be refunded, with interest, and the assigned bond to be surrendered, or, in default thereof, the amount to be paid, with interest, and that the defendants pay the costs:—from which decree they appealed.

Botts, for the appellants, made the following points;—1st. That if there was any right of recovery, it belonged to the heirs of Songster, and not to his executors:—in support of which position, he cited 3 Bac. Abr. 91; 2 Levinz, 92; Ventris, 175; and 2 Call, 22, *Eppe v. Demoville*.

2dly. That if the two entries in the name of Bullitt, stated in Songster's Kentucky bill,† were the same which originated the title meant to be transferred to him, 57 it is *not shown by any legal or proper evidence, that there was any interference with the entries of the defendants in that suit; or, if any, to what extent the interference was.—The conveyance from Bullitt to Songster, though the best evidence, is not filed; and the interferences are made out, only by the admissions of the bill and possibly by the survey, annexed to the record, which is not, to this purpose, intelligible to the appellant's counsel. It was just as much in the power of Songster to impeach any other entry made by Bullitt in Kentucky, and, without proof, to indemnify it with the title conveyed to him, as it was to impeach, and identify, with that title, the entries, mentioned in the bill.

3. That if the plaintiffs were aggrieved, their remedy was at law, by an action of covenant, upon the agreement.

4. That if the contract was to be rescinded, it should have been upon terms of a re-conveyance of the land, yielding back the possession to Bullitt's heirs, and accounting for profits.‡ And this the more especially, as the opinions of the Courts in Kentucky were not that Bullitt's grant was void, but only that his entries were too vague to prevail against prior grants.

5. That the covenant provided only for the case of an eviction of Songster, by a suit against him, and not for the speculative suit, in which he occupied the unfavourable position of a complainant,§ admitting the all important, and as yet unproved fact, that the entries of the Kentucky defendants covered the same land that Bullitt had entered and sold; an admission, by which Songster might have procured a decree, against himself, 58 in favour *of any other distant land holders he might please to select.

6. That the decree was erroneous in com-

*Note. The two entries in question are each for 500 acres: the first, "the remaining part of a warrant for 2,000 acres granted him for military service, joining David Griffith and Charles Simms, below, to the north westward of the said Griffith:"—the second, "joining below his other entry and Charles Simms."—Note in Original Edition.

†Note. It does not appear in the record that Songster was ever in actual possession of the land, or received any profits, but if he had, the Court would probably not have compelled him to re-convey the land, or account for profits: the title conveyed to him being totally defective, and the benefit of his bargain, (whatever it might have been,) being lost.—Note in Original Edition.

§Note. Mr. Botts appears to have overlooked that part of the agreement in which it was provided that Songster should prosecute a suit for the land in a reasonable time.—Note in Original Edition.

*Note. This bill stated that William Black, and the other defendants to the suit in Kentucky, claimed, and included in their patent, the whole of the said one thousand acres of land, which therefore was totally lost to Songster by the decision against him: and this allegation appeared to be verified by a survey made in that suit by order of the court: a copy of the plat and certificate of which was exhibited and duly authenticated as part of the record from Kentucky.—Note in Original Edition.

selling Bullitt's executor to pay the amount of the assigned bond, in case they should fail to surrender it; because they were thereby precluded from showing that it made part of the record of a suit proving the obligor insolvent.*

No Counsel appeared for the appellees.

Friday, April 3d, 1812, the president pronounced the opinion of the Court, that the decree be affirmed.

59 *Patton, Administrator of Page, v. Williams and Wife.

Argued Dec. 20th, 1811.

1. Wills—Construction—What Constitutes a Legacy?—

Case at Bar.—A testator bequeathing to the executors of his daughter's husband, to be divided among her children by him, a sum of money, it was considered as a legacy to them from their grandfather, and not assets belonging to the estate of their father; notwithstanding the object of the bequest was, in the will, stated to be to make up their mother's fortune; part of which was not paid in her lifetime, nor to her husband, after her death.†

2. Legacies—Interest.—If a testator "desire that no interest shall be demanded on a legacy, but that the executor will pay it off as soon as money can be raised by selling certain property," no interest is to be demanded until a reasonable time for raising the money shall have elapsed; after which, if the executor improperly withhold payment, he is chargeable with interest.

3. Wills—Fund Appointed for Payment of Debts—Effect.—A fund appointed by a will, for payment of debts and legacies, must be considered sufficient, unless the contrary be proved.

4. Executors—Parol Agreement to Pay Legacy from Individual Estate—Validity.—A parol agreement, by an executor, to pay a legacy out of his own estate, is not void under the act to prevent frauds and perjuries, if a decree was previously obtained for the legacy to be satisfied out of certain property appointed by the testator; for part of which property the executor was accountable under the decree, and responsible *de bonis propriis*; and such agreement was made in consideration of forbearance to enforce the decree.‡

Mann Page, the elder, by his last will and testament, dated the 7th of November, 1780, directed certain lots, laid off for a town in Hanover County, to be sold to pay his just debts and legacies.

Another clause in the said will was as

*Note. There was no suggestion in the answer of Bullitt's executors, or in any other part of the record, that Sampson Turley, the obligor in the assigned bond, was insolvent.—Note in Original Edition.

†See monographic note on "Legacies and Devises" appended to Early v. Early, Gilm. 124.

‡In this case there was no proof of a marriage contract;—the charge in Burwell's books not being evidence in his favour, and the words of the will being uncertain in that respect: since the testator might have intended to make up his daughter's fortune, 1500*l.* without binding himself to do so. But quære, if such contract had been proved, would not the decision have been different?—See Chichester's executrix v. Vass's administrator, 1 Munford, p. 98, pl. 4, 5.—Note in Original Edition.

§See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

¶The executor being required by the decree to render an account of the money he had received, for such of the lots in Hanover Town as he had sold, and also for the profits of them all, since the death of his testator, would have been liable, *de bonis propriis*, by the final decree, for the balance which might have been struck against him on that account. See Barr v. Barr's administrator, 2 H. & M. 28; and Moore's executrix v. Ferguson, 2 Munford, 421. Of course, if the lots remaining unsold were insignificant in value, (which probably was the case,) the greater part of the claim of the plaintiffs might be considered as due from himself personally. His agreement, then, was, in a great measure, not to make good, out of his own estate, a deficiency of assets, but to pay his own debt to the estate of his testator.—Note in Original Edition.

follows:—"As it has pleased God to deprive me of my daughter Judith Burwell, I give to the executors of Lewis Burwell five hundred and seventy pounds current money, to make up her fortune fifteen hundred pounds; to be divided between his two daughters Judith and Alice; having paid Mr. Burwell eight hundred pounds on his marriage, and, about five or six years past, one hundred barrels of corn, and a negro man Jack, value one hundred and thirty pounds; and I imagine there are some articles still to be carried to my credit.

60 *The testator, also, "desired than no interest should be demanded for the legacies left, but that his executors would pay them off as soon as money could be raised by selling what was directed to be sold."

The real and personal estates devised by the will to the widow and children of the testator were very considerable.

William C. Williams, having married Alice Grymes Burwell, one of the said legatees, and as agent for Judith C. Burwell, the other applied to John Page, the only surviving executor of Lewis Burwell, for payment of the said 570*l.* who, in a letter dated February 15th, 1795, informed him that, "no doubt, the executor of Mann Page, as soon as they could ascertain what proportion of his debts was to be paid by each of his sons, would cheerfully pay the legacy according to the will; but perhaps the creditors of Lewis Burwell might claim it as a debt due to him, because, in his books, he had charged it as such; and that the claims against his estate were large enough to consume all the assets, including that sum.

A suit was thereupon brought in the late high Court of Chancery by the said legatees against Mann Page, the only acting executor of the said Mann Page, deceased, and the said John Page, surviving executor of Lewis Burwell, to recover the legacy in question; and the plaintiffs prayed that Page's executor (having used the estate of his testator, and not paid the money as early as it ought to have been) might be decreed to pay the same with interest.

Page's executor, in his answer, stated that a part of the estate, appointed in the will to be sold for the payment of the debts and legacies, remained unsold, and submitted to the Court whether he was bound to pay the legacies from any other fund than the one pointed out by the will. But he did not state whether the fund so provided was sufficient or not;—or how much thereof remained unsold; or assign any reason for having failed to apply it sooner to the objects for which it was intended.

61 *No answer was filed by Burwell's executor; and no depositions were taken. The cause was heard on the bill, answer of the defendant, Mann Page, and exhibits, and, on the 7th October, 1799, the Chancellor (Wythe) decreed "that, unless the defendant, Mann Page, do pay unto the plaintiffs, William C. Williams and Alice his wife, (in right of his said wife,) and Judith Carter Burwell, five hundred and seventy pounds, current money of Virginia, being the amount of the legacy left them by his testator, with interest thereon

from the first day of January, 1783, and their costs, out of the fund appropriated by his testator for the payment of his legacies, on or before the first day of December next ensuing the date of the decree, certain commissioners, after advertising, &c. should expose to sale the lots laid off by the testator for a town, (except a square devised by him to his son Matthew Page,) and, out of the proceeds thereof, pay to the plaintiffs their demand; and, in case the defendant, Mann Page, shall have sold the said lots, that he render an account thereof, with the application of the money, and an account of the profits of the lots since the death of his testator, which accounts were also directed to be made up before the same commissioners.

This decree was affirmed by the Court of Appeals, the 9th of November, 1801.

On the 3d of July following, a letter was addressed by the plaintiff, Williams, to the defendant, Mann Page, enclosing copies of the decrees, and declaring his willingness to receive interest annually, if the defendant would secure the payment of the principal, in any reasonable time, by a mortgage on property; and that he would take upon himself to pay the other legatee;—observing that, if the defendant would not accede to this arrangement, “he supposed the account must be settled according to the decree.” What answer was returned to this letter does not appear. But it seems that before the 6th of December, 1802, the defendant had, by parol agreement, assented to the said proposal; for on the last-
62 mentioned day, *the plaintiff sent him another letter enclosing a statement of the claim, and a blank mortgage, in which he requested him to put such property as he pleased, and to make the time of payment agreeable to himself. These papers were delivered by a certain John W. Green, who afterwards stated, on oath, “that Mr. Page then appeared languid and indisposed, and said he had been very unwell for several days; that, after having examined the papers, he returned the whole of them (except the letter) to the witness, saying they were all right, and that, when he came to town, he would fill up and execute the mortgage, or to that effect, appearing only averse to finishing the business, at that time, on account of his then indisposition.”

The defendant failed, however, to execute the mortgage, and departed this life, some time in the year 1803, after making a will, dated March 16th, and recorded October 13th, in which he subjected all his estate, both real and personal, to the payment of his debts, bequeathing to his executors all his property, of what nature soever, in Hanover Town, the town of Bath, in Berkeley County, and the State of Tennessee, together with his personal property, to be by them applied, in the first place, to that purpose.

On the 19th of January, 1807, George Miles, who had married the plaintiff, Judith C. Burwell, by a writing under his hand, “in pursuance of an agreement heretofore made, and money received, and a settlement this day made, assigned, transferred,

and made over, to William C. Williams, his moiety of the said legacy.”

On the 1st of May, in the same year, a bill was filed in the Superior Court of Chancery for the Richmond District, by the said Williams and wife, and in his own right as assignee of George Miles, against Robert Patton, administrator, with the will annexed of the said Mann Page the younger, and also against his devisees; setting forth the circumstances above stated, and praying a decree against his estate for the amount due on account of the
63 *legacy on the 3d day of July, 1802, with interest on that sum till payment, according to the agreement aforesaid. The plaintiffs urged, moreover, that the said Mann Page, “considering the property decreed to be sold for payment of the legacy, as completely his own by the said contract, had actually devised the same as his own property.”

The defendant, Robert Patton, in his answer, said, that the lots in Hanover Town were, under the will of Mann Page the elder, chargeable, in the first place, with his debts; and the defendant would be able to prove that those debts greatly exceeded in amount the value of the said lots; that the legacies were chargeable on no fund, except the possible residuum of the sales of those lots, after paying the debts; and, of course, were not chargeable upon the testator's representatives, or upon any existing portion of his estate: that, if any such agreements were made as those stated in the bill, they were without consideration valid in law or equity, and therefore void: that under the act to prevent frauds and perjuries, Mann Page, the executor, could not charge himself individually with the payment of the legacy, or with any debt of the estate managed by him, without a note or memorandum in writing; which act of assembly the defendant relied on as fully as if he had pleaded the same. “How far the said executor had committed himself on this subject by his own will, this defendant submits to the Court: being informed, that if it contained an assumption of a right of property, such assumption is void, and probably grew out of that general ignorance of the state of his own affairs by which he was uncommonly distinguished.”

Mann Page, one of the devisees, filed an answer, merely referring to, and adopting that of Patton. The other devisees never answered.

A written agreement between the plaintiff and the counsel for the defendant was filed as an exhibit, in the following words: “It is agreed that, if the Court should be of opinion, that the amount of the debts, chargeable by the will of the testator on the Hanover lots, should be of
64 *importance to be ascertained: or if the proportion which those debts would bear to the value of the lots should be important in the decision of the claim, then, in either of those cases, a commissioner may be directed to take an account of those debts, and of the value of the said lots, to be evidence in the cause.”

May 20th, 1807, the cause came on to be heard, as to the defendant Patton, by con-

sent of parties, on the bill, answers, exhibits, and examination of John W. Green, the witness aforesaid; on consideration whereof, the Chancellor (Taylor) "was of opinion that the testator of the defendant, by his agreement with the plaintiff, was bound for the legacies, (to recover which the former suit was instituted,) as, thereby, the plaintiffs in that suit forbore to proceed under the decree; and the plaintiff William C. Williams hath, also, conformably to the said agreement, paid to George Miles the one half of the legacy aforesaid, to which he was entitled in right of his wife, who was a plaintiff in that suit; and that the statute for the prevention of frauds and perjuries is no bar to the plaintiff's demand, as, in this case, there is a sufficient consideration to support the promise." He therefore adjudged, &c. that the defendant, Patton, out of the estate of his testator in his hands to be administered, do pay unto the plaintiffs nine hundred and sixty-five pounds seventeen shillings and three pence three farthings, with lawful interest thereon from the third day of July, 1802, till payment, and the costs expended by them on this occasion, in full satisfaction of the decree above referred to."

From this decree the defendant Patton appealed.

Saturday, Nov. 2d, 1811, the president pronounced the opinion of the Court that the decree be affirmed. Afterwards, viz. December 20th, the cause was reconsidered on Botts' motion, and argued by him and Williams; but on Wednesday, the 19th of February, 1812, the decree was again affirmed.

65 *Roger's Administratrix v. Chandler's Administratrix.

Friday, Jan. 10, 1811.

Administrators—Plea of "Fully Administered"—Verdict—Sufficiency.*—Upon issue joined on the plea of "fully administered," a verdict finding, in general terms, "the issue for the plaintiff, and that assets equal to the claim of the plaintiff came to the hands of the defendant," is uncertain and insufficient. It should set forth, with sufficient certainty, what portion of the assets, which came to the defendant's hands, was unadministered at the time of suing out the plaintiff's writ.

Same—Same—Same—Same.—As to what is sufficient certainty in a verdict of this nature, see Booth's executors v. Armstrong, 2 Wash. 301.

Decedent's Estate—Appraisement—Effect as Evidence.—An appraisement of a decedent's estate, though not signed by the executor or administrator, and therefore not to be received as an inventory, is admissible as prima facie evidence of the value of the estate.—See Carr's executor v. Anderson, 2 H. & M. 361, and Atwell's administrators v. Milton, 4 H. & M. 562.

In an action of assumpsit, in the County Court of Fauquier, on behalf of Burton Whatham and Anne his wife, formerly Anne Chandler, administratrix of Stephen Chandler, deceased, against Joanna Rogers, administratrix of Robert Rogers, deceased, the defendant pleaded "non assumpsit by her intestate," and plene administravit; to which pleas the plaintiffs replied generally. At the trial the plaintiffs offered, as evidence to show the amount of assets, an appraisement of the estate of Robert

Rogers, by certain persons appointed by the said county Court; which appraisement was made on oath, and admitted to record, as an "inventory and appraisement;" but was not signed by the administratrix. The Court rejected this evidence altogether; not permitting the jury to see it; to which opinion the plaintiffs excepted. Other evidence was offered which satisfied the jury, and a verdict was found in the following words; "we of the jury find the issues for the plaintiffs, and do find that assets equal to the claim of the plaintiffs came to the hands of the defendants; and we do find for the plaintiffs 40l. 14s. 10d. damages." Judgment was accordingly entered, which, upon an appeal, was affirmed by the District Court holden at Haymarket; whereupon the defendant again appealed to this Court.

Friday, January 10th, 1812, the President delivered the Court's opinion, that "the verdict of the Jury, on the second plea was defective, in this, that it did not find, with sufficient certainty, what portion of the assets, which came to the hands of the appellant, were unadministered by her, at the time of suing out the writ of the ap-
66 pellees; and that the appraisement offered in evidence by the appellees, though no evidence as an inventory of the estate of the appellant's intestate, (it not having been signed by her,) was prima facie evidence of the value thereof, and ought to have been left to the jury as such."

The judgment was therefore reversed, and a venire facias de novo awarded, with a direction that, on the execution thereof, the appraisement stated in the bill of exceptions be admitted as evidence for the purpose above mentioned.

Turner v. Turner.

Friday, Jan. 7th, 1812.

Mortgages—Bill for Redemption—Decree—Day for Redemption.†—Where a mortgagor is admitted to redeem upon his bill filed for that purpose, the decree ought not to be in general terms, that "upon his paying the money with interest the mortgagee shall convey to him the mortgaged premises." But "that such conveyance be made, if he within a limited time, do make such payment; and, if not, that he be foreclosed of all equity of redemption; and that the mortgaged premises be sold," &c. See *Davidson v. Waite*, 2 Munf. p. 527.
Same—Bill for Account of Profits—Costs.—On a mortgagor's bill, for an account of profits and a conveyance of the mortgaged premises; if he still be indebted on the mortgage, his equity of redemption should be allowed him; but the costs of suit should be decreed against him.

This was a suit in Chancery, on behalf of James Turner, against Bartholomew Turner, in the County Court of Goochland.

The object of the bill was an action of profits, and conveyance of the title, of a tract of land, for which a deed had been made by a certain William Sampson and Betsey his wife, to the defendant. The plaintiff alleged, that he was equitably entitled to the land, by purchase of the said Sampson; that, having borrowed the sum

*See principal case cited in *Gardner v. Vidal*, 6 Rand. 106; foot-note to *Booth v. Armstrong*, 2 Wash. 301; foot-note to *Sturdivant v. Raines*, 1 Leigh 481.

†See foot-note to *Crawford v. Weller*, 23 Gratt. 835; monographic note on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197. See generally, monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

of fifty pounds of the defendant, he caused the said deed to be made, as a mortgage to secure its re-payment; that the defendant was put into possession, and by the use and occupation of the land had more than satisfied his claim of the money, with interest. The defendant contended that the bargain between the plaintiff and him, was originally an absolute sale of the land, and that the said sum of fifty pounds was paid in part of the purchase money; but he admitted that, afterwards, the plaintiff pressed him to give him time to repay the same with interest, and to
67 take "back the land; to which he assented, and gave time till Christmas, 1798, and no longer. He therefore insisted that the last arrangement made the contract, not a mortgage, but a conditional sale."

By consent of the parties, all matters in difference between them, relative to the suit, were referred to certain arbitrators, whose award was to be made the decree of the Court. An award was returned, declaring their opinion to be "that the endorsement on the deed in question shall operate as a mortgage;" which endorsement was in the following words: "memorandum, it is agreed between the within-named Bartholomew Turner, and James Turner, (who in this case represents the within-named William Sampson,) that if he, the said James Turner, his heirs or assigns, shall pay, or cause to be paid, to the said Bartholomew Turner, his heirs, &c. the sum of fifty pounds current money, as within mentioned, with legal interest thereon from the date of 19th March last, and to be returned on or before the 25th day of December next ensuing the date of this indenture, then this indenture is to be considered by the parties, and 'tis hereby agreed by the said Bartholomew Turner, to be null and void to all intents and purposes. 'Tis understood by the parties, that the above fifty pounds, with interest as aforesaid, is to be paid by the said James Turner to the said Bartholomew Turner, on or before the 25th day of December, 1798, or this conveyance is to be considered good and valid." The arbitrators awarded "that on the said James Turner's paying the said Bartholomew Turner fifty pounds, with interest from the 19th March, 1798, the land shall revert to the said James Turner."

The award, moreover, set forth that, "on further examination of the open accounts between the parties, there appeared to be a balance of 11. 4s. 9d. in favour of the said James Turner."

68 "The county Court decreed, that, upon the plaintiffs paying the said sum of fifty pounds, with interest until payment, the said Bartholomew convey to him the land by deed with warranty against himself and those claiming under him; (but appointed no time for such payment;) and that the plaintiff recover costs; which decree being affirmed by the Superior Court of Chancery, the defendant appealed to this Court.

Friday, January 10th, the following opinion and decree were pronounced.

"It is the opinion of the court, that the decree of the Chancellor, affirming that of the County Court, is erroneous; the latter decree being erroneous in this, that a time should have been limited within which, if the appellee paid the money, he should have been entitled to a conveyance from the appellant; and in default of such payment, be foreclosed of all equity of redemption, and a sale directed of the mortgaged premises;—as also in this, that although the appellant was entitled to his costs in that Court, costs are decreed against him."

"The said decrees are therefore reversed with costs, and the cause remanded to be proceeded in according to the principles of this decree."

Stockton v. Cook.

Wednesday, Jan. 15, 1815.

Sale of Land—Purchase with Notice of Encumbrance—Equitable Relief.—A purchaser of land, warranted by the vendor to be free of all encumbrance, is not precluded from relief, in equity, against his bond for the purchase money, by the circumstance that before he made the purchase, he was fully apprised of the encumbrance.

Bonds—Assignment.—The assignee of the bond is not in a better situation than the assignor. See Norton v. Rose, 2 Wash. 233, and Picket v. Morris, id. 256, accordant.

This was an application, to the Superior Court of Chancery for the Richmond district, by John Stockton, purchaser of a tract of land from William and John Roberts, to be relieved against his bond
69 for 52l. 10s. part *of the purchase money, on the ground that the land was encumbered by a previous mortgage for 64l. 11s. 8d. from the said William Roberts to James Smith & Company; from which encumbrance the complainant insisted that he ought to be exonerated, because the original written agreement concerning the purchase, bound the said William and John Roberts to make him a title "clear of any fraud or deceit;" and their deed to him contained a clause warranting the land to be, at the time of granting the same, free and clear, of and from, all manner of encumbrances, and from the just claim of any person or persons whatsoever."

The complainant, in his bill of injunction, did not mention whether he had notice of the encumbrance, at the time of the purchase, or not. He alleged, however, that, having paid the residue of the purchase

+Sale of Land—Covenant against Incumbrances—What it Comprehends.—The case of *Stockton v. Cook*, 3 Munf. 68, very clearly shows that a covenant against incumbrances comprehends known as well as unknown incumbrances, and that the vendee is not precluded by his previous knowledge from claiming the fulfilment of the covenant. Were it otherwise, it would be impossible for him to provide for his security. TUCKER, P., in *Jackson v. Ligon*, 3 Leigh 186. See principal case also cited in *Cabell v. Roberts*, 6 Rand. 582.

±Bonds—Assignment—Assignee Takes Subject to Equities.—The assignee of a bond takes it not only subject to all discounts, but to all equities to which it was subject in the hands of the obligee. Garland v. Richeson, 4 Rand. 260, citing the principal case. See further, *foot-note* to Norton v. Rose, 2 Wash. 233; *foot-note* to Picket v. Morris, 2 Wash. 256; *monographic note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801; *monographic note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

*Note. As to the difference between a mortgage and a conditional sale, see *King v. Newman*, 2 Munf. 40.—Note in Original Edition.

money, he advertised his said bond, forewarning all persons from taking an assignment thereof; notwithstanding which, the defendant, Harman Cook, bought it for little more than five pounds, and afterwards, as assignee, brought an action at law, and recovered a judgment upon it;—that James Smith & Co. had commenced a suit in Pittsylvania County Court to foreclose the equity of redemption; and that William & John Roberts were insolvent.

It was alleged in Cook's answer, and proved by testimony, that the complainant knew of the mortgage before he bought the land. It also appeared in evidence, that Cook, before he bought the bond, was fully informed of Stockton's determination not to pay it in consequence of that encumbrance.*

The late Chancellor, Wythe, on the 21st of September, 1803, dismissed the bill with costs;—whereupon, in October following, the complainant filed a bill of review, alleging the said decree of dismissal to be erroneous on its face;—in which last-mentioned bill a new averment was inserted, "that the complainant was 70 ignorant of the encumbrance at the time of the purchase."—But this allegation was disproved by the deposition of Samuel Calland, who stated "that he was and is now the agent of Smith & Company; that among their papers, he discovered a deed of trust or mortgage for Robert's land; that he made Stockton acquainted therewith, who made light of it, and plainly intimated to the deponent, that he, Stockton, believed that the British debts would never be paid; and that the purchase by Stockton took place after this information was given him." This witness stated, further, that he brought a suit, as agent, to foreclose the mortgage, or deed of trust, and obtained a decree, amounting to ninety-one pounds, which Stockton paid.

Chancellor Wythe, perceiving no cause for altering his decree, affirmed it, and adjudged and decreed, that the bill of review be dismissed with costs;—whereupon the complainant appealed.

Wednesday, January 15th, 1812, the following was pronounced as the opinion of this Court, (consisting of Judges Fleming, Brooke, Cabell, and Coalter,) JUDGE FLEMING dissenting.

"This Court is of opinion, that the said decree is erroneous: therefore, it is decreed and ordered that the same be reversed and annulled, with costs: and this Court, proceeding to make such decree as the said Superior Court of Chancery ought to have pronounced, is of opinion, that the decree of the said Court, pronounced the twenty-first day of September, 1803, and sought by the bill of review in this cause to be reviewed and reversed, is also erroneous: therefore it is further decreed and ordered that the same be reversed and annulled; that the injunction awarded the said John Stockton to stay execution of a judgment recovered against him by the said Harman Cook in the District Court, held at New

London at September Term, 1797, be perpetual; and that the *appellees, out of the estate of the said Harman Cook in their hands to be administered, if so much thereof they have, pay to the appellants the costs expended by the said John Stockton, as well in prosecuting his suit on the bill of review, as in prosecuting the original suit in the said Court of Chancery."

JUDGE BROOKE assigned the following reasons for concurring in this decree.

I concur in the opinion that the decree of the Chancellor ought to be reversed. Though Stockton was apprised of the mortgage to Smith & Co. he did not consent to take the land with that encumbrance. The covenant of the vendors does not except it; and the deed to the vendee contains an express warranty and covenant against all encumbrances. The vendors evidently preferred to take the claim of Smith & Co. upon themselves to having its amount deducted from the purchase money; they believed, (no doubt,) that, as it was a British debt, it could never be recovered. The complainant (the vendee) having paid off the mortgage, has an equitable title to have the amount deducted from his bond to the vendors; and their assignment to the defendant does not place him in a better situation than that of the assignors.

JUDGE FLEMING.—Whenever I have the misfortune to differ in opinion from the majority of the Court, I feel great diffidence in my own judgment; though, in the case before us, I have the consolation to reflect that I concur with the venerable Judge, who pronounced the decree, and is now no more. Being of opinion that the decree, dismissing the bill of the appellant, is correct; and, consequently, differing from a majority of this Court, I shall briefly state some of the grounds on which my opinion is founded; and must premise a sound, and well established maxim, that whoever comes into a Court of equity to ask relief against the operation of the law, ought to appear with a pure conscience, and, first, do equity to all parties concerned.

72 *Let us examine whether the appellant in this case has so conducted himself? He states in his original bill, that the land, for the purchase money of which his bonds were executed, was, by Roberts, previous to his said purchase, mortgaged to James Smith and Co. to secure the payment of a considerable sum of money. But finding, afterwards, where "the shoe pinched," and that the simple fact (though literally true) was insufficient for his purpose, and did not avail him, he, in his bill of review, added a very important assertion, to wit, that "of this circumstance he was ignorant at the time of the purchase;" which assertion he knew to be false, and which is pointedly disproved by two respectable witnesses, whose credibility stands fair and unimpeached.

Samuel Calland deposes that, about the year 1786 or '87, while Stockton and Roberts were on terms for the land, the former applied to the deponent, who was the agent of Smith & Co. to whom the land was under

*Note. The other material circumstances are noticed in the opinion of JUDGE FLEMING.—Note in Original Edition.

a deed of trust or mortgage; that he delivered the papers respecting the land to Stockton, who kept them several weeks, and returned them, previous to his contract with the Roberts's, and made light of it; intimating to the deponent that he believed the British debts would never be paid; the mortgage having been made to secure the payment of a British debt. In answer to an interrogatory, put by Stockton by the witness, he said that he understood the bond had sold for an inconsiderable sum; but that Stockton had damn'd its credit by advertising it; and another reason why it sold so low was that it was not payable until more than three years and a half after the sale. And Cook, in his answer, says, he always intended that whatever money he might receive on the bond, more than sufficient to discharge Roberts's debt to him, (to secure the payment of which the bond was pledged,) should be restored to Roberts.

But to return to the notice. Drury Cross deposes that he had bargained with the Roberts's for the purchase of the land; when Stockton came to him at his own house, and *informed him that it was under a mortgage to James Smith & Co. And, wholly from what Stockton stated, in regard to the encumbrance that was fixed on the land, he declined his bargain; and, in a few days thereafter, Stockton himself became the purchaser. Thus did he, by a subtle artifice, defeat Cross of the purchase, in order to secure it to himself; for, although the fact was true, that the land was under a mortgage to Smith & Co. yet, as his motive was to secure the purchase to himself, (which he, no doubt, knew to be an advantageous one notwithstanding the encumbrance,) it was a palpable fraud practised upon Cross. And, with a full knowledge of all these circumstances, in which he had been an artful and a principal actor, he had the address to prevail on the Roberts's (either from their ignorance, or their necessities,) to covenant, in their deed of October, 1787, (which he, no doubt, had prepared himself,) that the said land, "at that time, was free and clear of and from all manner of encumbrances, and from the just claim of any person or persons whatsoever;" and, as such, warranted the same to the purchaser, who, had he intended upright and fair dealing with the parties, should have deducted the sum, for which the land was mortgaged, out of the price, and paid, or given his bond or bonds for the balance; and taken a special warranty for the land, adapted to what he well knew to be the circumstances of the case.

It appears, too, from the exhibits and evidence in the cause, that, notwithstanding the mortgage which Stockton afterwards discharged, it was to him an advantageous purchase; for it appears by the deed of trust, or mortgage, that, in addition to the 246 acres purchased by Stockton, there was a tract of 220 acres adjoining, (which had been sold by Smith & Co. to Roberts,) comprised in the deed; making, in the whole, 466 acres; which latter tract of 220 acres was subject to contribute in due proportion, to discharge the sum for which the whole was mortgaged, to wit, 64l. 11s. 4d. And

it is, also, in evidence, that Stockton sold a part of the 246 acres, (but
74 *how much thereof does not appear,) to one Hubbard, for five hundred dollars.

But, however that may be, I am of opinion that, if Stockton would avail himself of the warranty in the deed from the Roberts's, his remedy (if any he hath, is against them: though, according to the principles laid down by the Judges of this Court in the case of Grantland v. Wight, (a) they ought, in equity, to be relieved against their warranty. The case alluded to was this: Wight sold to Grantland a piece of ground lying on a street in Richmond, by certain metes and bounds, marked out at the time of sale, which lot was supposed, and publicly advertised by Wight, to extend fifty feet on the street, but, on measurement, it fell short of the distance, between 5 and 6 feet. Grantland, after his purchase, and with full knowledge of the deficiency in the ground, obtained from Wight a written contract to make him a title, in which was a covenant that the ground extended fifty feet on the street; when, in fact, it fell short upward of five feet. Grantland brought his bill to have a deduction in price of the ground; not pro rata, according to the deficiency, but claimed an extra deduction, alleging that the remainder of the ground was rendered of much less value, on account of the said deficiency. Wight contended, only, that the deduction should be in due proportion to the deficiency; but the Judges of this Court were unanimously of opinion that Wight would have been relieved, altogether, against his covenant, had he sought such relief; although it was executed under his hand and seal; because Grantland was apprised, of the boundaries of the ground, though not of the quantity, at the time of the purchase; and acquainted with the deficiency, at the time of the contract.

In the case before us, Stockton, at the time he obtained a covenant that the land was then free and clear of and from all manner of encumbrances, and, as such, warranted to him, had perfect knowledge, (though expressly denied in his bill,) that it was under a deed of trust, or mortgage to Smith & Co. and had deceitfully
75 availed himself of that knowledge to wrest the bargain from Cross, and secure it to himself. The two cases are different in circumstances, but, in principle, appear to me the same.

There is abundant evidence in the record, that Stockton was a litigious, contentious man; and his conduct, throughout the transactions before us, appears to me replete with chicane, artifice, and want of candour. I therefore think him not entitled to countenance in a Court of equity; and am, upon the whole, of opinion, that the decree is just, and ought to be affirmed: but, a majority of the Court thinking otherwise, the decree is to be reversed with costs, and this injunction made perpetual.

Blakey v. West.

Argued, Thursday, Jan. 16th, 1812.

Injunctions—*Motion for Dissolution Overruled*—*Appeal by Consent*.—Upon a county court's overruling a motion for dissolution of an injunction, the parties cannot make the injunction perpetual, by consent. In order that an appeal may be taken; but to authorize an appeal, the cause must be regularly proceeded in to a final decree. See in *Norris v. Tomlins* and *Gray*, 3 Munford, 386, another case in which an appeal could not be taken by consent of parties. See also *McCall v. Peachy*, 1 Call 56, and *Clark v. Connay*, 1 Munford, 160.

In this case, (which was a bill of injunction, filed in the County Court of Buckingham,) on the defendant's motion for dissolution, it was ordered and decreed, that the motion be overruled; and ("in order that an appeal might be taken" to the Superior Court of Chancery,) the injunction was "by consent of parties," perpetuated. The chancellor reversed the decree, and directed the bill to be dismissed; whereupon the complainant appealed.

The opinion of this Court, pronounced Wednesday, January 22d, was as follows. "It not appearing, that the injunction was perpetuated, by the act of the County Court, or that any final judgment was rendered, by the said court, on the case, although (for the purpose of appealing) the parties consented that the bill should be perpetuated;—this Court is of opinion that the appeal did not lie to the Superior Court of 76 Chancery; and that that "court, consequently, erred in reversing the said decree, and dismissing the bill. The said decree of reversal is therefore reversed with costs; and the appeal dismissed, in order that the case may be proceeded in, from the decree overruling the motion for dissolution as aforesaid."

Philips and Wife v. Melson and Others.

Argued, Jan., 1812.

Wills—Construction—Residuary Clause—What Passes Thereby—Reversion after Life Estate.—In this case, a general residuary clause in a will was construed as not carrying the reversion after a life estate in the land; there being other property which the testator evidently intended to convey by such clause; and moreover, the life estate in the land being created for the benefit of the same persons, to whom the residuum was bequeathed: it was therefore decided, that they were not entitled to the fee simple; but that it vested in the heir at law.

Same—Same—Same—Same—Same.—See *Kennon v. M'Robert* and wife, 1 Wash. 111, 112, where it was said, that a testator might devise lands for years "or for life, and limit no particular remainder; and, in that case, the reversion will pass in the residuary clause;" but the reason given is, that such appears to be the intention of the testator. A case, therefore, like this, in which the intention of the testator, collected from the whole will taken together, appears to be different, may properly be considered as not conflicting with the principle there laid down. See *Wyatt v. Saddler's heirs*, 1 Munford, 537, and *Johnson and others v. Johnson's widow and heirs*, Id. 549.

Isaac Melson, of the county of Accomack, by his last will and testament, dated the 5th day of June 1784, and recorded June 1st, 1785, devised his land to his wife "during her widowhood, to raise his four youngest

children on. He gave to his son Levin Melson, one large iron pot, his riding saddle, and a black heifer; to his wife and four youngest children, his two best feather beds and furniture; to his daughter Nancy, one safe; to his daughter Betty, one desk; and to his daughter Polly, one square walnut table." He desired the rest of his estate to be sold, and the money to be equally divided among his four smallest children, and concluded with appointing Charles Bagwell executor, who refusing to act, administration, with the will annexed, was granted to M'Keel Bonowell. The personal estate of the testator, in possession, at the time of his death (exclusive of the specific legacies aforesaid) was worth, according to the inventory, 42l. 9s. 10d. The debts paid by the administrator, and necessary expenses of funeral and administration, amounted to 42l. 15s. 10 1-2d.

Rachel Melson, the widow of the 77 testator, by a "bargain *with Levin Melson, his eldest son and heir at law, on certain conditions, which she considered beneficial to herself, gave up to the said Levin, possession of the land devised to her as aforesaid. She died, and after her death, he remained in possession of the land, and, by his last will and testament, dated the 31st day of March, 1795, and recorded June 29th, in the same year, devised it to his wife Nanny Melson, during her life or widowhood; and at her death or marriage, part to his son Noah Wyatt Melson, and his heirs for ever, and the residue thereof to his son James Milliner, and his heirs for ever."

Matthias Philips, having married Nancy, the only survivor of the four youngest children of Isaac Melson, (the other three having died unmarried, and without issue,) laid claim to the whole, or a considerable part of the said land, contending that, by virtue of the clause in his will, by which he directed the "rest of his estate to be sold, and the money to be equally divided among his four youngest children," the remainder over, after the widow's life estate in the land, was devised to the said youngest children.

To try his title, he instituted an action of ejectment against Nanny Melson, the widow of Levin Melson; in which action a case was agreed, stating, among other things, that Betty Melson, one of the said four youngest children, died in her father's lifetime; and that Caty Melson and Polly Melson, the other two, departed this life after having survived him; and, "that the said Isaac Melson, at the time of his death, left two daughters not mentioned in his said will, to wit, Peggy Wyatt, who is now living, and Susanna Smith, who has died, since the death of the said Isaac Melson, leaving issue, who are yet alive."

Judgment was entered for the defendant in ejectment; whereupon Philips and wife filed their bill in the Superior Court of Chancery for the Williamsburg district, making the lawful representatives of Isaac and Levin Melson defendants, and 78 praying a decree for the land "itself, or part thereof; or, if the Court should be of opinion that it must be sold, under the words of the will, then for the

*See monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

*See monographic note on "Legacies and Devises" appended to *Early v. Early*, Gilm. 124. The principal case was cited in *Markells v. Markells*, 32 Gratt. 567; *Irwin v. Zane*, 15 W. Va. 663.

money, or so much thereof as they were entitled to.

"The widow and children of Levin Melson answered the bill, denying the right of the plaintiffs to any interest in the said land; insisting that, at the death of the widow of Isaac Melson, a remainder over did not pass, by the residuary clause, to the four younger children, but the reversion vested in Levin Melson, the heir at law; there being other property, which the testator probably had in contemplation in the said residuary clause; and not the said remainder in the land. The facts contained in the case agreed at law were admitted by the counsel on both sides as evidence in this suit.

Chancellor Tyler was of opinion, that the residuary clause in Isaac Melson's will, conveys no interest to the plaintiffs in the real estate; that there are no words in the will conveying an intention in the testator to defeat the heir at law; that, as the testator devised his land to his wife for life, for her benefit and that of the younger children, it is to be fairly inferred, that he had given them all the interest in his land he intended; that the implication in the residuary clause is too weak to warrant the exclusion of the heir; and that, therefore, the reversion of all the real estate of the said Isaac Melson went to his heir at law, Levin Melson, or his descendants." It was therefore decreed and ordered, that the bill be dismissed with costs; from which decree the plaintiffs appealed.

Friday, January 24th, 1812. JUDGE ROANE pronounced the opinion of this Court, (consisting of JUDGES ROANE, CABELL, and COALTER,) that the decree be affirmed.

79

*Purcell v. Maddox.

October, 1811.

1. **Chancery Practice—Suit for Distribution of Estate—Proceeding Must Be against All Parties.**—In a suit in Chancery, on behalf of a person who claimed a share of a residuum, as purchaser from one of the legatees, the administrator de bonis non, and all the children of the testator were defendants to the bill. But proceedings were had against two of them only; viz. the legatee of whom the plaintiff purchased; and another, who also claimed the same share by a pretended purchase; it appearing that, by a decree in a suit in behalf of the administrator de bonis non, a division among certain persons as residuary legatees, had been directed, and one of the defendants now before the Court, had been ordered to pay to the other the share in question. Yet it was determined that proceedings should have been had against all the defendants; and the cause was remanded to the Court below for that purpose.

See *Richardson's Executors v. Hunt*, 2 Munford, p. 148, and *Hooper and Wife v. Royster and wife*, 1 Munford, 119.

In a suit in Chancery, in the County Court of Prince William, on behalf of John Maddox against Thomas Purcell, administrator, de bonis non, and John Purcell, William Purcell, James Purcell, George Purcell, Charles Purcell, Elizabeth Purcell, and Sarah Purcell, children of William Purcell deceased, the plaintiff claimed the defendant George Purcell's share of the decedent's estate, by purchase for a valuable consideration. The defendant, James Purcell, by his answer, set up a claim to the same share, by virtue of a similar bargain; contending that the plaintiff had fraudulently induced the said George to

sell his share, when he was drunk, and for a very inadequate consideration; but that his own purchase was fairly made for a reasonable price. The answer of George Purcell supported that of James; and both insisted that, according to the contract between Maddox and George Purcell, either party had a right to recant within a certain time; which, he the said George had offered to do; but Maddox had refused to release him from the agreement.

A copy was exhibited of a decree in Chancery, in a suit by Thomas Purcell against the said William Purcell's "representatives,"* by which a residue of the estate of the said decedent, remaining in the executor's hands, to the amount of 213l. 15s., was ordered to be equally divided among Thomas Purcell, James Purcell, George Purcell, Elizabeth Purcell, and Sarah Purcell, who (it was said therein) were all the legatees having a right

80 to the said "residue; so that the share of each was 42l. 15s. It was stated in the same decree, that the said legatees had become the purchasers of the said estate; and James Purcell was ordered to pay to George the sum of 42l. 15s. for the purpose of making an equal division. The right of the plaintiff Maddox to the benefit of his bargain with George Purcell, appeared established by depositions.

No process was served on the other defendants, who were stated, in the sheriff's return, to be "no inhabitants of his bailiwick;" neither was any order of publication entered against them. In what manner the cause was set for hearing is not set forth in the record. But on the 6th of April, 1808, the County Court decreed, "that the plaintiff recover against the said defendant, James Purcell, the sum of 42l. 15s., with interest from the 1st of January, 1803, till paid; and that the said defendant pay the costs, &c." This decree was affirmed by the Supreme Court of Chancery for the Richmond district; whereupon the said James Purcell appealed to this Court.

On Monday, the 3d of February, 1812, the President delivered the Court's opinion, that the decree of the County Court was erroneous, because proceedings were not had against all the defendants to the bill of the appellee; although, upon the merits of the case, (as now disclosed,) this Court inclined to approve the said decree.

The decrees of both the Courts below were, therefore, reversed; and the cause remanded to the said Court of Chancery, and thence to the County Court, to be finally proceeded in as to all the parties aforesaid.

81 *Davis v. Johnson & Company.

Argued, Friday, December 20, 1811.

1. **Sheriff—Failure to Levy—Action on Case—Instructions.**—In an action on the case, against a Sheriff, for failing to levy an execution, if the return on the execution was "that there were no effects with which the debt could be satisfied," the

*Note. Who were made defendants, in that suit, as "representatives" of William Purcell, did not appear in the transcript of the decree.—Note in Original Edition.

†See monographic note on "Sheriffs and Constables" appended to *Goode v. Galt*, Gilm. 152; monographic note on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.

burthen is thrown on the plaintiff of proving the falsehood of such return: and the Court, if requested in a proper manner, ought so to instruct the jury. But if the defendant request the Court to instruct the jury, "that it is incumbent on the plaintiff to prove the falsehood of the return mentioned in the declaration:" and no return be distinctly stated therein: the court ought to decline giving any instruction in pursuance of such request.

This was an action on the case in the Fredericksburg District court on behalf of Richard Johnson and James Young, merchants and partners, trading under the firm and style of Richard Johnson & Company, against Isaac Davis, late Sheriff of Orange County, for misconduct in office, in refusing and neglecting to levy a writ of fieri facias, in favour of the plaintiffs, against a certain Benjamin Hyde, which lawfully came to his hands to be executed; the plaintiff averring that, "at the time of the delivery of the said writ of fieri facias to the said defendant, and afterwards, and before the return of that writ, that is to say, on the day of , the said Benjamin had divers goods and chattels, within the bailiwick of the said declaration, of which he might have made and levied the debt, interest and costs aforesaid, as he was by the said writ commanded, to wit, at Orange County aforesaid; of which the defendant then and there had notice." The defendant did not expressly state, whether any, or what, return was made on the writ of fieri facias.

Plea "not guilty," and issue.

On the trial of the cause, the defendant moved the court to instruct the jury, "that it lay on the plaintiffs to prove the falsehood of the return mentioned in the declaration as made by the defendant, on the plaintiff's execution against Benjamin Hyde, as therein set out. The Court instructed the jury that it lay on the defendant to prove the truth of the said return." The defendant excepted to that opinion, and (a verdict and judgment having been rendered against him) appealed to this court.

Tuesday, February 11, 1812, the following opinion of the court (consisting of JUDGES ROANE, CABELL, and COALTER,) was pronounced.

82 "The Court is of opinion, that the appellant having moved the court below to instruct the jury that it lay on the appellees to prove the falsehood of the return mentioned in the declaration, as made by the appellant on the appellee's execution, when no such return is distinctly stated in such declaration; the said court ought to have declined giving any instruction in pursuance of such request. The Court for the purpose of preventing further litigation in this case, also expresses its opinion to be that, if the return to which the instruction in question was applied, had been that there was no effects with which the debt of the appellees could be satisfied," "such instruction was also erroneous; as such return should be so far taken to be true as to throw the burthen of proof on the adverse party:—and, as this instruction (though probably proceeding from the mistake of both the Court and the parties) might have produced injury to the appellant; and as the said judgment, for

the reasons aforesaid, is erroneous;—it is considered, that the same be reversed, &c.; that the verdict be set aside, and a new trial be had, on which the instruction of the Court, if required, must conform to the foregoing opinion."

83 *Legrand, Executor of Anderson, v. Francisco and Others.

Argued Oct. 22, and Nov. 27th, 1811.

1. *Chancery Practice—Final Decree—Necessity of Decree Nisi.**—Where a defendant in Chancery has not answered the bill, it is error to enter a final decree against him without the previous service of a decree nisi. And his appearing before commissioners appointed to take an account, or having notice of their proceeding to take it, does not preclude him from making this objection.

2. *Same—Suit by Legatees for Division—Effect of Final Decree.*—It seems that a final decree, in a suit by legatees, for the division of a testator's estate, is a bar to a bill exhibited by the same persons, or their legal representatives, suggesting that the executor had kept back part of the property, but not averring that this was new matter since discovered, or that the decree was obtained by fraud.†

In a suit in Cumberland county Court, between James Anderson, an infant, by Charles Allen, his guardian, Peter Francisco, and Susanna, his wife, and Agnes Anderson, an infant, by William Anderson, her next friend, plaintiffs and Thomas Anderson, executor of James Anderson, deceased, defendant, for a division of the estate of the said decedent among the several legatees, according to his will; and the plaintiffs having filed their bill, and the defendant his answer, by consent of parties, commissioners were appointed, who made a report, stating a division and allotment of the said estate, or so much thereof "as was rendered by the executor," among the plaintiffs and the defendant; whereupon, at March Court, 1788, it was decreed and ordered, that the said division and allotment be made firm and stable between the parties, and that they pay equal proportions of the costs of suit.

No appeal was taken; nor bill of review filed with leave of the court. Susanna, the wife of Francisco, having afterwards died, and David Malone having intermarried with Agnes Anderson, a bill was filed in the same County Court, in January, 1791, by Peter Francisco, administrator of Susanna Francisco, his late wife, James Anderson, David Malone, and Agnes his wife, against Thomas Anderson, executor of James Anderson, deceased, charging "that the said testator left on his plantation, at the time of his death, a considerable estate of personal goods and chattels, consisting of corn, wheat, oats, tobacco, horses, hogs, sheep, and stock of all kinds, with a great quantity of plantation utensils, and which came to the hands and possession of the said defendant,

84 "and unaccounted for, by the said defendant before the commissioners, appointed by a decree of the said County Court of Cumberland, to divide the estate

*See monographic note on "Decrees" appended to Evans v. Spurgin, 11 Gratt. 618.

†Note. Such a bill is not a bill of review, but an original bill. See the note to Ellzey v. Lane's executrix, 3 H. & M. 591.—Note in Original Edition.

of the said testator, according to his last will and testament." The plaintiff therefore prayed that a new account might be rendered of the defendant's administration, and a final settlement and division be made, by commissioners to be appointed by the Court. But there was no averment, in this bill, that the new matter therein set forth was discovered by the plaintiffs since the decree in March, 1788; nor that the said decree was obtained by fraud.

The defendant not having answered, an order of account was made, without any service of a decree nisi. The defendant at first attended the Commissioners, who made a report on the 7th of May, 1800, stating a balance of 107l. 13s. 6d., due from him to the complainants. "For reasons appearing to the Court," this report was set aside, and another account directed to be taken by the same Commissioners. The defendant had notice, but failed to attend them, in the last instance; and in January, 1801, they made another report, whereupon it was decreed and ordered, that the plaintiffs recover against him 133l. 7s. 4d., with interest from October, 1787, till paid, and the costs.

From this decree the defendant appealed to the Superior Court of Chancery for the Richmond district, where (on the 7th of March, 1803,) the Court, "neither affirming nor reversing the decree at this time, referred the accounts between the parties to one of its own Commissioners, to be by him examined, stated, settled, and to the Court reported: the appellant was permitted to answer the bill of the appellees, and commissions to take depositions were awarded." The appellant then filed an answer, in which he averred that he had gone into a settlement with the complainant, under an order of Cumberland County Court, and fully and fairly accounted for all his transactions as executor; that nothing was due *from him to the complainants; and that no allowance had ever been made him for his services as executor.

A report was afterwards made by a commissioner, on considering which, together with sundry examinations of witnesses, the Chancellor, (Taylor,) on the 2d of May, 1807, reversed the decree of the County Court, and adjudged and decreed that Josiah Legrand, (on whose behalf, as appellant, the appeal had been revived, which abated by his death,) "out of the goods and chattels of Thomas Anderson deceased, in his hands to be administered, pay to each of the appellees 53l. 4s. 1d., with interest thereupon, at the rate of five per centum per annum, to be computed from the first day of November, 1803, until payment; and moreover, out of the same estate in his hands to be administered, if so much thereof he hath, and if not, out of his own estate, pay to the appellees the costs by them expended, as well in prosecuting the suit in the said County Court, as in defending the said appeal."

From which decree Josiah Legrand appealed.

Leigh, for the appellant. The decree of the County Court was erroneous, because no day was given the defendant to show cause

against it; which ought always to be done where the decree is by default. (a) Our act of assembly (b) does not alter this rule. The proviso, "that the Court, for good cause shown, may allow the answer to be filed, and grant a further day for the hearing," shows the meaning of the act to be, that the decree must not be absolute, but conditional; and such has been the constant practice of our country.

2. The Chancellor's decree was also erroneous. The decree of March, 1788, between the same parties, and in relation to the same subject of controversy, was a complete bar to this suit. (c) A bill of review might, indeed, have been resorted to for error in law, if such existed, on the face of that decree, or upon new matter since discovered. (d) But this was not a bill of review.

86 *The Chancellor has erred, too, with respect to costs. He reversed the county Court decree, yet gave the costs of both Courts against the appellant. If the decree was irregular, the appellant ought not to pay the costs of correcting it.

Wickham, on the same side, observed that the costs of the appeal ought not to have been decreed to be paid by Josiah Legrand, out of his own estate, in case that of his testator should be deficient; but out of the estate of the testator only; because the testator, having appealed, was himself the cause of incurring those costs.

Wirt, for the appellees. As to the first objection; where a defendant in a Court of equity has attended to the taking of depositions, and made objections to the Commissioner's proceedings, he ought to be considered as a party in substance, though not in form. Thomas Anderson was permitted to file his answer, in the Superior Court of Chancery; and the whole case was referred to Master Commissioner Greenhow. He had full opportunity of defence before that Commissioner, and fully availed himself of it.

Our second Bill in the County Court was in the nature of a bill of review, if one was necessary; but, in fact, such a bill was not necessary; our only object being to charge additional facts against the executor. The prior proceedings are no where pleaded in bar.

Costs are discretionary with a Court of equity. The executor withheld the estate improperly: and, since his misconduct rendered the suit necessary, he ought to pay the costs.

Wickham, in reply. The County Court decree was clearly erroneous. There was no direction that the decree nisi should be served on the party, without which, it could not, with propriety, be made absolute. The defendant's attending the Commissioner did not preclude him

87 *from making this objection; as, in *Blincoe v. Berkeley*, (1 Call, 405,) the appearance of the adverse party, at the taking of the deposition, was held to be no

(a) *Hinde's Ch. Pr.* 488.

(b) *Rev'd Code*, 1st vol. p. 66, sect. 28.

(c) *Coop. Eq.* 229.

(d) *Coop. Eq.* 89.

waiver of his objection that it was taken under a commission issued without notice of the intended application for it. The principle which governed that decision applies to this case. Thomas Anderson's appearance in Court was not until after the first decree, though at the term in which it was pronounced; and then only for the purpose of appealing. It was no appearance to the cause.

The Chancellor, upon the answer filed before him, ought to have determined whether the decree of March, 1788, was a bar or not; instead of doing which he referred the accounts again. That decree was either regular or irregular. If irregular, it could not be set aside but by appeal, writ of error, supersedeas, or bill of review. The plaintiffs should have excepted to the report of the first commissioners, if it was incomplete, if all the property was not produced to them by the executor.

The bar relied upon in the answer is equally good as if formally pleaded. He says in the answer that he had fully and fairly settled all his accounts as executor before those commissioners.

There are three instances in which a party may overhaul a decree: 1. For error in law apparent on its face; (which is not pretended in this case); 2. Upon discovery of new matter; and, 3. Where the decree was obtained by fraud; (a) in which case there may be a quasi bill of review. But no discovery of new matter, or fraud in obtaining the decree, is suggested here. Again, a bill of review cannot be filed without leave of the court.* This bill, therefore, was not a bill of review; and should have been dismissed, being barred by the decree.

Thursday, February 13th, 1712, the president pronounced the opinion of the Court, that the decrees of the Superior Court of Chancery, and County Court, were both erroneous; that of the County Court, because "it was rendered against the testator of the appellant without his having answered the bill, or the nisi decree served upon him."

Both decrees were therefore reversed, "without deciding upon any other points made or occurring in this cause,"† and it was ordered, that the cause be remanded to the said Court of Chancery, and from thence to the County Court, to be regularly proceeded in from the nisi decree of the said County Court, so as to let the appellant avail himself of the decree of that Court of March, 1788, in a suit between the same parties, which, as it now seems to this Court, ought to be conclusive, or to make such other defence, against the bill, as he may be advised is right and proper, in order to a final decree."

(a) Coop. Eq. 45, 96, 98.

*Note. A bill to impeach a decree for fraud in obtaining it, may be filed without leave of the Court, and is an original bill. See Coop. Eq. 96, 97; 2 P. Wms. 73. Loyd v. Mansell. See also Banks v. Anderson and others, 2 H. & M. 20.—Note in Original Edition.

†Note. Several points were suggested in the argument, which, not being decided by the Court, are not mentioned by the reporter.—Note in Original Edition.

Pitts, Executor of Rowzee, v. Tidwell.

Febry., 1812.

1. **Injunction—Dissolution—Appeal—Statute.**—Under the 3d section of the act of January 20th, 1804, concerning the proceedings in Courts of Chancery. (Revised Code, 2d vol. p. 20.) an appeal from an order dissolving an injunction, could not be taken, but only from the dissolution of the bill. But see the act of January 20th, 1810, acts of 1809, ch. 11th, sect. 2d.
2. **Appellate Practice—Dismissal of Bill by Complainant—Effect.**—It is not competent to a complainant to dismiss his own bill, and then object, in an appellate Court, that the prayer thereof has not been decreed in his favour.
3. **Injunction—Dissolution—When Bill Stands Dismissed—Presumption in Appellate Court.**—Where an injunction is wholly dissolved in a County or Corporation Court, the bill is not to stand dismissed, until two succeeding Courts have been held thereafter in such County or Corporation; and the appellate Court will not presume, from length of time, that two such Courts were held; but this circumstance must explicitly appear in the transcript of the record.
4. **Same—Same—Same—Quære.** If it do explicitly appear, that two such Courts were held; and it do not appear that at or before the second court, any cause was shown against the dissolution of the bill: can the clerk's neglecting to enter the dissolution have the effect of keeping the cause on the docket?

Thomas Pitts, executor of Ralph Rowzee, deceased, having brought an action of debt in the County Court of Westmoreland, and obtained a judgment against Reuben Tidwell, upon a bond for 34l. 10s. 11d., executed to the said Rowzee in his life time, a bill was filed on the chancery side of that Court, and injunction granted, to stay proceedings on the said judgment. The equity stated was, that Rowzee had been guardian of the complainant, from the time of his being very little more than 14 years of age, until he attained the age of 21 years; shortly after which the said Rowzee, who was uncle to the complainant, taking advantage of the influence he had over him, in consequence of having the entire control of his person and property so many years, had induced him to enter into a settlement of the guardianship account, and, (through his ignorance of the nature of accounts, of the annual profits of his estate, and of the disbursements which had been made for him by the said guardian,) had persuaded him to execute the bond aforesaid, for a pretended balance due from him; "he, the said Ralph, stating, that he never intended to demand any thing of the complainant, but that his only object was to have the account closed."

The merits of the case need not be further reported; being sufficiently set forth in the opinion of Judge Fleming.

The County Court, on considering the bill, amended bill, answer, amended answer, and exhibits, at February term, 1806, ordered the injunction to be dissolved, "and that the defendant recover of the complainant his costs," &c.; from which decree the defendant prayed an appeal to the Superior Court of Chancery for the Williamsburg district. "And at another day, to wit, at a Court of quarterly session continued and held for Westmoreland

§See monographic note on "Injunctions" appended to Clayton v. Anthony, 15 Gratt. 618.

§See monographic note on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co. 1 Rob. 268.

County, the 30th day of October, 1806, came the complainant and dismissed his bill, and prayed an appeal to the Superior Court of Chancery for the Williamsburg district."

The chancellor (Tyler) was of opinion that, instead of the County Court's dissolving the injunction, it should
90 "have directed an account to be taken of the said Ralph Rowzee, during the whole period he acted as guardian to the appellant, with any other accounts which may since have subsisted between them." He therefore reversed the decree, and ordered the cause to be remanded to the said County Court, for that Court to direct the accounts aforesaid, to be taken; giving leave to the parties to take further testimony as they, or either of them, may choose.

From this decree, Pitts, executor of Rowzee, appealed.

Saturday, February 22d, 1812, the following was pronounced as the opinion of this Court.

"The Court is of opinion, that the first appeal taken in this case, being from an order dissolving an injunction; and it neither appearing that two succeeding courts had been held thereafter, in the said county; (even prior to the time when the second appeal was prayed;) nor that the clerk had entered a dismission of the bill, pursuant to the 3d section of the act of January, 1804, entitled "An act concerning the proceedings in Courts of Chancery, and for other purposes;" (one, or both, of which were necessary to make the decree of dissolution final;) the said order was not of a character to authorize an appeal to the Superior Court of Chancery. And, as to the appeal prayed upon the dismission of the bill, by the appellee, in October, 1806, the Court is further of opinion, that it is not competent to a party to dismiss his bill, and then object in an appellate Court, that the prayer thereof has not been decreed in his favour.

"The decree of the Superior Court of Chancery is therefore reversed with costs; and that of the County Court, dismissing the appellee's bill at his own instance, is to be affirmed."

JUDGE FLEMING, dissenting from the foregoing, pronounced the following separate opinion.

Whenever I dissent from a majority
91 of the court, it *will perhaps be expected, and I think it incumbent on me, to assign some reason for my opinion; and the difference on this occasion being merely on a matter of practice, I shall briefly notice, that on the 27th of February 1806, Tidwell's injunction was dissolved by the County Court of Westmoreland, on which he prayed an appeal, which was allowed him on the usual terms; but it being from an interlocutory decree, not authorized by law, he could not prosecute it. By an act of assembly, passed the 20th of January, 1804, (ch. 29, sect. 4,) it is enacted that "where an injunction is wholly dissolved in an inferior Court, the bill of the complainant shall stand dismissed of

course, with costs, unless sufficient cause be shown against such dismission, at or before the second Court, let the same be monthly or quarterly thereafter: and it shall be the duty of the several clerks of the said Courts to enter such dismission on the last day of the terms aforesaid."

It was the official duty then of the clerk of Westmoreland County to have entered the dismission of the bill on the last day of the same Court after the injunction was dissolved, no sufficient cause having been shown against such dismission. At the October Court following, Tidwell, finding the cause still on the docket, did what the clerk ought, *ex officio*, to have done before; as it is highly presumable that two Courts, either monthly or quarterly, had intervened between February and October, when Tidwell dismissed his bill, and prayed an appeal (not from the dismission of his own bill, but) from the decree dissolving his injunction, which then had become final.

There appears some irregularity in the proceedings, but it was not the fault of the appellee; and, in cases of equity, I am not for adhering to rigid rules of practice; but would relax a little to obtain justice.

With respect to the merits of the cause, it appears to me that the decree directing an account to be taken of the guardianship of Rowzee is correct: First, because
92 "the estate of his ward consisted of between thirty and forty negroes and about 450 acres of good land: he was sent only two years to school from the age of fourteen, when Rowzee became his guardian, lived chiefly among his relations, was meanly clad, and had large sums of money to pay after he came of age, for necessaries whilst he was under the guardianship of his uncle Rowzee. Secondly, because the guardian (conscious, no doubt, that he had not done justice to his ward, but had neglected his interests) showed great anxiety to have the account of his guardianship settled, as soon as his ward came of age; saying, at the same time, "that he was fearful, unless he could get a settlement that he should be greatly injured, on account of the property of his ward being considerably wasted during his minority." Thirdly, because after the settlement, (when or how it was made does not appear,) he took the bond of his ward for about 34l., but declared he never intended to receive any money on it; but only meant it as a bar against any claim which his ward might bring against him, as his guardian; and it is in evidence that great waste had been committed on Tidwell's property, whilst Rowzee was his guardian. And lastly because by our act of Assembly concerning guardians, orphans, &c. it is enacted, that every orphan who has an estate, the profits of which shall not be sufficient for his or her maintenance, shall be bound apprentice, &c. Upon these grounds, I am of opinion that the decree directing an account to be taken of the guardianship of the appellant's testator ought to be affirmed: but a majority of the court being of a different opinion, the decree is reversed, and the bill of the appellee dismissed with costs.

93 *Throckmorton v. Cooper's Lessee.

March, 1812.

1. **Ejectment*—Arrest of Judgment—Variance in Counts of Declaration.**—After issue joined in ejectment on the title only, and a verdict for the plaintiff for the land in one of the counts in the declaration mentioned, it is no ground for arrest of judgment, that the two counts laid demises of the same land from different persons. See Rev. Code, 1st vol. ch. 78, sect. 85, p. 12.
2. **Same—Variance in Account—Demurrer.**—Quære, would a demurrer to the declaration in this case have been sustained?

In an action of ejectment, in the Superior Court of Frederick County, the declaration contained two counts; the first of which laid the demise of the land in controversy, (viz. "the land whereon Albion Throckmorton formerly lived containing 294 acres,") as from a certain John Holker; and the second laid the demise of the same land, as from Hannah H. Cooper. Mordecai Throckmorton, tenant in possession, was admitted defendant in the room of the casual ejector, confessed the lease, entry, and ouster, pleaded the general issue, and agreed to insist on the title only at the trial. The jury found for the plaintiff "the land in the second count in the declaration mentioned, and one cent damages; and for the defendant on the first count; subject to the opinion of the court, whether the ejectment could be sustained, upon the declaration filed in this cause." The court, afterwards, on motion of the plaintiff, permitted him to amend his declaration by enlarging his term, from ten to fifteen years; (a) and having considered the verdict, and a motion of the defendant in arrest of judgment, was of opinion that the said motion be overruled, and that judgment be entered for the plaintiff for the land in the second count of the declaration mentioned, together with his damages and costs.

Whereupon the defendant appealed.

Page, for the appellant, and Wickham, for the appellee, submitted the case; and, on the 6th of March, 1812, the judgment was affirmed.

94 *Gibson v. White and Company.

March, 1812.

1. **Chancery Practice—Attachment against Absent Defendant—Decree against Garnishee.**—In a suit in Chancery, against a defendant, who is out of this

*See monographic note on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

(a) See Hunter v. Fairfax's devisees, 1 Munf. 218, p. 12, and p. 238.

2. **Chancery Practice—Absent Defendant—Want of Due Publication—Who May Object.**—The objection for want of due publication against an absent defendant, may be taken by other defendants who may be affected by the decree against him, and if made in the appellate court, will prove fatal, though the absent defendant were not a party in the appeal. Craig v. Sebrell, 9 Gratt. 133, citing the principal case. See principal case also cited in McCoy v. McCoy, 9 W. Va. 445.

3. **Same—Decree—Recital of Due Publication—Effect in Appellate Court.**—In Steenrod v. Railroad Co., 27 W. Va. 12, it is said: "The decree of June 5, 1880, states that the cause came on to be heard, among other things, upon the order of publication against the nonresident defendants 'duly executed.' This according to the settled law is conclusive as to the due publication of the order, so far as the appellate court is concerned. Hunter v. Spotswood, 1 Wash. 146; Gibson v. White, 3 Munf. 94; Moore v. Holt, 10 Gratt. 284." To the same effect, the principal case is cited in Moore v. Holt, 10 Gratt. 291.

4. **Judgment against Garnishee.**—There can be no final judgment subjecting the money or effects in the hands of the garnishee in advance of judgment

country, and another, within the same, having in his hands effects of, or otherwise indebted to, such absentee, a decree cannot be entered against the defendant in this country until, by legal and regular proceedings, the plaintiff has established his claim against the absentee.

2. **Same—Same—Liability of Garnishee.**—In such case, if the defendant in this country appear not to be a debtor of the absentee, but hold effects belonging to him, by a title not effectual against creditors, or without any title at all; he should be considered personally responsible, only for so much as he may have consumed; or appropriated to his own use, so as not to be forthcoming, or for the profits he may have received; but for that amount, a decree may be made against him personally, in the first place; holding the property in his hands ultimately bound, if he be insolvent; and for the balance of the plaintiff's claim the court may proceed in the first place against the property itself, either by considering such defendant a trustee for the use of creditors, a directing a sale, unless the debt be paid by a given day; or by sequestering it, (under the Act of Assembly,) as the property of the absentee.

This was an attachment in Chancery in the County Court of Prince Edward, on behalf of William White and Company against Thomas Gibson an absent defendant, and Robert Gibson, a resident of that county, charged as fraudulently holding effects of the said absentee, sufficient to satisfy the claim of the plaintiffs, which was partly founded on a bond for \$11, dated the 24th of May, 1803, and partly on an open account of goods sold and delivered, &c.; beginning July 4th, 1801, and ending October 24th, 1803; total 1381. 0s. 0d.; including, as it seems, the same \$11, for which the bond was given; that sum being entered in the account, under date of May 24th, 1803, as "a difference in exchange of horses." This account was supported by the deposition of a certain Thomas Anderson, taken with notice to Robert Gibson, but without any publication of notice to Thomas Gibson. (b) The deponent stated, that "he came to live with William White about the 1st of September, 1801, and continued with him until about the 1st of September, 1803, as a store keeper; that Thomas Gibson, one of the defendants, was in the habit of buying goods of the said White; that he, the deponent, believed the articles in the said account, (which was annexed to his deposition,) between the first of September, 1801, and the first of September, 1803, were correct; that he delivered the greater part of them, and had no doubt of the correctness of the balance."

The defendant, Robert Gibson, by his answer declared, that he had purchased, for a full and adequate price, all the property

for the plaintiff against the defendant. Coda v. Thompson, 39 W. Va. 71, 19 S. E. Rep. 548, citing the principal case. George v. Blue, 3 Call 455, and Withers v. Fuller, 30 Gratt. 547.

5. **Lien of Decree—Statutes.**—The conclusion arrived at by JUDGE STAPLES in Lee v. Swenson, 76 Va. 173, that entirely independently of §§ 1 and 2, ch. 118 of the Va. Code of 1873 (which are also in force in West Virginia), a decree, entered directing a commissioner of sale out of the funds reported in his hands to pay certain creditors named has under §§ 1 and 2 above mentioned, the effect of a judgment and is a lien on the lands of such commissioner of sale, was declared by the court, in Rickard v. Schley, 27 W. Va. 638, to be unsustainable in light of the Virginia cases decided prior to the passage of these sections, and cites, in support of his contention, Gibson v. White, 3 Munf. 98, and Enders v. Board of Public Works, 1 Gratt. 364. See further, monographic note on "Decrees" appended to Evans v. Spurgin, 11 Gratt. 615.

(b) See Rev. Code, 1st vol. p. 230, sect. 17.

which had belonged to Thomas Gibson, and had paid the whole of the purchase money, amounting to 491l., after deducting therefrom the sum of 683l. 16s. due to him from the said Thomas, to secure which was, indeed, his principal inducement to the purchase.

Sundry depositions were taken, with notice to Robert Gibson only; proving circumstances concerning Thomas Gibson's running away from his creditors, with the privy and assistance of Robert; and that, in a conversation with one witness, Robert said, "he was very much troubled about his brother Thomas's affairs in this country; that his brother would be in, shortly, to settle them himself, for that he had property here to pay his debts." It was also proved that the property which Thomas owned before his departure, and of which Robert took possession, consisted of a tract of land, (the number of acres, and value, not mentioned,) and four slaves and other personal property, worth about six or seven hundred pounds.

The defendant, Thomas Gibson, not having entered his appearance, and given security according to the Act of Assembly, (a) an order was made, at May Court, 1801, "that he appear here, on the first day of August Court next, and answer the plaintiff's bill,* and that a copy of this order be forthwith inserted in some one of the newspapers printed in the City of Richmond, for two months successively, and also posted at the front door of the Court-house of this County." A certificate, (not on oath,) of Ritchie and Worsley, editors of the Enquirer, "that the above advertisement was inserted in that paper once a week for two months," was filed; but no proof appeared that it had been posted at the front door of the Court-house.

The cause was heard the 20th of August, 1807, on the bill, answer, and exhibits; on consideration whereof, it was decreed and ordered, that the complainants
96 recover *against the defendants 138l. 9s., with interest from the 20th of November, 1803, till payment, and their costs.

A petition of appeal was presented to Chancellor Taylor, on behalf of the defendant, Robert Gibson, who had been prevented, by necessary absence, from appealing at the time the decree was pronounced; suggesting the following errors in the proceedings; viz.

1st. There is no evidence exhibited to justify the decree; the depositions filed to establish a debt against Thomas Gibson, not being taken with notice, published, as by the Act of Assembly is required.

2d. There is no proof that impeaches the petitioner's title to the property in his possession, purchased from the defendant Thomas, which is sought to be subjected to his debt.

3d. The answer of the petitioner, responsive to the plaintiff's bill, could not be disallowed by a Court of Chancery, un-

less impeached by the verdict of a jury, in a suit of this description.†

4th. The process required by law was not used in the commencement and prosecution of this suit.‡

5th. The decree is pronounced against the defendants, without discriminating the relation in which they stand, regards the debt, and the property that ought to be subjected thereto.

6th. The plaintiffs have not been ruled to give bond and security, as the law requires. (b)

The Chancellor granted the appeal, and auxiliary supersedeas, upon the usual terms; and afterward reversed the decree; and, proceeding to make such decree as, in his opinion, the County Court ought to have

pronounced, decreed, that Thomas
97 Gibson do pay to the appellees *138l.

9s. with interest as aforesaid, and their costs in the County Court; and that the appellant pay them the amount of their said recovery, on their entering into bond, without sufficient security, to be approved by the clerk of the Superior Court of Chancery, in the penalty of 350l. with condition to restore the said money, with interest, to the said Thomas Gibson, in case he shall, within the time prescribed by law, (c) claim the same, and be adjudged entitled thereto.

To this decree a writ of supersedeas was awarded by a Judge of this Court; the reasons stated in the petition being, 1. Because there was no sufficient proof that the petitioner was indebted to the said Thomas Gibson, or had effects belonging to him in his hands, to any amount whatever; and, 2. Because, if such were the fact, no decree ought to have been entered against the petitioner for any specific sum, as there was no proof that supported any such decree; but an account should have been directed of the moneys, or effects, of the said Thomas in his hands, and a decree entered, only for the balance of the moneys appearing due, or for the sale of the effects; whereas, by the decree as rendered, the petitioner is made immediately chargeable with a fixed sum of money, although it is not proved that he is indebted to the said Thomas to any certain amount.

Wickham, for the plaintiff in error, and Samuel Taylor and Hay, for the defendant, submitted the case.

Friday, March 6th, 1812, JUDGE ROANE pronounced the following opinion of the Court.

"The Court is of opinion, that there is no error in so much of the decree of the Superior Court of Chancery as reverses that of the County Court with costs; but that the residue thereof is erroneous, in this; that, to entitle the appellees to a decree against the appellant, Robert Gibson, they should have proved themselves, in a legal

*Note. Quære. As to the correctness of this position, see Rowton v. Rowton, 1 H. & M. 91, pl. 4; Nice v. Purcell, Id. 372; Paynes v. Coles, 1 Munford, 378, pl. 2 and 3; Marshall v. Thompson, 2 Munford, 412, pl. 2.—Note in Original Edition.

†Note. No restraining order was entered against the defendant, Robert, from paying away the effects in his hands, as either endorsed on the writ, or made by the Court. But quære, had he a right to complain of this omission?—Note in Original Edition.

(b) Rev. Code, vol. 1st, p. 115, c. 78, sect. 3.

(c) Id. sect. 4.

(a) Rev. Code, vol. 1st, p. 115, c. 78, sect. 2.

*Note. The terms of this order, under the Act of Assembly, should have been, "that the absent defendant appear, &c. and give security for performing the decree."—Note in Original Edition.

98 way, to be creditors of Thomas Gibson; first, by "proceeding regularly against him, under the Act of Assembly, as an absentee, which neither appears from the record, nor is stated in either of the decrees to have been done; and secondly, by exhibiting legal and sufficient proof of their debt.

"The deposition of the witness, Anderson, neither appears to have been regularly taken, on due publication of notice to the absentee, Thomas Gibson; nor does his deposition, as taken, prove any specific sum due, or give any explanation of the bond of said Thomas Gibson, found in the record; although he is the subscribing witness thereto, and might, perhaps, have given a satisfactory account thereof, had he been examined touching the debit, in the account, under date of the twenty-fourth of May, 1803.

"The decree of the Superior Court of Chancery is also erroneous, in this, that as the appellant does not acknowledge himself a debtor of the absent defendant, but claims the property in dispute as his own, no decree ought to have been pronounced against him, personally, for the payment of money, unless it had appeared that he had consumed, or appropriated, part of the property to his own use, so that the same was not forthcoming, or had derived profits from the use thereof; and then only to the amount of the value of the property so consumed, or appropriated, and of the profits so received; but that if the title of the property appeared to be in the appellant, though not in a way to be effectual against creditors, or not to be in him at all, but in the absent defendant, (of which this Court gives no opinion,) the Court, after taking an account (agreeably to the principles before stated) of the sum for which the appellant was personally responsible, ought to have proceeded against the property itself, either by considering the appellant as trustee thereof, for the use of creditors, and directing a sale, unless the debt was paid by a given day; or by sequestering it (under the Act of Assembly) as the property of the absentee; holding it,

99 (in either case,) ultimately, bound for "the sum decreed against the appellant personally. Therefore, it is decreed and ordered, that so much of the said decree of the Superior Court of Chancery, as is before mentioned to be correct, be affirmed; that the residue thereof be reversed and annulled; and that the appellees pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And it is ordered that the cause be remanded to the said Court of Chancery, and from thence to the County Court of Prince Edward, to be regularly proceeded in, to a final decree, agreeably to the foregoing principles and opinion."

Randolph v. Randolph and Others.

Tuesday, March 10th, 1812.

1. **Sale of Personalty—Passing of Title—Presumption as to.**—When a slave is sold and delivered altho' without a bill of sale, it is to be presumed, prima facie, that the seller has parted with his title. If, therefore, he contend, that he reserved the title

in himself, until the purchase money should be paid, the onus probandi lies on him.

2. **Chancery Practice—Sale of Property under Execution—Injunction.**—It seems, that a person who claims title to a slave taken in execution, may get relief in equity, by an injunction to prevent the sale; notwithstanding his remedy at law. See this point more expressly decided in *Wilson v. Butler*, post.

William Randolph, on the 4th of May, 1808, presented a bill to the Judge of the Superior Court of Chancery for the Richmond District, setting forth, that in December, 1806, he made a conditional sale of a negro boy, by the name of Horatio, to Isham Randolph, for 110l. to be paid, 200 dollars part thereof out of the said Isham's then crop of tobacco, and the balance out of his ensuing crop; but that it was expressly stipulated and agreed, that he should make no bill of sale, and the property should not be changed, until the whole of the purchase money should be paid; that upon these conditions, the said Isham took possession of the said slave, but he altogether failed to pay any part of the said sum of 110l. and had become altogether insolvent; that notwithstanding the premises, John G. Woolfolk and John Hoomes, executors of John Hoomes, deceased, having issued a writ of fieri facias against

the said Isham Randolph, had 100 *caused the said slave to be taken in execution by the Sheriff of Powhatan, who threatened to advertise and sell him to satisfy the said writ; and should he be purchased by some person living at a distance, or in some other state, the complainant might run the risk of losing him, as well as his debt aforesaid.

The prayer of the bill, therefore, was, that the said Isham Randolph, the Sheriff of Powhatan, and the executors of John Hoomes, be made defendants, and compelled to answer, &c.; that Isham Randolph, having failed to pay the purchase money as aforesaid, be decreed to relinquish to the complainant all pretensions to the said slave; and that the said Sheriff be perpetually enjoined from proceeding to sell, and ordered to deliver him up to the complainant.

The Chancellor granted the injunction.

No answer was filed by Isham Randolph; a decree nisi was entered; but no further

***Chancery Practice—Sale of Property under Execution—Injunction.**—In Virginia, the decisions seem to establish the principle, that a court of equity should not interfere, to prevent a creditor from seizing and selling under his execution any property which he may think liable to it: unless the property be of such a character that the owner cannot be fully compensated by the verdict of a jury giving him its fair market value; and that this can only be, where the property is of such a value that it may fairly be supposed to have a peculiar and additional value in the estimation of the owner, the *pretium affectionis*! *Baker v. Rinehard*, 11 W. Va. 241, citing the principal case: *Wilson v. Butler*, 3 Munf. 559; *Scott v. Halliday*, 5 Munf. 108; *Sampson v. Bryce*, 5 Munf. 178; *Bowyer v. Creigh*, 3 Rand. 26; *Allen v. Freeland*, 3 Rand. 175; *Randolph v. Randolph*, 6 Rand. 198; *Sims v. Harrison*, 4 Leigh 346; *Kelly v. Scott*, 5 Gratt. 479; *Summers v. Bean*, 13 Gratt. 417. See further, monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

In *Lewis v. Spencer*, 7 W. Va. 601, it is said that in the principal case it was held that a court of equity might enjoin a sale of personal property until the question of title was settled, and that a party claiming the property should not be left to an action at law for uncertain damages; but that this decision was modified by the subsequent cases of *Bowyer v. Creigh*, 3 Rand. 26, and *Allen v. Freeland*, 3 Rand. 170.

proceedings appear to have taken place against him.

From the answers of the acting Sheriff of Powhatan, and Hoomes's executors, it appeared that those defendants considered the negro Horatio as being the absolute property of Isham Randolph; and that a bond to indemnify the Sheriff in selling, had been given, with ample security.

It was proved, by depositions, that an agent of William Randolph (the claimant) had claimed the slave on his behalf, and prohibited the Sheriff from selling him; that William Randolph, before he sold the said slave to Isham, had declared his intention to reserve the title in himself, until the 200 dollars were first paid; and that after selling and delivering him, he said that he had made such reservation. It was also proved, that Isham Randolph repeatedly told a witness that the negro boy Horatio, in his, the said Isham's possession, was not his property, nor did he consider him as such, until he should pay the money agreed on to William Randolph,

101 which he *considered himself unable to pay, and therefore should return the said boy. But it was proved by another witness, that Isham Randolph, in December, 1806, told him, that William Randolph had agreed that he, the said Isham, should take the said negro, for which he was to pay sixty pounds, out of the crop of tobacco then prizing, at the estate he rented, and fifty pounds out of the next crop of tobacco; without saying any thing about the said reservation. No testimony was produced concerning any declarations by the complainant and Isham Randolph, when both were present.

On the 18th of September, 1809, the cause was heard; and the Chancellor "being of opinion, that the injunction in this case should not have been granted, because, if the seizure in the bill mentioned, was unlawful, the law afforded a complete remedy," decreed and ordered that the bill be dismissed; from which decree the complainant appealed.

The cause was argued by Call, for the appellant, who quoted *The Duke of Somerset v. Cookson*, 3 P. Wms. 390, and *Fells v. Read*, 3 Vesey, Jun. 70, to show that in a case like this, the law did not afford a complete remedy; but equity had jurisdiction, and ought to give relief by injunction.

No counsel appeared for the appellee.

Monday, March 16th, 1812, JUDGE ROANE pronounced the Court's opinion, that, "on the ground that the sale of the slave in the proceedings mentioned, was admitted by the bill, and established by the testimony, and there was no evidence adequate to prove the reservation set up, on the part of the appellant, (and not on that stated by the Chancellor,) the decree is correct; and this the rather, because the appellant saw it proper to dispense with the answer of the appellee, Isham Randolph, (who 102 *was a party, and privy to the whole transaction,) by setting the cause down for trial, without his answer.

Decree affirmed.

Boykin's Devises v. Smith and Others.

Monday, March 16th, 1812.

1. **Real Estate—Court-House—Presumption of Title.**—The Court of a County having caused a Court-house and Jail to be erected, in or about the year 1754; and Courts having been continually held in such Court-house, until the year 1801, it ought, in a Court of equity, to be presumed that the title to two acres of the land built upon, and adjacent, were duly vested in the Court and their successors; although no deed from the original proprietor can be produced.
2. **Same—Same—Same.**—Quære, ought not such presumption to take place at law, as well as in equity?
3. **Ejectment—Chancery Practice.**—It seems, that in such case, a decision in ejectment, against a person claiming by assignment from the County Court, is no bar to his recovering the land in a Court of equity.
4. **Release—Entry in Open Court—Validity under Statute of Frauds.**—A release entered of record, by a verbal direction in open Court, is valid under the statute of frauds; for the clerk who makes the note or memorandum, is to be considered as the agent of both parties.
5. **Chancery Practice—Amendment of Bill.**—Quære, after a suit in Chancery has been set for hearing, has the plaintiff a right to amend his bill, before the hearing, as a matter of course, upon paying the defendant all costs occasioned thereby? or is such amendment to be permitted only upon good cause shown? See Rev. Code, vol. 1, p. 65, c. 64, sect. 23; Coop. Eq. 382, 384.

Upon an appeal from a decree of the Superior Court of Chancery for the Williamsburg District, by which a bill filed by Francis M. Boykin, James Johnson, and Anne his wife, was dismissed with costs.

The bill stated, that on the 7th day of January, 1800, the Legislature of this Commonwealth enacted a law entitled, "an act for altering the place of holding Courts in the County of Isle of Wight;" that by the said law certain Commissioners were appointed to contract with Francis Boykin, late of said County, for erecting at his own expense, a Court-house and Jail, at the most convenient place on his land; in consideration whereof, it was enacted, that whensoever he should have completed the said buildings, and the same should be received by the said Commissioners, thenceforth, all the public buildings at Smithfield, belonging to the County of Isle of Wight, should be vested in him, to and for his own proper use, &c. that by an act passed the 6th day of January, 1802, to explain

the above-recited act, the land, set 103 *apart for the use of the said buildings in the town of Smithfield, was vested in the said Francis Boykin, his heirs and assigns; that under a contract with the said Commissioners, he proceeded

***Ejectment.**—See monographic note on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.
†**Statute of Frauds.**—See monographic note on "Frauds, The Statute of" appended to Beale v. Digges, 6 Gratt. 582.

‡**Chancery Practice—Amendment of Bill—When Leave Granted.**—As a general rule, a court of equity will, at any time before the hearing, grant leave to amend where the bill is defective as to the parties, or the mistake or omission of any fact or circumstance connected with the substance of the bill, or not repugnant thereto. This amendment may be by common order, before answer or demurrer, and afterwards by leave of the court. *Holland v. Trotter*, 22 Gratt. 130, citing the principal case; *Mason v. Nelson*, 11 Leigh 227; *Stephenson v. Taverners*, 9 Gratt. 398; *Smith v. Smith*, 4 Rand. 95; *Sillings v. Bumgardner*, 9 Gratt. 273. Thus while the plaintiff will not be permitted to make a new case, he may so alter the frame and structure of his bill as to obtain an entirely different relief from that asked for originally. *Belton v. Apperson*, 26 Gratt. 217. For further information on this subject, see monographic note on "Amended Bills" appended to *Belton v. Apperson*, 26 Gratt. 207.

to build, on a place selected by them, on his land, and at his own expense, a Court-house and Jail, which was received by the Commissioners; and that the Court for the County of Isle of Wight had since been constantly held at the said place; that by the will of the said Francis Boykin, the plaintiffs were entitled to the land and public buildings in Smithfield, vested in him by the said Acts of Assembly; but that the defendants, heirs of a certain Thomas Smith, and claiming under him, had got possession, and refused to surrender the same, under various pretences, which were merely fictitious; for so lately as the year 1798, the said Thomas Smith disclaimed, in open Court, all pretensions of title to the said land, and requested the Clerk of Isle of Wight to enter a release of all his right, title, interest, and claim thereto, which entry was accordingly made at the time, on the solicitation of the said Thomas Smith. The prayer of the bill therefore was, that the plaintiffs might have possession of the said land and public buildings in the town of Smithfield; that the defendants account for the rents and profits thereof; and for general relief.

The defendants, by their joint answer, denied that the Commonwealth had any title to the lands and buildings in the bill mentioned. They stated that Thomas Smith, under whom they claimed and held, was, on the 1st of November, 1754, seized in fee simple of the lands in dispute, and in order to enhance the value of his adjoining estate, then agreed to the erection of certain buildings thereon, for the public use of the County of Isle of Wight, as a Court-house and Jail. They admitted that the land was kept in the public use and occupation of the said County, for the purposes aforesaid, from that time until the year 1801. They admitted further, that on the

4th of June, 1798, the said Thomas Smith, for the aforesaid *purpose of increasing the value of his adjoining lands, in open Court, verbally declared, that he thereby relinquished all his right and interest to the said land, and its appurtenances, to the said County, for the purpose of continuing the Court-house and other public buildings thereon, for the use of the said County; and that this verbal release was entered of record. But they expressly charged that there never was any written conveyance or release, executed by the said Thomas Smith, disposing of the said land. They conceived, that as the possession aforesaid of the County of Isle of Wight was far short of fifty years, and as he never conveyed the said land by writing, the title continued in him.

The defendants farther alleged that Francis Boykin, under whom the plaintiffs claim, instituted an action of ejectment, to recover the same land, in the Suffolk District Court; that, in that suit, a case was agreed, and after solemn argument, determined in favour of the defendants; an appeal from which decision is still pending. They relied upon that judgment as a bar to the complainants' recovery before the Court of Chancery, as well as a plea to its jurisdiction. They conceived, however, that the equity, as well as the law of the

case, was on their side; the only consideration which actuated Thomas Smith, in making the aforesaid verbal gift or release, having been the expectation of benefit to his adjoining estate, by the Court's continuing to sit in the town of Smithfield; which benefit was lost by the removal of the seat of justice from that place. They therefore submitted to the Court, "whether it could be consistent with equity for the Commonwealth to deprive them both of the consideration and the property."

The record for the proceedings in ejectment was among the exhibits. In the case agreed in that suit, it was stated that the verbal release by Thomas Smith, in open Court, was "for the purpose of increasing the value of his adjoining lands;" but the clerk's entry of that release (which was set forth in *hæc verba*) mentioned

105 no *such consideration, or condition, but expressed the release as absolute.

The case agreed, also, stated the other facts, concerning the seisin of Thomas Smith, in the year 1754, &c. in conformity with the answer.

No depositions appear to have been taken in the cause, which, on the 30th of June, 1808, was set for hearing on the plaintiff's motion. At a Court held the 27th of April, 1810, a motion was made by the plaintiffs to amend their bill, which the Chancellor overruled; but the amendments being prepared and read to the Court, permitted the same to be filed, "among the evidence in the cause, as part thereof." In those amendments, the plaintiffs averred that Thomas Smith never was seised or possessed of the land in question; that one Arthur Smith, uncle of the said Thomas, was, at or about the year 1754, and long before that time, seised of the same, and of the lands adjoining; that the records of the Court of the Isle of Wight County, at or about that time, and for several successive years, appear to be lost and mutilated, so as to prevent any direct and clear evidence of the facts as detailed in the said case agreed, relative to the erection of said buildings for public use; and, therefore, the facts so stated are founded in mere conjecture; in opposition to which a fair presumption might and ought to arise, from the nature of the transaction, the duty and power of the Court; that Francis Boykin did institute an ejectment, and that such proceedings were had thereupon as stated by the defendants; that the appeal from the judgment in that action abated by his death, and was not revived; that the case agreed presented only one point, viz. whether the declaration said to be stated on record by Thomas Smith, in 1798, was a legal conveyance of the property in dispute; in which it is manifest that the said Francis Boykin mistook his remedy; that the case aforesaid was defective in another view; that it did not distinctly set out the performance by said Boykin of the conditions

on which he was to take the property in contest, which conditions *have been fully performed; that it is fair to presume, especially after the lapse of fifty years, that the said Arthur Smith had sold to the County of Isle of Wight the said two lots of ground, and received a

proper consideration therefor, as the said County had a right to purchase for that object; or that if he gave the said two lots, the object with him was to increase the price of his other lots and land; "a consideration which the said Arthur, and those claiming under him have enjoyed, because the fact is that the lots are sold by him, or them, for an increased price, so as to give an ample consideration for the two acres given to the County; that it is not distinctly seen how the said Thomas Smith derived his title to these lots from the said Arthur; that if he did derive any title thereto in any manner, the declaration made by him in 1798 should be considered as binding him in this Court, where the substance, and not the form, of things should be regarded; more especially as the record of this declaration is an unqualified act of the said Thomas Smith, and contains no reservation of any purposes, as the case agreed would seem to import; that it is unconscionable, in the defendants, to take and hold possession of property, of which a gift, or sale, may fairly be presumed by Arthur Smith, or of that which has been relinquished by their ancestor, because of a defect in legal forms; and that it is the province of this Court to supply legal defects, to cause that to be done which ought to have been done, and to carry into effect agreements made upon fair consideration."

The cause having been set for hearing, and the Chancellor (Tyler) discerning no reason to delay the decision thereof, no "motion having been made to continue the same," he was of opinion "that this Court hath no jurisdiction over the subject matter of this suit, the same having already been decided by a Court of competent authority." He therefore dismissed the bill; whereupon the plaintiffs appealed.

107 *Wirt, for the appellants, relied on three points; viz. 1. The Court of Isle of Wight County had a good equitable title to the land in controversy, there being no deed, but reason to presume a parol contract, and payment of a valuable consideration to the proprietor. The transfer, therefore, of the Court's title to Boykin, gave him a good right to sue in equity, though not at law.

2. The proceedings in the action of ejectment are no bar to the suit in Chancery; the only point submitted by the case agreed relating to the legal title; beside which, it appears, from the amended bill, that the case agreed was erroneous in many respects.

3. The Chancellor erred in refusing leave to amend the bill, at our costs. He permitted, indeed, the amended bill to be filed "as evidence." If he could with propriety do this, the decree is erroneous, being in opposition to the evidence. If he could not, the amended bill should have been received, and the plaintiffs allowed to support it by testimony.

Wickham, contra. If Boykin had any right at all, it was what the law gave him—merely a legal right; but he has none in law or equity.

He comes into a Court of equity, on the

ground that he has not a legal right. Yet twenty years' possession is a sufficient title in ejectment; and, according to his own showing, the County, under which he claims, had possession a much longer time.

The bill does not rely on any purchase by the County. It does not say that the land was paid for, nor at what time it was taken for public use. The answer speaks of the transaction as a voluntary assent of Thomas Smith, that the buildings might be erected to enhance the value of his adjoining lands; to be used, so long as the Court should choose to use them as a Court house and Jail. There is no proof that "two acres" were laid off, or any certain metes and bounds. His declaration in 1798, minuted by the clerk, could not operate

108 ate a conveyance; for lands *pass only by livery of seisin, or writing sealed and delivered. But his declaration was that he released to the use of the County. Considered as a release, it was void; there being no releasee; for a County is not a body politic and corporate, able to take a release. It operated, therefore, only as an agreement or consent, that the land might be used for a Court house and Jail; his object being to keep the Court house there. It could not be his intention that they should sell it the next minute. Boykin, after getting the Court house removed, comes with a bad grace to claim our land. The strict right of the Commonwealth was all he could get by the Act of Assembly; and this is one of the cases, above all others, in which a Court of equity ought not to interfere.

2. The mistake in the case agreed, in the ejectment, is no ground for equitable jurisdiction. A new action of ejectment may still be brought, and a new case might be agreed. The statement heretofore made, would not be binding upon the parties, in the new ejectment. If there had been any circumstance to induce a presumption of a conveyance, the jury, in a Court of law, could have presumed it. (a) But, on the contrary, there is the strongest ground for presuming the erection of the buildings to have been merely permissive, and that the right of the County was to cease whenever the Court house should be removed.

3. This was not a proper case for granting leave to amend the bill. The rule is, that the bill is not to be amended at the hearing without good cause shown; and none was suggested. Besides, the motion was not for a continuance, but for leave to amend, and try the cause immediately; which could never be tolerated. The Chancellor could not have intended to receive the amendments to the bill as evidence in the cause. The record in this part of it is loosely worded; but the meaning may be, that he received the writing (which was offered) as evidence toward supporting the plaintiff's motion for leave to amend his bill.

109 *Wirt, in reply. This is a common case; a suit in equity to enforce an equitable title; there being none that can

(a) Tanner's Administrator v. Saddler, 2 H. & M. 370.

be enforced at law. The question is, whether, after such length of time, and the release by Thomas Smith, in open Court, payment for the land ought not to be presumed. I do not contend that a deed is to be presumed. This could not have been the case; for the Court of a County could not take a deed; since it is not a body corporate. Even supposing the consideration of the bargain, between Arthur Smith and the County, was the enhancement of the value of his adjoining lands, the erection of the public buildings was a compliance with the consideration. He gained the object he had in view; and this was sufficient to give the County an equitable title. Mr. Wickham contends, that this enhancement was to be perpetual. But Smith knew that a Court house could at any time be removed, and of course submitted to the risk of such removal. The Court not being a body corporate, could not maintain ejectment. Of course, Boykin, their vendee, could not.

As to the amendment to the bill; the Chancellor was bound to grant leave to amend, on payment of costs. He plainly received the amendment as evidence in the cause; for such are the express words of his decree. This was truly an original and extraordinary course of proceeding; and, I admit, was wrong. His meaning was, that allowing it to be evidence, it could not affect the case; the door of the Court of equity being shut by the judgment in ejectment.

Wickham. It is plain from the law, (a) that Boykin's right, if any, is strictly legal. The act of 1748 (b) says, that "the Court may purchase two acres, whereon to erect their public buildings, for the use of their county, and for no other use whatever." It follows, therefore, that when a Court house is removed, the land reverts to the original proprietor. The fee simple is declared to be in the Court

and their successors, so long as it is applied *to the use of the County, and no longer. It is therefore only a base fee, like an estate to a man and his heirs, while a certain tree shall stand.

After a cause is set for hearing, the bill cannot be amended, without good cause shown. Otherwise a lis pendens might be kept up for ever.

The case presents another point. The devise of Boykin could not sue; for the devise was void, there being, at the time, a person holding the legal title, in full adverse possession.*

Wirt. The act of 1748 gives a fee simple to the Court and their successors. The words used in the law are intended to vest in the County the exclusive property for its use. But when new property is purchased, and paid for with the old, the latter is in fact applied to the use of the County. The Court appointed Commissioners to contract with Boykin. The heirs of Smith stood by and did not interfere. Ought they now to be permitted in equity to take from him the property he was to receive in exchange for that which he parted with? His was only a parol contract, and his right only equitable.

We do not claim under the Act of Assembly, but his contract with the County. Could the Court make him a deed, or any contract with him but by parol?

A devise of an equitable interest is clearly good, so far as to pass such interest to the devisee.†

Monday, March 23d, the following opinion of the Court was pronounced by Judge Roane.

"The Court is of opinion, that as the act of 1748, in relation to the erection of Court houses in the several Counties of this Commonwealth, was anterior to the acquisition of the lot, now in question, by the Court of Isle of Wight County, was a general law which all the County Courts were bound to take notice of, and conform *to, and made it the duty of such

Courts, in relation to Court houses thereafter to be erected, to purchase two acres of land for the purpose aforesaid; (for the acquiring and holding of which the said Courts respectively, and their successors, were made competent by the said act;) it ought to be presumed, at this distance of time, that the title to the said lot was duly acquired by the Court of that County, although a deed may not have been made therefor, or may have been lost; (in which last case, an application to a Court of equity, to restore the said deed is equally proper;) and this the rather, as it is admitted by the appellees, that their ancestor, the tenant of the said land at that time, agreed to the erection of the public buildings thereon, in consideration of the enhancement of the value of his adjoining property. That agreement, although it may not have been evidenced by writing, being anterior to the Act of frauds, and founded on a valuable consideration, would have been binding in a Court of equity; even had it not been carried into complete execution, by the erection of the public buildings thereon, at the expense of the County, the holding the public buildings there for a great number of years, and the consequent enhancement of the value of the adjoining land. The Court is further of opinion, that the release of Thomas Smith, (under whom the appellees claim,) contained in the proceedings, being founded on a valuable consideration, (namely, the agreement and erection of the public buildings before mentioned,) is not only obligatory on the appellees, but even satisfies the provisions of the said Act of frauds; the clerk of the Court, in entering the said release of record, being, quoad hoc, the agent of both parties. On these grounds, and on that of the County Court of Isle of Wight having duly assigned their right to the premises to Francis Boykin, (under whom the appellants claim,) by accepting the Court house erected by him, under the Act of January, 1800, the Court is of opinion that the equitable title of the appellants to the said lot should be carried

into *effect; and that the said decree is erroneous; therefore, it is decreed and ordered that the same be reversed and annulled, and that the appellees pay to the appellants their costs by them expended in

(a) Rev. Code, vol. 1, p. 86.

(b) Ed. of 1760, p. 179, c. 4, sect. 30.

*Note. See *Hyer v. Shobe*, 1 Munford, p. 200.

†See the authorities cited, 2 Munford, p. 203.

the prosecution of their appeal aforesaid here. And this Court, proceeding to make such decree as the said Superior Court of Chancery ought to have pronounced, it is further decreed and ordered, that possession of the premises in question be delivered up to the appellants, that the rents and profits thereof be accounted for by the appellees, and that they release all their right in the premises to the appellants. And it is ordered that the cause be remanded to the said Court of Chancery to be finally proceeded in pursuant to the foregoing opinion and decree."

Franklin v. Wilkinson.

Tuesday, March 17th, 1812.

1. **Chancery Practice—Dissolution of Injunction—Dismissal of Bill.**—After an injunction has been wholly dissolved, if the cause be set for hearing on motion of the defendant in equity, he cannot take advantage of the circumstance that the bill should have been dismissed under the Act of Assembly.

See *Pitts v. Tidwell*, ante.

2. **Bill of Review—Wrong Advice of Counsel.**—It is no ground for a bill of review, that the party was prevented from proving certain important facts, by wrong advice of one of his counsel; or that the other was unable to attend to the cause when called for trial, which circumstance was unknown to the party, until after the decree.

Upon an appeal from a rejection, by the Superior Court of Chancery for the Richmond district, of a motion for leave to file a bill of review.

The decree, which the appellant wished to have reviewed, was founded on a bill of injunction to stay proceedings on a judgment at law in his favour against the appellee. The equity relied upon by the complainant in that bill was, that a bond, on which the judgment was obtained, was given for money won at gaming between him and a certain Davis Booker; that before the said bond became due, he became the creditor of the said Booker for a larger sum of money, upon a similar consideration of gaming, and offered to discount the same, which the said Booker agreed to, but said he had not the bond then with him, but would, when he went home, destroy it, or return it, on sight; not-

withstanding which, he assigned it to a certain Alexander Hunter, who afterwards assigned it to Owen Franklin, the appellant.

The material allegations of that bill not being admitted by the answer, and no evidence in support of it being filed, the injunction was dissolved on the 17th day of March, 1806. At Rules in the clerk's office, in the same month, the complainant replied generally, and commissions to take depositions were awarded. The bill was not dismissed according to the Act of Assembly; (a) neither does it appear from the record, that cause was shown at the next term against such dismission; but, at Rules, in the month of December, 1806, the cause was set for hearing on motion of the defendant, by his counsel; and, at March Term, 1807, on hearing the bill, answer, exhib-

its, and examinations of witnesses, the Chancellor adjudged and decreed, that the injunction be perpetual.

The reasons suggested for reviewing this decree were, that "the appellant gave a valuable consideration for the said bond in a wagon and team of horses, estimated at cash prices, and never knew, or heard, until after the assignment of it to him, and delivery of the said wagon and team, that it was suspected to have been given for a gaming consideration; that he would not accept the said bond, until he received an assurance from the said Wilkinson that it was good for twenty shillings in the pound; that he was prepared to prove these facts, but, being informed by one of his counsel, that he need not take any depositions, and the other, who succeeded to his business, being unable, from a domestic misfortune, to attend to the cause when it was called for trial, the decree perpetuating the injunction was rendered without any opposition, or any statement of facts which might have been made for a continuance. The appellant was advised, that, however new, in strict fact, this case might be, yet, in principle, it falls within the cases allowed to be proper for bills of review; because he charges, 1st. That the indispensable absence of his counsel at the trial was unknown to him, until long after the decree of perpetuation;

2d. That he was prevented, by causes which he had no means of controlling, from taking the necessary testimony; and, 3d. That that testimony, now taken upon notice, and here produced, proves that he was induced to take the said bond upon the assurance of the said Wilkinson himself.

The Chancellor, "being of opinion that there was no error in the decree sought to be reviewed," refused permission to file the bill.

Hay, for the appellant, observed, that he should press the point, that misinstruction of counsel, by which the client was prevented from availing himself of testimony, is a sufficient reason for a bill of review; but felt himself precluded by the cases of *Theveat's administrator v. Finch*, and *Eastham v. Britton*, lately decided. He would therefore only contend, that the injunction having been wholly dissolved, and no cause shown, at the next term, against the dismission of the bill, it stood dismissed of course, under the Act of Assembly. The clerk's neglecting to enter such dismission was a breach of his duty, but could not keep the cause on the docket, against the positive words of the law, "that the bill should stand dismissed, of course, with costs." All the subsequent proceedings were, therefore, coram non iudice; the suit, in contemplation of law, being at an end.

No counsel for the appellee.

Thursday, March 19th, 1812, JUDGE ROANE delivered the following opinion of the Court.

"It appearing that the cause was set for hearing upon the motion of the appellant, by his counsel, the Court is of opinion, that he cannot now be received to insist

*See generally, monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

†See monographic note on "Bills of Review" appended to *Campbell v. Campbell*, 22 Gratt. 649.

(a) Revised Code, 2d vol. p. 29, ch. 29, sec. 8.

on the absolute dismissal of the bill of the appellee, under the Act of Assembly; and it not appearing that any sufficient ground is alleged in the bill of review, to entitle the appellant to a reconsideration of the decree perpetuating "the injunction, the Court, without deciding on any other point in this cause, is of opinion, that there is no error in the said order rejecting the bill of review: therefore it is decreed and ordered, that the same be affirmed."

Darby v. Henderson and Duncan, Administrators of Drummond.

Thursday, March 12th, 1812.

1. **Appellate Practice—Reversal of Judgment.**—An appellate Court ought not to reverse a judgment, without proceeding to give such judgment as the inferior Court should have given. See *Blane v. Sansum*, 2 Call. 496, and *Mantz v. Hendley*, 2 H. & M. 308, pl. 7, to the same effect.

2. **Sergeant of Corporation—Right to Sue for Money Due Judgment Debtor.**—A Sergeant of a Corporation has not the right to sue for money due to an insolvent debtor. See an important law on the subject of recovering the debts due to insolvent debtors, in Acts of 1812, c. 6, p. 36.

Declarations—Blanks Therein—Effect.—As to the effect of blanks in declarations, see *Blane v. Sansum*, 2 Call. 494; *Stephens v. White*, 2 Wash. 203; *Taylor & Co. v. McLean*, 3 Call. 557; *Craghill & Co. v. Page*, 2 H. & M. 446, pl. 4; *Digges v. Norris*, 3 H. & M. 288: from all which it appears, that the circumstance that the damages are left blank is unimportant; but if the gist of the action be blank, it is fatal.

This was an action of assumpsit in the Corporation Court of Fredericksburg, on behalf of Adam Darby, Sergeant of said Corporation, against the administrators of William Drummond, deceased; the declaration charging the defendants, on the ground that their intestate was indebted, by simple contract, for work and labour, &c. to a certain John Blanton, who was taken upon a *capias ad satisfaciendum*, and discharged from custody, as an insolvent debtor, having subscribed and delivered in a schedule of his estate, and taken the oath prescribed by the 38th section of the Execution Law of 1793. (a) It was stated in the declaration, that the schedule contained a statement of the sum of , due to the said Blanton from ; by reason of which premises, the defendants were duly, and according to the directions of the 41st section of the same act, summoned to appear before the Court of the said Corporation, at a Court to be held "on the day of , 180 ; and they the said defendants appearing accordingly, and not confessing any thing to be due to the 116 said *Blanton, or to the plaintiff, were discharged from the said summons; and the plaintiff averred that no part of the recovery aforesaid" (by William Smith, the creditor of Blanton, which was set forth in a preceding part of the declaration) "was discharged, and the said judgment was not altered, suspended, or

reversed; by reason of all which premises, and by force of the Act of Assembly in that case made and provided, action had accrued to the said plaintiff to recover whatever sums of money might be due from the said defendants to the said plaintiff."

The declaration then proceeded to set forth and charge, in several counts, a debt by simple contract from the said Drummond, in his lifetime, to the said Blanton, with several promises to pay the said debt; averring that "no payment thereof had been made to the said Blanton by him the said Drummond, or by the defendants, his administrators, and that the whole remained due and unpaid," &c. but the sums of money were left blank throughout those counts, except the damages, which were laid at 500l.

The defendants pleaded "non assumpsit by their intestate;" and issue being joined, a verdict was found, and judgment entered, in favour of the plaintiff, for 129l. 9s. 2d. damages.

A writ of supersedeas to this judgment was awarded by a Judge of the General Court; the petition alleging, 1. "That upon the face of the record, it was apparent the plaintiff had no right of action; the effects of an insolvent debtor being vested by law in the Sheriff of the County where they lie, or are found: and the right of recovering the debts, &c. due such debtor, being vested in the Sheriff, or such debtor only; 2d. That if a Sergeant of a Corporation has the right to sue for the debts of an insolvent debtor; yet the plaintiff, in his declaration, had made no averment that the petitioners, or their intestate, were charged in the schedule of the insolvent debtor, as his debtors; which 117 was a fatal chasm in the "title of the plaintiff to the action;" and, 3d. "That it did not appear from the declaration, that the petitioners, or their intestate, assumed to pay any sum of money to the insolvent."

The District Court reversed the judgment, and awarded the costs of prosecuting the writ, to the plaintiff in error; but did not proceed to give such judgment as the Corporation Court ought to have given.

The defendant in error appealed to this Court.

Botts, for the appellant, being dead, Robert Stanard, for the appellees, submitted the case without argument.

Thursday, April 9th, 1812, the following was delivered by JUDGE ROANE as the opinion of the Court.

"The Court is of opinion, that the judgment of the Superior Court reversing that of the County Court, is correct, as far as it goes, for the reason stated in the first error assigned in the petition for a supersedeas; but that the said Superior Court erred in not proceeding to enter such judgment as the said County Court ought to have rendered; namely, that the plaintiff should take nothing by his bill, and the defendant recover against the said plaintiff his costs in the County Court expended. On this ground, the judgment of the said Superior Court is reversed, with costs, and reformed in pursuance of the foregoing principle."

***Appellate Practice—Reversal of Judgment.**—To the point that an appellate court, on reversing a judgment, ought to enter such judgment as the inferior court should have entered, the principal case is cited in *Janey v. Blake*, 8 Leigh 92, citing the principal case: *Mantz v. Hendley*, 2 Hen. & M. 308; *Blane v. Sansum*, 2 Call 496.

See further, monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., Turnpike Co., 1 Rob. 268.

(a) Rev. Code, vol. 1, c. 151, sect. 308.

118 *Bell v. Allen's Administrator.

March, 1812.

1. Debt—Declaration—Bond—Material Variance.—A writing beginning, "Know all men, &c. that I, H. R., of the County, &c. am held and firmly bound," &c. and running throughout in the name of H. R. alone, is not to be received as evidence in support of a declaration against H. R. and H. B., charging that they both acknowledged themselves to be indebted, &c. notwithstanding the name of H. B. was signed under that of H. R., and issue was not joined on the plea of non est factum, or nil debet, but of "payment by H. B." See Atwell's Administrators v. Towles, 1 Munf. 178.

In an action of debt, in the District Court of Prince Edward, on behalf of Daniel A. Allen, administrator of Daniel Allen, sen., deceased, against Henry Rawlins and Henry Bell, the declaration charged that both the defendants "acknowledged themselves to be indebted" to the plaintiff's intestate, and charged them throughout as if they had jointly executed the bond on which the action was founded. The defendants being arrested at different times, a judgment by default was entered, and confirmed, at Rules in the Clerk's Office, against Rawlins. Bell, without praying over, pleaded payment, and issue being joined thereupon, a verdict was found for the plaintiff, subject to the opinion of the Court, whether a writing (set forth in hæc verba) be proper evidence to support the declaration. The writing in question began, "Know all men by these presents, that I, Henry Rawlins, of the County of Buckingham, am held and firmly bound," &c. and did not mention the name of Henry Bell in the body of it; but his name was signed under that of Henry Rawlins.

Upon this special verdict, (the cause having been transferred to the Superior Court of law, for Buckingham County,) judgment was entered for the plaintiff; whereupon the defendant, Bell, obtained a writ of supersedeas from a judge of this Court.

Peyton Randolph, for the plaintiff in error. Wirt, for the defendant.

Tuesday, March 17th, 1812, JUDGE ROANE pronounced the following opinion of the Court.

"It seems to the Court here, that the paper offered in evidence to support the

***Bond—Signing—Effect.**—In Beery v. Homan, 8 Gratt. 51, it was held that to constitute a valid bond of the party, the intention to bind himself must appear on the face of the instrument: that the signature and seal form a part thereof, and furnish *prima facie* evidence that the person so signing and sealing the bond intended to make himself a party thereto, and to be bound by the stipulations thereof; although the name of the party so signing, sealing and delivering the bond may not be inserted in the penalty or recited in the condition. ALLEN, J., in delivering the opinion of the court said: "The case of *Bell v. Allen*, 3 Munf. 118, does not actually decide that the bond there offered in evidence, was not the bond of the security because his name did not appear in the body of the instrument, but it was rejected when offered in evidence, on the ground of an alleged variance between it and the bond described in the declaration. If, however, it is to be inferred that the case was decided upon the ground that the bond was invalid as to the surety for the cause aforesaid, the authority of the case is impaired by the decisions of this court in the cases of *Bartley v. Yates*, 2 Hen. & M. 398; *Beale v. Wilson*, 4 Munf. 380; *Raynolds v. Gore*, 4 Leigh 278; and was in effect overruled in *Crawford v. Jarrett*, 2 Leigh 680.

See further, monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

declaration, materially varying from the one declared on, (the admissibility of which *first-mentioned paper, was reserved for the opinion of the Court by the verdict of the jury,) was improper evidence to support the declaration, and that the said judgment is erroneous;" which was therefore reversed, &c. and judgment was entered in favour of the plaintiff in error.

Evans v. Freeland.

Saturday, January 11th, 1812.

1. Scire Facias—Material Allegations.—A scire facias, purporting to be founded upon a judgment entered at Rules, in the clerk's office of a County Court, but not mentioning that judgment was confirmed, by not being set aside at the ensuing quarterly term, nor even that such quarterly term occurred prior to the suing out of the said scire facias, ought to be quashed, as not setting forth any legal cause of action.

2. Bail—Delivery of Principal—Effect.—It seems that a special bail's surrender of his principal to the sheriff is effectual, without his exhibiting a bail-piece, or other written evidence of his being bail; if the surrender be made in the County, in the Court of which he was accepted and entered as special bail in open Court, and it appear that the fact was known to the sheriff, who nevertheless refused to accept the surrender and hold the principal in custody.

Upon a writ of supersedeas to a judgment of the Washington District Court, affirming a judgment of the County Court of Wythe, upon a scire facias against Jesse Evans and John Evans, special bail for John Armstrong, at the suit of Archibald Freeland.

The scire facias described the judgment against Armstrong, on which the proceeding against the bail was founded, as having been "recovered at Rules held in the clerk's office," but said nothing of its being confirmed. The defendant pleaded a surrender of the said John Armstrong, in discharge of his bail, before the return day of the scire facias, to the Sheriff of the County of Wythe, where the original writ was served. On the trial of the cause, they moved the Court to instruct the jury, "that it is not absolutely and indispensably necessary, to make a surrender effectual, that the bail should exhibit a bail-piece, if the sheriff is otherwise consuant of the bail's undertaking, and where the surrender is in the County in the Court of which the special bail has been accepted and entered in open Court." But the Court refused the instruction, and in lieu thereof, gave the following, *to wit: "that it is absolutely and indispensably necessary, to make a surrender effectual, that the bail should exhibit a bail-piece, or other written evidence of the fact; and that, even if the sheriff might be otherwise consuant of the bail's undertaking; and where the surrender is in the County, in the Court of which the special bail has been accepted and entered in open Court, yet it is not sufficient without the exhibition of a bail-piece, or other written evidence of

***Scire Facias—Material Allegations.**—A scire facias upon an office judgment in a suit at law, which does not aver that the office judgment was confirmed by the court or by rise of the next court, will be fatally defective. The case of *Evans v. Freeland*, 3 Munf. 119, is a sufficient authority to prove this proposition: See J. J. delivering the opinion of the court in *Roach v. Gardner*, 9 Gratt. 92.

the fact:" to which opinion the defendants, by their counsel, excepted. A verdict was found for the plaintiff, but a new trial awarded; and, when it took place, the defendants renewed their motion, requesting the same instruction for which they contended before. The plaintiff's counsel opposed the motion, and required the Court to give the instruction which had been given as aforesaid: but, the Court being divided in opinion, neither of the said instructions were given; whereupon the defendants again tendered a bill of exceptions, which was signed and sealed, &c.

Verdict and judgment for the plaintiff.

The pleadings presented various other points, but the following, only, were noticed in the opinion of this Court, pronounced on Saturday, the 11th of January, 1812.

"This Court is of opinion, that the judgment aforesaid of the District Court is erroneous: therefore, it is considered, that the same be reversed and annulled with costs: and this Court, proceeding to give such judgment as the said District Court ought to have given, (not deciding upon the other points occurring in the case, further than to express its present impression to be that, under the actual circumstances of this case,* it was not necessary

for the plaintiffs in error, to have exhibited a *bail-piece at the time of the surrender in the proceedings mentioned,) is of opinion that the judgment of the said County Court is erroneous, in this, that the scire facias only purports to be founded upon a judgment entered at the rules, but does not aver, or show, that that judgment was confirmed, by not being set aside at the ensuing quarterly Court, nor even that such Court had occurred prior to suing out the scire facias aforesaid: therefore, it is further considered, that the said judgment be also reversed and annulled; that the said scire facias be quashed;" and that the plaintiffs in error recover costs in both the Courts below.

Lee's Administrator v. Carter & Forbes.

January, 1812.

1. **Judgment by Default—Appearance Bail.**—Where the defendant to a suit has not pleaded, but his appearance bail has, a judgment stating, "that the attorney for the defendant withdraws his plea, &c. and therefore that the plaintiff recover against the defendant." must be understood as a judgment against the bail only: (without including the principal:) and is therefore erroneous. See Wallace v. Baker. 2 Munford, p. 384.

In an action of debt in the Northumberland District Court, on behalf of Richard Bland Lee, administrator, with the will annexed, of Richard Lee, deceased, against John T. Carter, surviving obligor, in a bill penal executed by him and John James Maund, deceased, a common order was

*Note. It appeared in evidence, that the sheriff refused to accept the surrender, notwithstanding he was fully apprized of the undertaking of the plaintiffs in error as bail, but grounded his objection to holding Armstrong in custody, not on their want of right to make the surrender, but on motives of personal friendship and tenderness to the said Armstrong.—Note in Original Edition.

*See foot-note to Vanmeter v. Fulkmore. 1 Hen. & M. 329: monographic note on "Judgments" appended to Smith v. Charlton. 7 Gratt. 425

entered and confirmed, at Rules, in the clerk's office, against the defendant, John T. Carter, and William Forbes, the bail, for his appearance. At the ensuing District Court, the defendant having failed to appear, or give special bail, the appearance bail was allowed to defend the suit, and pleaded payment, whereupon issue was joined. At a subsequent term a judgment was entered in the following words: "This day came the parties by their attorneys, and the attorney for the defendant withdraws his former plea in this cause, and saith, that he is not informed by the said defendant of any answer to be given for him to the plaintiff in this action, whereby the defendant remains altogether undefended; therefore it is considered by the Court, that the plaintiff recover

122 against *the defendant the sum of five hundred dollars, the debt in the declaration mentioned," &c.

To this judgment a writ of supersedeas was awarded; and, on Saturday the 25th of January, 1812, the following opinion of this Court was pronounced by JUDGE ROANE.

"The judgment of the District Court is defective in this, that when the plea was withdrawn by the appearance bail, who was the defendant in the issue formed by that plea, the Court ought to have entered judgment, as well against John T. Carter, against whom an office judgment had theretofore been confined, as against the said appearance bail. The judgment is therefore reversed with costs; and this Court, proceeding, &c. It is considered that the appellant recover against William Forbes, the appearance bail, (as to whom this suit remains undefended,) and against John T. Carter, (against whom there was an office judgment confirmed at August rules, 1803,) the sum of five hundred dollars, the debt in the declaration mentioned, and his costs; but this judgment is to be discharged," &c.

Mortimer v. Brumfield.

Friday, March 18th, 1812.

1. **Detinue—Allegations.**—It is not necessary, in the declaration in detinue, to state a special demand and refusal: but the general charge, that the defendant, "although often requested," &c. is sufficient.
2. **Parent and Child—Possession of Mother Considered Possession of Infant.**—Where a slave is given to an infant and left by the donor with the mother of such infant for its benefit: (the father being dead:) the possession by the mother is to be considered possession by the infant. See Braxton v. Gaines and others. 4 H. & M. 151.

This was an action of detinue, instituted in the year 1807, in the District Court of Fredericksburg, on behalf of Charles Brumfield against John Mortimer, for a negro man slave, by the name of Tom. The declaration stated a casual loss by the plaintiff, and finding by the defendant; and then, without setting forth a special demand and refusal to deliver the slave, proceeded to charge that the defendant, "well knowing the premises, and that the

123 said *negro was the proper slave
 *Detinue.—See monographic note on "Detinue and Replevin" appended to Hunt v. Martin. 8 Gratt. 578.
 *Parent and Child.—See monographic note on "Parent and Child" appended to Armstrong v. Stone. 9 Gratt. 102.

of the plaintiff, although often required, &c. had not delivered, but the same slave had continually detained, and still did detain," &c.

Issue was joined on the plea of non detinet; and at the trial, which was had in May, 1809, the plaintiff offered in evidence the affidavit of Mary Sullivan; (agreed to be admitted by the parties;) proving, that "about 23 years since, Charles Mortimer, the father of the defendant, Adam Hunter, and the affiant, stood sponsors for the plaintiff at his christening; (he being then not more than two months old;) and the said Charles Mortimer named him after himself; that the day after the christening, the said Charles Mortimer brought a little negro boy named Tom, to Mrs. Brumfield's (the mother of said plaintiff,) and, in the presence of the affiant, Mrs. Willis, Mrs. Carter, and Nancy Mortimer, observed, that he had brought said negro boy as a present to his god-son, and he left said boy with Mrs. Brumfield, for her son, the plaintiff; the negro boy was then very small, not more than two years old, and appeared to be weakly: Mrs. Brumfield raised the said boy until she removed to Charleston, which was about six or seven years after: upon Mrs. Brumfield's removal to Charleston, the boy was left in the possession of the said Charles Mortimer, but on what terms, or under what circumstances, the affiant knew not of her own knowledge: the said negro boy remained in the possession of said Charles Mortimer, until his death, which happened about eight years since; and the said negro had been in the possession of the defendant from that time until he sold him to William Richards, since the institution of this suit: about two years after Mrs. Brumfield's removal to Charleston, she went to England, and took her son Charles with her, where they had resided ever since: a year or two before Charles Mortimer's death, the said Charles Brumfield came into this country, and remained in Fredericksburg five or six weeks, when he returned to England, and had resided there ever since." The witness

124 being questioned, "whether Charles Brumfield, when in Fredericksburg, made any demand on Doctor Charles Mortimer for said negro, answered, "Charles Brumfield observed to me, that he would ask Doctor Mortimer for the negro; but I advised him not to do so, as it might offend Doctor Mortimer, and it was probable Doctor Mortimer would give him more than the negro was worth; and I do not know that he made any demand."

The plaintiff also offered evidence to prove the value of the slave to be 105l. and that his hires, since he came to the possession of the defendant, were of the value of 108l. And this being all the proof exhibited by the plaintiff, the defendant demurred to the evidence, without introducing any on his part; and a conditional verdict was found in the usual form. The District Court gave judgment for the plaintiff, and the defendant appealed.

Wirt, for the appellant, contended, 1st. That the evidence was not sufficient to identify the slave in question; 2d. That the slave having been more than five

years in the possession of Charles Mortimer, the father, and, after his death, more than five years in the possession of John Mortimer, his son, the title of the plaintiff was barred by the act of limitations; (a) the force of which objection is not obviated by the plaintiff's being an infant; because it does not appear, that when he was in this country, he made any demand of the slave. Indeed, no action was brought, or demand made, in the lifetime of Doctor Mortimer, who might have better shown his right than it can now be shown by the present defendant.

3. The declaration contains no averment of a special demand before action brought. According to 1 Chitty, 121, and 2 Chitty, 236, the words, "although often requested," are not sufficient in detinue, but a special demand must be laid in the declaration. In *Burnley v. Lambert*, 1 Wash. 310, this point was incidentally made, but not decided; a decision upon it being unnecessary.

125 *Williams, contra. The identity of the slave is sufficiently established by the testimony of Mrs. Sullivan.

The act of limitations cannot bar the plaintiff's claim. The five years against him, ran during his infancy. Besides, the act is not pleaded, and the defendant has not given it in evidence under the general issue. In *Murdoch v. Herndon*, it was decided, that where the defendant may give the act in evidence, the other party may, in like manner, bring himself within the exceptions to its operation.

The case of *Newby v. Blakey*, is an authority in the plaintiff's favour; for he had more than five years peaceable possession, before his mother left the slave with Doctor Mortimer; which act of her's could not affect the right of her infant son.

As to the necessity of stating a demand in the declaration, it is sufficiently stated by the words "although often requested." The objection was made in *Burnley v. Lambert*, and must have been regarded as not tenable; otherwise the judgment, which was for the plaintiff, would not have been affirmed. I consider the point, therefore, as decided in that case, that the general allegation of licet sæpius requisitus is sufficient, without stating a special demand. It is unnecessary then to examine the British authorities."

On Wednesday, the 8th of April, 1812, the president pronounced the opinion of the Court, that the judgment be affirmed.

126 *Mason v. Williams, and Peyton v. Carr's Administrators.

Argued, Saturday, Nov. 30th, 1811.

1. Equitable Relief—How Lost by Compromise.—Under what circumstances a right to relief in equity

(a) *Newby's Administrator v. Blakey*, 3 H. & M.

57. *Note. The precedents in *Mills v. Graham*, 4 Bos. and Pull. p. 140, and *Kettle v. Bromsall*, Willes, 119, do not state a special request, but simply a licet sæpius requisitus. In the last-mentioned case, the objection was taken up by Sergeant Comyns, that a count, in the latter form, was not sufficient; but the Court overruled the objection. In that case, too, it is observable, that the point was made, not after verdict, but upon demurrer.—Note in Original Edition.

may be lost by acts of confirmation and compromise.

2. *Confession of Judgment*.—By Man of Weak Understanding.—When Supported.—A confession of judgment and release of equity, will be supported, though made by a man of weak understanding, in the habit of making improvident bargains, addicted to intoxication, and embarrassed in his circumstances; and though such confession was induced by the plaintiff's giving him time to pay the money; if no other influence was exerted, and no fraud was committed, in obtaining such confession; the same being deliberately and voluntarily made by the defendant, or by virtue of a power of attorney deliberately and voluntarily executed by him. See *Wigglesworth v. Steers*, 1 H. & M. 70; *Worsham v. McKenzie*, Id. 842, and *Whitehorn and Wife v. Hines* and others, 1 Munford, 557.

Upon appeals from decrees of the Superior Court of Chancery, for the Richmond District, pronounced the 15th day of June, 1808.

These cases (depending on the same principles) were heard together. The material circumstances, presented by the bills, answers, depositions, and exhibits, (so far as the same are not sufficiently set forth in the opinions of the judges,) were the following:

Some time in the spring of the year 1797, William Carr, of Stafford, contracted with Enoch Mason, of the same county, to sell him two hundred trees, of his, the said Mason's choice, to be cut by him from the land of the said Carr, for which he agreed to pay one dollar each, or two hundred dollars. No time was fixed when the trees were to be cut. He paid, in consequence of the contract, about 50l. 4s. 4d. in different payments. Either before, or a short time after, the said contract was made, Mason agreed with Valentine Peyton, that he should be a partner in the purchase. In the winter of 1798, Peyton went to the city of Washington, and made a bargain with Gustavus Scott, one of the Commissioners for that City, to whom was committed the purchase of timber, that he would receive of him one hundred of the said trees, at nine pence, Maryland currency, per cubic foot; the stocks to be not less than twenty feet long, and to square at least twelve inches; but, if to be had longer and larger, not to be rejected on that account; the timber to be delivered at the store houses at Aquia, and there to be measured by some persons to be appointed by the Commissioners; but Peyton did not bind himself to deliver it. When this bargain was made, Mason and Peyton had not cut any of the trees. After the contract between himself and Mason, Carr agreed to let a certain George Brent have twenty trees from the same land, at the price of one dollar each; which trees the said Brent caused to be cut in the spring of 1798, and to be sawed up the September following. In consequence of this circumstance, Mason and Peyton accused Carr of a breach of contract, and alleged, that they were prevented from getting a sufficient number of trees, of such dimensions as they wanted, and equally convenient to the landing place on Aquia Creek, with those which Brent had taken. The testi-

mony on this subject was in some degree conflicting; but much the greater number of witnesses declared, that fully two hundred trees could have been got, as near to the said landing, and as large as any which Brent had caused to be cut. They renounced the contract, however, on the ground of its having been violated by Carr, and threatened to sue him. Carr (being a young man addicted to extravagance and intoxication, as well as naturally weak, timorous, and unguarded, being also constantly needy, though in possession of a considerable estate, and in the habit of making disadvantageous and imprudent contracts, as was proved by many witnesses) was induced to compromise the dispute, by giving two bonds for three hundred dollars each, payable, severally, to the said Mason and Peyton. He made payments to the amount of 43l. 6s. in part of the bond, to Mason and, (suit being afterward brought upon it,) confessed judgment, on the return of the writ, which was executed without requiring bail. Suit was also brought on the bond to Peyton; whereupon Carr, (on Peyton's agreeing to give him three years to pay the money,) executed a power of attorney to Benjamin Botts, the plaintiff's attorney, to confess judgment for him, with a release of equity; which was accordingly done. A writ of fieri facias was issued on Mason's judgment, and a forthcoming bond taken, with John Williams security. In November, 1801, Carr departed this life; and, soon after, administration of his estate was granted to the said John Williams, and to Margaret Carr, who afterwards married William Smith. At Stafford February Court, 1802, a judgment was obtained by Mason against Williams, the surviving obligor in the forthcoming bond; and execution being issued, the sum of 27l. 6s. 7½d. was made in part. Peyton also revived his judgment, by scire facias, against the administrators, and sued out execution, which being returned nulla bona, he brought suit against them in the District Court, held at Haymarket, for a devastavit. The said John Williams, in his own right, and as one of the administrators, filed his bill in Chancery against Mason; and the said administrators, their bill against Peyton.

Injunctions were granted by Chancellor Wythe to stay proceedings on Mason's judgment, and in Peyton's suit for a devastavit, until the matters in controversy should be determined in equity.

The grounds on which the complainants prayed relief, were, that the defendants had taken a fraudulent and unfair advantage of the weakness of William Carr's mind; having obtained the bonds in question by importunities and threats; and by indulging him with time to pay the money; that the spirit of the original contract, on his part, had not been violated, as trees enough were standing to answer the purpose for which they were wanted by Mason; that, at any rate, the damages for the breach, if suit had been instituted, would have been small; since no more than twenty trees were sold to Brent, as to which only, the advantage of making the

*See monographic note on "Judgments by Confession" appended to *Richardson v. Jones*, 12 Gratt. 53. The principal case is cited in *McFarland v. Fish*, 34 W. Va. 500, 12 S. E. Rep. 552.

first choice was lost by Mason; that, therefore, the bonds for 600 dollars, if not altogether without consideration, were, at least, exorbitant and oppressive. The defendants insisted that they could have made a greater profit, by the contract, than the sum of six hundred dollars; that Carr had sold so many trees to Mason, and other persons, (but this allegation was not proved,) that they could not have procured a sufficient number of such as, 129 *hy the contract, they were entitled to; that no unfair means were used to induce Carr to sign the bonds; that he freely acknowledged his violation of the contract; and that his confessions of judgment were voluntary, and without compulsion.

Sundry depositions were taken on the subject of the emolument they might have made by taking the timber according to contract; from which it appeared, that in consequence of the great difficulty of wagoning such heavy logs to the landing at Aquia, and conveying them in rafts to the City of Washington, the profit would, probably, have been small; or, perhaps, a loss might have been sustained.

The Chancellor decreed, that both the injunctions be perpetual: whereupon the defendants appealed to this Court.

After argument by Botts, for the appellants, and Hay, for the appellees, the judges, on Monday the 20th of January, 1812, pronounced their opinions-seriatim.

JUDGE COALTER. There is considerable hardship in these cases; and had Carr, in his life time, and at an early day after the transactions complained of, resorted to a Court of equity for relief, I am not prepared to say that his case would not have come within the third species of fraud enumerated by Lord Hardwicke, in 2 Vezey, 155,(a) which is recognised by the Lord Chancellor in *Heathcote v. Paignon*, 2 Bro. Ch. Cases, 175. But contracts, which might, at first, be declared invalid by a Court of Chancery, may afterwards receive strength by acts of confirmation. (b) In this case there have been various acts of this kind.

1st. An unconditional confession of judgment to Mason. (c)

2d. The execution of a delivery bond, which does not appear to have been done in order to gain time to resort 130 *to a Court of Chancery, but with intention to pay the debt.

3d. He gave a sum of money to obtain a delay of execution on this bond.

4th. Independent of this, he paid a horse and saddle, in part discharge of the delivery bond. And,

5th. He confessed judgment in favour of Peyton, for his half of the debt, with a release of all equity against him.

These various acts of confirmation, in a case in which, originally, I should have entertained considerable doubts, are too numerous and strong to be surmounted.

The decrees must be reversed.

JUDGE BROOKE. I am not satisfied that there is any proof in these cases that William Carr laboured under a general incapacity to make a contract. That he was improvident, extravagant, and of very feeble understanding seems not to be denied. Nor am I of opinion that, at the time he executed the bond in question, he was incapable of contracting. I will not now, however, decide that he had no equity, under all the circumstances attending that transaction. I shall only observe that, if he had, he released it, in one of the cases before the Court, with his eyes open, and upon full deliberation. But what I rely on, as affecting both cases, is, that he, long after the bonds to the appellants, deliberately, and of his own accord, confessed judgments, and made several payments. However improvidently all this might have been done, he does not appear to have been under any pressure, or delusion, proceeding from the other party: and the rule is "*cujus est dare ejus est disponere*." The contract sought to be set aside was not a contract against law; it was not usurious: and confirmations, in which no fraud has been practised, (except of contracts of the last description,) are never relieved against in a Court of equity. The case of *Coles v. Gibbons*, 3 P. Wms. 290, decided by Lord Talbott, is supposed to have settled 131 this rule. *That case is relied on by

Lord Hardwicke, in the case of *Chesterfield v. Janson*, 2 Vezey, sen. 125,(d) in which the doctrine is very ably illustrated by him. I am therefore of opinion, that both the decrees must be reversed, the injunctions perpetuated as to the sums paid, and dissolved as to the balances due.

JUDGE ROANE. Not being able to discern, with the appellee's counsel, that William Carr, the intestate of the appellee, was incapable, through the weakness of his understanding, to bind himself by the original agreement in the proceedings mentioned, or to sanction and confirm the same, if originally objectionable; and not deeming it necessary to decide whether the original contract was in fact violated, or not, at the time the compromise was entered into between the appellant and the appellee's intestate; it being entirely competent for parties to compromise controversies, which appear to them to have a bona fide existence, and thus avoid the trouble and expense of a law-suit; I am of opinion that the various acts of confirmation, and acknowledgment, of the original contract, on the part of the said intestate, amount, in equity, to a waiver of the objections aforesaid, if otherwise existing; and, on this ground, that the decree in the case of Mason should be reversed with costs, and the injunction made perpetual as to the payments made on account of the debt in question, and the bill dismissed as to the residue; and that the bill be wholly dismissed in the case of Payton.

JUDGE FLEMING. I have, on this occasion, the mortification of differing from a majority of the Court; for whose opinion, as well individual as collectively,

(d) 1 Atk. s. c. very fully reported.

(a) See also, 1 Atk. 362.

(b) 3 P. Wms. 290.

(c) See 2 H. & M. 575.

I have the highest respect; but having also an opinion of my own, formed according to the best of my judgment, upon mature deliberation, I feel it a duty I owe, as well to myself, as to the community at large, openly to declare it: and, in my conception, there never came before me
132 "a case more proper for the interference of a Court of equity, than the one now under consideration.

There appears, however, nothing amiss in the original contract for the purchase of the timber, in the proceedings mentioned; but all seems perfectly upright and fair; but the subsequent conduct of the appellants has a contrary character, and presents, to my view, a very different aspect. When I speak of the appellants, I mention them jointly, not well knowing how to separate or distinguish between them; for, although Mason appears to have been the principal agent in the business, Peyton seems to have shared and equally divided the spoil. And here it seems proper to advert to, and consider, the character and disposition of the person with whom they were dealing, and who had contracted with Mason for the above-mentioned timber. Although he was not a perfect idiot, no less than seven witnesses, to wit, Luke Cannon, (who was his guardian when he came of age) Asa Blanchard, Fielding Tolson, John Overall, Samuel Davis, James Hayes, and John Hayes, all, as well from their own personal knowledge of him, as from the current report of the neighbourhood, prove him to have been much addicted to intoxication, timorous, extravagant, and often in want of money, unguarded, in the general habit of making improvident bargains, and easily imposed upon by any person who would take the advantage of him.

John Hayes deposeth that he was a tenant of Mr. Carr, who made him great offers of discount in his rent; and when the deponent made him payments in money, which he thought due, Carr told him to charge what he thought proper, which he always positively refused, as he would not take the advantage of him; which he might have done had he thought proper. And, in answer to an interrogatory put to him by Mason's counsel, he said, he always thought him easily imposed upon in his bargains; and had frequently felt for him in stores, when he saw him giving extravagant prices for goods.

With these unhappy traits in his
133 character, the appellants, *living in the same neighbourhood, must have been well acquainted, and were resolved to make their advantage of them. It seems admitted on all sides, that appears from the evidence in the cause (not necessary to be here recapitulated) that Carr had not committed a breach of his contract; it may then be asked what injury he had done the appellants, either in their persons or property or what cause of action or complaint they had against him? The answer is plain and obvious, "none at all." But he was wealthy, or in possession of, or rather entitled to, a large estate, and they must have a part of it: and how was it to be effected? Why, well knowing

his temper and disposition, they were resolved to charge him with a breach of contract, which he never committed, work upon his timidity, threaten him with a suit, and heavy damages, and their object was completed; which I cannot but consider as a shameful departure from justice and moral rectitude, and as a very proper subject for the animadversion and correction of a Court of equity; especially, as there is no legal consideration for executing the bonds in controversy, which were exacted, or rather extorted, from the intestate of the appellee, by working upon the imbecility and timorous state of his mind who had done them no injury.

And here let me notice some of the leading principles laid down in the books of equity. "An unconscionable bargain, (as a purchase or security got from an heir in his father's life time) is now (says Fonblanque) (a) usually avoided in equity; for he would justly forfeit the character of an honest man, who should endeavour to make an advantage of this easy age, and enrich himself at the cost of those who either could not foresee, or do not rightly apprehend the loss. The rule (says he) upon which Courts of equity in these cases proceed is not merely in respect of the age of the heir contracting. *Osmond v. Fitzroy*, 3 Pr. Williams, 131. In *Wiseman v. Beake*, *Wiseman* was near forty years of age, and a proctor of the commons; 134 in the case of *Curwin v. Milner*, "the heir was about twenty-seven years of age; but the real object which the rule proposes is to restrain the anticipation of expectancies, which must, from its very nature, furnish to designing men an opportunity to practise upon the inexperience, or passions, of a dissipated man. And this being the object of the rule, its operation is not confined to heirs, but extends to all persons, the pressure of whose wants may be considered as obstructing the exercise of that judgment, which might otherwise regulate their dealings. See *Smith v. Burrows*, 2 Vernon, 346; *Proof v. Hines*, *Forrester*, 111; *Freeman v. Bishop*, 2 Atk. 39, and *Brookes v. Gally*, 2 Atk. 34." If, then, heirs, though in advanced age, and other persons, the pressure of whose wants is considered as obstructing their judgment in their dealings with artful and designing men are to obtain relief in equity, where they all receive something valuable in lieu of what they contract to pay to such artful and avaricious men; how much more forcibly does the rule apply in the case before us, where the unfortunate Carr received about 50l. advanced by Mason, at different times, for his 600 dollars? 43l. 6s. of which 50l. 4s. 4d. he repaid in his lifetime; and by an account, settled between the parties by Benjamin Parke, a commissioner, under an order of Court, in May, 1802, Mason appears indebted to the estate of Carr 3l. 10s. 1½d., after allowing him interest on his advances to that time.

But, supposing, for a moment, that Carr had actually committed a breach of his contract, and that Mason was justly entitled to recompense therefor, his taking the

(a) Fonbl. 183, 184.

bonds, now the subject of controversy, was clearly usury within the statute; for he confesses and states, in one of his answers, as a meritorious fact, that, when a compromise was entered into, he offered to take 400 dolls. if well secured at a short date, but Carr (who, as already proved, was always in want of money) preferred a long credit, which (says Mason) he named himself; and for fourteen or fifteen months forbearance, he took "his 5 bonds for 600, instead of 400 dolls.: three hundred payable to himself and Peyton each: which alone (had all the other transactions been upright and fair) would have completely annulled and made void the whole. But it has been observed, that Carr voluntarily confessed judgments on both the bonds: and therefore they were binding on his administrators. To which I answer, that that circumstance strongly corroborates the testimony of the seven witnesses who had already given evidence respecting his general character.

And, with respect to the case of Peyton, that confession of judgment was by a special power of attorney made to the lawyer who prosecuted the suit against him, whom he styles his friend, and who drew it with great professional art and skill, but seems to have overshot the mark, and proves, to my mind, a consciousness that something was rotten at bottom. The power concludes with these remarkable words, to wit "And it is understood, that I have instructed, and do hereby instruct, my said attorney, to release all errors and equity, in, by, of, to, and concerning the said judgment, Witness my hand and seal, &c."

If the bond, on which the suit was instituted, had been given on a good and bona fide consideration, why all that abundant caution in wording the power of attorney? To me it is additional evidence, that all was not right and fair. I am truly sorry at being compelled, by the circumstances of this case, to make use of any harsh language towards the appellants; but, it does appear to me, that the scheme to inveigle and fleece the timid, unwary, and unhappy intestate of the appellee, was conceived in avarice, nurtured by fraud, and consummated in glaring iniquity: and am therefore of opinion, that the decrees are just, and ought to be affirmed:

136 *but, a majority of the Court being of a different opinion, both decrees are to be reversed, the injunctions, as to the payments actually made perpetual, and dismissed as to the remainder; which is to be certified, &c.

In the case of *Mason v. Williams*, the decree was reversed, with costs; the injunction made perpetual as to 70l. 12s. 7½d., and dissolved as to the residue of the judgment; the bill, so far as it sought further relief, was dismissed, and it was ordered that the appellant pay to the appellee his costs by

*Note by the reporter. Peyton, in his answer alleges that a bill of injunction, on behalf of Carr, had been prepared, before the power of attorney was executed: which circumstance perhaps, induced the insertion therein of the words releasing equity: though no proof of this allegation appears in the record.

him expended in prosecuting his suit in the said Court of Chancery.

In that of *Peyton v. Carr's* administrators, the decree was also reversed; the injunction totally dissolved, and the bill of the appellees dismissed with costs.

Lewis v. Long.

Saturday, March 14th, 1812.

1. *Court of Appeals—Jurisdictional Amount.*—In an action of debt, in a County Court, on a single bill for more than one hundred dollars, if the jury find for the plaintiff, the debt in the declaration mentioned, to be discharged by less than one hundred dollars; and, upon a writ of superseas, at the instance of the defendant, the judgment be reversed; the plaintiff cannot appeal to the Court of Appeals from such judgment of reversal.

2. *Bonds—Assignment—Evidence—Confession of Assignor.*—Quære, whether proof of any confession by the assignor of a bond, after the assignment that the money had been paid to him before the assignment, can be given in evidence against the assignee?

This was an action of debt, in the County Court of Harrison, by Asher Lewis, assignee of Daniel Richmond, against David Long. The declaration was on a "writing obligatory," under seal, for two hundred and fifty dollars, "to be paid in trade such as is to be had, deer skins, furs, flax, snake root, beef, pork, bacon, &c. for value received." The defendant, without prayingoyer of the writing obligatory, pleaded "payment;" and, secondly, that he paid the debt in the declaration mentioned, to the obligee, before notice of the assignment. At the trial, the defendant offered evidence to the jury, that in the spring of the same year, (after the action was 137 *brought,) Richmond, the obligee and assignor of the note, confessed to the witnesses, that the defendant paid him the

†*Appellate Practice—Jurisdictional Amount.*—Although the action is for more than the amount required to give the appellate court jurisdiction, if the verdict is for less than that amount, the appellate court will not take jurisdiction upon the appeal of the defendant. *Duffy v. Figgat*, 80 Va. 666, citing principal case: *Gage v. Crockett*, 27 Gratt. 735; *Harman v. City of Lynchburg*, 33 Gratt. 37; *Barton's Ch. Prac.* 1110; *Batchelder v. Richardson*, 76 Va. 835; *Campbell v. Smith*, 32 Gratt. 288; *Buckner v. Metz*, 77 Va. 107; *Umbarger v. Watts*, 25 Gratt. 177. To the same effect the principal case is cited in *Hawkins v. Gresham*, 85 Va. 35, 6 S. E. Rep. 473; *Hartscock v. Crawford*, 85 Va. 416, 7 S. E. Rep. 588; *Rymer v. Hawkins*, 18 W. Va. 816. The principal case is also cited in *Greathouse v. Sapp*, 26 W. Va. 88; *Hutchinson v. Kellam*, 3 Munf. 216; *foot-note* to *Harman v. City of Lynchburg*, 32 Gratt. 37.

See further, monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 263.

Same—*Jurisdiction—Matter in Controversy—Meaning of the Phrase.*—The matter in controversy is that which is the essence and substance of the judgment, and by which a party may discharge himself. This construction of the phrase, "matter in controversy," as used in the statute relating to the appellate jurisdiction of the court of appeals has been approved in *Clark v. Brown*, 8 Gratt. 561, 563; *Buckner v. Metz*, 77 Va. 126; *Umbarger v. Watts*, 25 Gratt. 177; *Thompson v. Adams*, 82 Va. 677; *Rymer v. Hawkins*, 18 W. Va. 818; *Skipwith v. Young*, 5 Munf. 266. See further, *foot-note* to *Harman v. City of Lynchburg*, 33 Gratt. 37; monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 263.

‡*Bonds—Assignment—Evidence—Confessions of Assignor.*—In *Dade v. Madison*, 5 Leigh 406, it is said: "In *Lewis v. Young*, 3 Munf. 136, one judge was of opinion, that the confessions or declarations of the assignor after the assignment made, were not evidence; and this seems consistent with the rule which admits the confessions of a party, made when he is interested, to be evidence, but does not

full amount of the debt in the note mentioned, before the assignment thereof; also an account stated, between the said Richmond and the defendant, with a certificate thereto annexed, under the hand and seal of the said Richmond, (dated since the institution of this suit,) acknowledging that account to be just and right, "and that David Long was to have credit, on his notes, for the same, to wit, the note that Asher Lewis holds against him, and another which I now give up;" and proof that the same was signed by the said Daniel Richmond. To all which evidence, the plaintiff objected, and the Court declared the same inadmissible; whereupon the defendant filed a bill of exceptions. A verdict was found in the following words: "We, the Jury, find for the plaintiff, the debt in the declaration mentioned, to be discharged by the payment of forty-six dollars and fifty-nine cents, debt, with interest thereon from the sixth day of March, in the year 1804;" and judgment was entered accordingly; but a writ of supersedeas was awarded, on the defendant's motion, by order of the District Court holden at Morgan town; and the judgment was reversed, on the ground that the evidence offered had been improperly rejected. The cause was therefore remanded to the County Court, to be further proceeded in, with instructions to receive the evidence aforesaid. From this judgment of reversal, the plaintiff appealed to this Court.

Wickham, for the appellant. The declarations of Richmond, the assignor, made while the suit was pending, and after the obligor had full notice of the assignment, could not be evidence against the assignee. Had he been brought forward as a witness, he should have been rejected, as attempting to prove his own turpitude; for, if he assigned a negotiable paper, when he knew it had been paid, he was guilty of a 138 fraud. The authorities *on this point are reviewed in Baring v. Reeder, 1 H. & M. 154.

Williams, contra, submitted the question, whether this Court had jurisdiction; the verdict being for less than one hundred dollars, and the suit upon a single bill.

If the suit had been in the name of Richmond, his acknowledgment would have

admit his confessions made after he has parted with his interest. *Burton v. Scott*, 8 Rand. 399, 408; *Pocock v. Billing*, 2 Bing. 309, 9 Eng. C. L. R. 409. Indeed, even this rule seems to confine the admissibility of the confession, to the case of the party being dead at the time of trial, or to the case of a party identified in interest."

See further, monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

Bonds—Payable in Money or Equivalent—Declaration.—"In *Minnick v. Williams*, 77 Va. 751, it is said, "When the obligation is to pay money with a mere privilege to the obligor to pay in some other article on or before a certain day, it is unnecessary to take any notice of such privilege in the declaration if the day passes without payment of the money or the delivery of the other equivalent article. *Lewis v. Lono*, 3 Munf. 186; *Butcher v. Carille*, 12 Gratt. 520." The principal case is also cited in *Dungan v. Hendelrite*, 21 Gratt. 151, 152.

Appellate Practice—Dismissal of Appeal—Costs.—In *Ayres v. Lewellin*, 8 Leigh 616. JUDGE TUCKER, in his dissenting opinion, cites the principal case as one in which an appeal was dismissed, but no costs allowed. See further, monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

been evidence. "He stands indifferent between the present parties; being equally responsible to both. In *Walthall v. Johnston*, 2 Call, 275, declarations by the mortgagee, under whom the defendant claimed, that the mortgage was paid off, were admitted as evidence on the part of the plaintiff. I consider that case decisive of this.

Wickham, in reply. The declaration is the rule of jurisdiction. In that, the debt is stated as 250 dollars, which, therefore, is, properly, the sum in controversy. The bond is no part of the record; oyer not having been prayed.

On the merits; Richmond's confession was offered, either as an act, or as evidence. If as an act, it was not obligatory on the assignee; since he, as assignor, had parted with his interest in the bond. If as evidence, he ought to have been personally in Court.

The case of *Walthall v. Johnston*, is no authority in this case. It is not completely reported; the manner in which the objection was taken to the testimony not being stated. The authorities cited in *Baring v. Reeder*, show, that, under some circumstances, the endorser of a negotiable paper may be received to prove it was paid; but not under circumstances proving his own turpitude.

Williams. Mr. Call's Report of *Walthall v. Johnston*, is verbatim from the Record.*

139 *Tuesday, March 24th, a further argument took place, by desire of the Court, on the single question of jurisdiction.

Williams then contended, that the verdict in this case was erroneous in point of form; but the judgment should, in substance, be considered as only for the balance found by the jury to be due. The writing obligatory described in the declaration is evidently a single bill. The jury, therefore, ought not to have found the sum originally due, but the balance only; the form adopted by them being proper, only, where there is a penalty. (a) In *Smith v. Harmanson*, 1 Wash. 6, even though the action was on a bond, the jury found, "that the defendant doth owe to the plaintiff, 1147l. 18s. 4d., parcel of the debt in the bill aforesaid mentioned;" and this Court affirmed the judgment. That decision turned, indeed, upon the principle, that the defendant being the appellant, could not take advantage of the failure to give continuing interest till payment; which error tended to his benefit: but the form of the verdict appears to have been approved by this Court; except as to the omission in relation to the interest. I consider that case to have settled the point concerning the form of the verdict.

The old doctrine that, in debt, the plaintiff must recover the exact sum laid in the declaration, has long been exploded. (b)

But, however this may be, the jurisdiction of the Court of Appeals is limited by the actual "matter in controversy;" not the

*Note. The Record of the case of *Walthall v. Johnston*, is exactly conformable to Mr. Call's Report.—Note in Original Edition.

(a) Rev. Code, vol. 1, p. 111, c. 78, sect. 21.

(b) 2 Selwyn's N. F. 470, 2 W. Bl. Rep. 1231, *Aylett v. Lowe*; Doug. 6 (3d ed.), *Walker v. Witter*; 1 H. Bl. 349, *McQuillin v. Cox*.

penalty. A similar expression, in the act establishing the Federal Courts, (a) has been construed by the Supreme Court of the United States, in the manner I contend for. (b)

140 *Wickham, in support of the appeal. A writing "obligatory," must be understood, a bond with a penalty. But, admit it to be a single bill: the plaintiff must always declare for the sum originally due; and the judgment must conform to the declaration. It was therefore properly entered for 250 dollars to be discharged by the balance found by the jury. But the verdict does not fix the "matter in controversy." If they found too little, the plaintiff might recover more on the new trial. The moment the Appellate Court reversed the judgment, the whole subject was again in controversy; both parties being left at large.* Another jury might find the original sum to be still due; or that the whole was paid.

I am confident, the penalty of the bond, and not the balance due, has always been the measure of jurisdiction in this Court. The case of *Smith v. Harmanson* has no application; the point now in debate not having been touched.

Williams, in reply. Mr. Wickham's complaint is against the Superior Court of Law, for setting aside the verdict, and awarding a new trial. The matter in controversy, in that Court, was the amount of the verdict only. If the judgment had been affirmed, I hold it clear, the defendant could not have appealed to this Court. It follows, that when it was reversed, the plaintiff could not.

Tuesday, March 31st, the Judges delivered their opinions, seriatim.

JUDGE COALTER. The first question is, as to the jurisdiction of this Court.

The action is on a single bill for 250 dollars. There are two pleas; 1st. Payment generally, and 2d. Payment
141 *before notice of assignment: and the jury find for the plaintiff, the debt in the declaration mentioned, to be discharged by the payment of 46 dollars and 59 cents, with interest thereon from the 6th of March, 1804, till payment; and judgment was entered accordingly.

The judgment, therefore, in this case is, de facto, for 250 dollars; and the main question then, is divided into two: 1st. Whether the judgment ought to have been in the form in which it is; and, 2d. Whether, if it ought, the Court ought not to look to the substantial, not to the formal recovery, in ascertaining their jurisdiction.

As to the first, it may suffice to observe, that although the late decisions in England

are, that in actions of debt on simple contract, judgment may be entered for the sum proved to be due; as, in detinue, for the goods proved to be detained; yet, I apprehend, no case can be found, where the debt arises by specialty, in which the judgment is not entered for the entire sum.

In cases of simple contract, the defendant may plead nil debet; but before the statute giving the plea of payment, where such payment was made after the day mentioned in the condition, the bond was considered as discharged of its condition, and the defendant could not, either on a bond or single bill, plead payment, without, at the same time, pleading an acquittance; and that he must have pleaded with a profert; it being under seal; agreeably to the common law maxim, that a contract must be dissolved by an instrument of equal dignity with that which created it. (c) If there is a condition, or defeasance, by which the party may discharge himself by the payment of a less sum within a given time, he might avail himself of this condition by craving oyer thereof, and pleading that he had performed it; in other words, he might plead solvit ad diem. In consequence of this strictness of the common law, the parties were compelled, where payment had not been made according to the condition, by reason of which, the bond became, as it were, single, and the plaintiff had a

142 right to judgment *for the penalty, to resort to the Courts of equity to be relieved from the penalty: to avoid this inconvenience, therefore, the statute in this country (similar to which, is the statute of 4 and 5 Ann, c. 16, in England) provides, that where judgment shall be entered on a bond, conditioned for the payment of money, the judgment shall be entered for the penalty, to be discharged by the payment of the principal sum due, with interest thereon, and costs; in other words, giving the Common Law Courts a right to relieve against the penalty. I don't understand this act as giving the right to enter judgment for the penalty; (that would have been the entry before the act;) but as permitting the entry to go further; that is, to have a condition annexed to it that it may be discharged by payment of the principal sum due, &c.; and this clause of the act provides for those cases where no payment had been made, either before or after the day. This, however, was not the only inconvenience arising from the strictness of the Common Law, in this respect; a person indebted by bond may have made payments after the day specified in the condition of such bond, to the full amount of the principal sum, with all interest due; yet, such payments being made after the day, and no acquittance being obtained, payment ad diem could not be pleaded; or he may have paid off a single bill without procuring an acquittance; in such cases he was bound by the rules of the Common Law, to plead payment with an acquittance, as before stated; which not being obtained, the parties were again forced into the Courts of equity: to remedy which, the statute further provided, that in case of a bond, &c.

(a) L. U. S. vol. 1, p. 62.

(b) United States v. M'Dowell, 4 Cranch, 316.

*Note. See the case of *Minor v. Goodall*, 3 Call, 393, in which it was decided, that although a decree in Chancery be for less than one hundred dollars; yet, if the matters in dispute exceed that sum, the Court of Appeals has jurisdiction.—Note in Original Edition.

†Note. JUDGE COALTER observed, that in that case, a special breach of the condition of the bond was laid in the declaration; whereby the sum "in dispute," was limited to 328 dollars: being less than the lowest sum for which the Supreme Court can entertain jurisdiction.—Note in Original Edition.

(c) 1 Morg. Vade Mecum, 277, 8, 9; 2 Salk. 508, 519.

conditioned for the payment of money, the defendant might avail himself of the performance of the condition after the day limited therein for the payment; in other words, that he might plead payment post diem; and I have no doubt but that the legislature intended to extend the right of pleading payment without acquittance to cases of single bills, according to the clear provisions of the statute of Ann, al-
 143 though *they are not so explicit as that statute is, or as could be wished. It is sufficient, however, in this case, that the statute, concerning assignments, gives a clear right to the defendant, to set up all payments made to the original obligee before notice of assignment.

The plea, according to these provisions, was, that the party, after the day, had paid the principal and all interest due, &c.: (a payment of part could not be pleaded;) and if he made good his plea, he succeeded; if not, the plaintiff still recovered the entire sum, but to be discharged by the sum found; the plea being falsified. But in consequence of some difficulty, or doubt, as I apprehend, whether partial payments, or mutual debts, could be introduced, or in consequence of the danger of surprise on the parties, the statute of Geo. II, "concerning discounts and off-sets," (a) was enacted in England; and a like doubt, in this Country, whether the practice which prevailed, of allowing payments, or off-sets in part, in the nature of a discount, and of entering up judgment to be discharged by the balance found really to be due, was correct, produced our statute concerning discounts. That course is again confirmed by the act concerning interest, which directs, that the jury shall find the sum that is really due, and say from what time interest shall run, if they shall allow interest; and the judgment is still given for the debt in the declaration mentioned, as also for the interest, by the jurors in their verdict found; and which interest is in the nature of damages.

None of these laws were intended, I presume, to change the Common Law forms of entries, or mode of bringing suits, and declaring. But may be said, that if a single bill has been due a considerable time, and a small part only has been paid, so that the balance, with the interest thereon, will far exceed the amount declared on, the condition annexed to the judgment, to wit, that it is to be discharged by the payment of a larger sum, would be nugatory and improper.

144 *This objection, I think, may easily be obviated by attending to the regular forms of entries.

I will first instance a bond for 100 dollars, conditioned to pay 50 dollars, which has been due for twenty-five years, and admitted to be a subsisting debt. If there is a judgment by default in this case, the Court will render a judgment for the 100 dollars, and will not annex a condition, under the act of assembly, allowing a running interest, inasmuch as the party would not be bound to pay the greater sum mentioned in the condition, and might discharge himself by the payment of the 100

dollars. And so the regular entries are for the 100 dollars without condition.

But the plaintiff wants his interest beyond the twenty years; and, having claimed damages for the detention of the debt, he either takes his writ of inquiry, or the jury are charged on the defendant's plea of payment, if there was a plea, and they assess the damages beyond the twenty years; and then the judgment will be for the penalty, together with these damages, as though the bond were single. This would have been the course before the late act of assembly authorizing the jury, if they allow interest, to say from what time it shall run, &c.; and as to what would be the proper entry, since that law will be considered hereafter.

I will now take the case of a single bill for 110 dollars. I will suppose 10 dollars of it to have been paid at the time the bill fell due; and that the balance had been on interest for five years; and will inquire what would have been the proper verdict and judgment, as well before, as since, the act concerning interest above mentioned.

The verdict, if before the act, when drawn out in full form, would be, "We, the jury, find that the defendant hath not paid the debt in the declaration mentioned, as the plaintiff, by replying, hath alleged, but that 100 dollars, part of the said debt, is yet due, and owing to the plaintiff, and we assess the plaintiff's damages by
 145 reason *of the detention of said debt, to 30 dollars, beside his costs." And the judgment on this verdict would be, "therefore it is considered by the Court, that the plaintiff recover against the defendant 110 dollars, the debt in the declaration mentioned, together with 30 dollars, the damages by the jurors in their verdict assessed, and his costs: But this judgment may be discharged by the payment of 100 dollars debt, together with the damages aforesaid, and the costs."

Since the act concerning interest, the verdict, in the above case, would be: "We, the jury, find that the defendant has not paid the debt in the declaration mentioned, as the plaintiff, by replying, has alleged, but that he yet owes to the plaintiff 100 dollars, part thereof, with interest thereon from the day of , until payment;" and the judgment thereon would be entered thus: "That the plaintiff recover against the defendant 110 dollars, the debt in the declaration mentioned, together with interest on 100 dollars, part thereof, from the day of , until payment, as by the jurors, in their verdict aforesaid, allowed, and his costs: But this judgment may be discharged by the payment of 100 dollars debt, with interest thereon as aforesaid, and costs."

The Act of Assembly has only changed the damages from interest, found in a gross sum, to a running interest.

This was done for the benefit of the creditor, and will not, by implication, be intended to alter his Common Law mode of recovery, or further to change the nature of his judgment, and the form of his recovery, than is necessary to effectuate the objects of the law; and being intended for his benefit, will not be construed so as to subject his specialty contract to the hazard,

(a) See 2 Burr. 826, Collins v. Collins.

in this respect, of a simple contract, by giving him a judgment only for the sum found due, and thereby subjecting him to the danger of a non-suit, &c.

146 *Would not the contrary doctrine be extremely hard in such a case as this? The plaintiff is assignee of a single bill; he is, at his peril, to notice the payments made to his assignor, and bring his suit for the balance; otherwise, if it turns out that the balance is below a given sum, he is non-suited!!(a)

But even as to the original parties, credits may be claimed and set up, which are really unjust, or which the party expected were to be adjusted another way; in fact, the defendant may, or may not, make his discounts; he may elect a cross suit. I think, in this country, the defendants are sufficiently favoured in being permitted to offer their discounts, without notice: and I see no reason for now altering a practice which, I believe, has been uniform in all the Courts, for the great length of time, during which, many of these laws under which the change is now called for, have existed. I believe such a decision would produce incalculable mischief, by subjecting a vast number of just judgments to reversal, of which the parties never thought of complaining.

The verdict and judgment therefore are, in my opinion, substantially, in correct form.

If this be true, then this case, as to the jurisdiction of the Court, will stand upon the same ground, I apprehend, as the cases of bonds above 100 dollars, conditioned to pay a sum below 100 dolls.; or where the payments proved, reduce the sum actually due, as in this case, to 46 dolls. 59 cents. I would not refuse jurisdiction in one of these cases, unless I would in both. The larger sum, in both cases, is that which is recovered according to the forms of law, and may be said to be nominal; the smaller is the real sum recovered. I at first inclined to think that we ought, in both cases, to regard this latter, as the sum on which our jurisdiction would depend. I am told, however, in cases of bonds, the penal sum has always formed the criterion, and I incline to think, that this is proper, and ought not now to be departed from.

147 *Had this suit originated in the District Court, if I am right on the first point, that Court would have had jurisdiction, and would not have nonsuited the plaintiff, although the sum really due was found to be but 46 dollars 59 cents.

The debt claimed and found by the jury, is 250 dollars; the plaintiff, if required, is bound to establish his debt to that amount. Suppose there had been also a plea of non est factum, the whole sum would have been in contest. The plaintiff would have proved the sealing, and recovered the entire sum; but the law authorizes the Court to annex a condition to their judgment. This act, though, will not, without express words, oust that Court of a jurisdiction, which it unquestionably has, according to the principles of the Common Law. But if that Court would have had original ju-

risdiction, I presume, for the same reasons, it would have had appellate jurisdiction: indeed, it has taken appellate jurisdiction; that Court having such jurisdiction, where the debt, or damages, or other thing recovered or claimed, exclusive of costs, is of the value of 100 dollars: and I think that Court was correct in taking such jurisdiction. But if this Court has not jurisdiction, that Court had none. The 14th section of the act constituting the Court of Appeals, says, that appeals may be granted, heard, and determined, by the Court of Appeals, to and from any final judgment of the District Courts, in the same manner, and on the same principles, as they are to be granted by the District Courts, to and from final judgments of the County Courts. According to this law, I apprehend, this Court has heretofore taken jurisdiction in cases of bonds, where the penalty has exceeded 100 dollars, although the principal sum really due was less. Seeing no reason to distinguish this case from cases on bonds; and believing that the course of this Court, as to them, has hitherto been correct, and ought not to be changed; I think we have jurisdiction in this case. This brings us to consider whether the judgment of the Superior

148 *Court of law, reversing that of the County Court, was correct.

I do not think it necessary, or proper to decide, positively whether the assignment of the bill in this case, could have been examined as a witness, on the ground that he stood equally indifferent to the parties, or rather, that his interest either way was equal; that point not arising, though I am strongly inclined to think that he might, on the principles stated in the case of *Jordaine v. Laashbrooke*, reported in 7 T. R. 601.

I am, however, clear, that to permit his oral or written declarations, made after the assignment, (and which he might not be willing to verify on oath,) to be given in evidence, would be opening a door to fraudulent combinations between the assignor and his former creditor, that would be of very dangerous tendency. I think, therefore, that the judgment of the County Courts, rejecting such declarations, was correct, and must be affirmed, and that of the Superior Court reversed.

JUDGE CABELL. It has been long and repeatedly settled, that the plaintiff, in debt or simple contract, may support his action by proof of a sum different from that claimed in the declaration, (unless there be a variance in the description of a written instrument; and that his recovery will be according to his proof, and not according to his claim.) (b) In such cases the action of debt may be assimilated to the action of assumpsit. In the case before the Court, the action was founded on a single bill, and the jury having found for the plaintiff the debt in the declaration mentioned (250 dollars) to be discharged by the payment of 46 dollars and 59 cents, with interest thereon from the 6th day of March, 1804, the County Court entered up a judg-

(b) Douglas's Report, p. 6; 2 Sir Wm. Blackstone, 1231; 1 H. Black. 249, 550; 12 Mod. 72. and 3 Ld. Raym. 816.

(a) See *Hepburn v. Lewis*, 2 Call, 497.

ment, pursuant to, and almost in, the words of the verdict. Not having heard the first argument in this case, I shall give no opinion except on the general questions, growing out of the second
149 *argument, as to the proper manner of entering up the judgment, and as to the jurisdiction of this Court.

The foundation of the action being a written instrument, plainly and distinctly set forth in the declaration, it is very evident, on general principles, that the action could not be sustained, but by the exhibition of the very writing declared on. This writing would show that the certain and precise sum claimed was originally due; and if there should be no other evidence in the cause, judgment would necessarily be given for the whole sum thus claimed. But since the act of 1748, (a) it has been always competent to the defendant in an action like the present, to make, on the trial, all the discount he can; "and upon proof thereof, the same shall be allowed in Court." If such discount be "allowed," it operates as an extinguishment of so much of the plaintiff's demand; and on what principle is it that the Court can give a judgment for the part thus legally extinguished, and standing on no better ground than if it had never existed. It cannot be necessary for identifying the cause of action, so as to prevent a future suit for the same thing; for that is sufficiently done by the declaration. I can perceive no rule of law which requires it, nor any principle of justice which authorizes it. These remarks do not apply to the cases of bonds having conditions that the penalty shall become void on the payment of a smaller sum. There the law requires the judgment to be entered for the penalty which serves as a security to the plaintiff for the sum really due with its interest. But where the parties have created no penalty, and where the law does not annex one, what right has the plaintiff, or the Court, to give to the sum originally due, but since partly discharged, all the effect of a penalty? Such a course, would, in many cases, be materially injurious to the defendant, by subjecting him to the costs of a suit in the Superior Court, if there remained due one cent only; and even if that fact should appear by the receipts endorsed on the single bill, as exhibited by the
150 plaintiff himself. *I am, therefore, clearly of opinion that the County Court erred in the form of entering up the judgment.

But the question of jurisdiction now presents itself, founded on the objection that the sum really due, and in controversy between the parties, is of less value than 100 dollars. I was, on the first view of this subject, strongly inclined to believe that, as the judgment of the County Court was in form, for a sum sufficiently large, this Court might, on that account, take cognizance of the case, and proceed to affirm a reverse. But on further consideration, and particularly on a more attentive examination of the clause of the Act of Assembly defining the jurisdic-

tion of this Court, (1 vol. Rev. Code, p. 60,) I have abandoned that impression. It is evidently the intention of the legislature to exclude from this Court causes of minor importance; and, therefore, its jurisdiction, in cases at law, is confined to causes where the matter in controversy, shall be equal in value, exclusive of costs, to 100 dollars. In the case presented by this record, I consider the matter in controversy between the parties, to be the sum of 46 dollars and 59 cents, found by the jury, and not the nominal sum of 250 dollars, for which the Court, in pursuance of their own ideas of form, have entered the judgment. The plaintiff was obliged to demand, in his declaration, the 250 dollars; that being the amount of his single bill; but that is not the matter in controversy; for the jury, substantially, found only the sum of 46 dollars and 59 cents, with which he is content, but to which the defendant objects as being too much. This sum is, therefore, the real matter in controversy, and decides the question of jurisdiction. I am, therefore, of opinion, that the appeal be dismissed, as having been improvidently granted.

JUDGE BROOKE. The judgment in this case is for 250 dollars, to be discharged by the payment of 46 dollars and 59 cents, the amount of the verdict of the jury.

Whether the judgment was cor-
151 rectly entered, it is not *now necessary to decide. My impression is, that it ought to have been rendered for the sum found by the jury, and no more. That sum, I consider, in the present case, to be the true criterion of the amount of the matter in controversy in this Court; and, of consequence, that it cannot take cognizance of the appeal in question. The case in 4th Cranch, (which has been relied upon) is, in principle, analogous. There, the judgment of the inferior Court was correctly entered for the penalty of the bond, which amounted to more than enough to give the Court jurisdiction; but the damages claimed being less, the Court refused to take cognizance. I am not prepared to say, however, that, in the case of a judgment (for a penalty) on a bond, that case would be conclusive here. There may be something in the Act of Assembly in relation to judgments on bonds which might change the rules of decision. In other respects, it appears to me that there is no substantial difference between that section of the Act of Congress, upon which the decision alluded to was bottomed, and that section of the Act of Assembly which defines the jurisdiction of this Court. I am therefore of opinion that the appeal be dismissed.

JUDGE ROANE. This is an action of debt brought by the appellant against the appellee in the County Court of Harrison. It was an action for money, although it was coterminously agreed and stipulated in the bill itself, that deer skins, and other articles would be received in payment. In 2 Bac. 278, we are told, that in the case of a bill for 20l. to be paid in watches, an action of debt must be brought for the money, and not for the watches, because they are of uncertain value. It is also an action upon a single bill for 275 dollars, and not

(a) Virg. Laws, Ed. of 1760, p. 249.

on a bond or bill penal for that sum. Although the single bill, which is contained in the record, not being set out upon oyer, cannot be resorted to, to show this, and the words "writing obligatory," contained in the declaration, standing singly, would perhaps more properly import a bond
152 or bill penal "than a single bill, I infer irresistibly that the instrument on which it is founded was of the latter, and not of the former, character. I infer this from the general structure of the declaration, from its being therein stated that the promise was to pay the same sum in deer skins, and other articles, (which would seem to exclude the idea of the payment of a smaller sum in money,) and from the omission to aver in the declaration, as is usual in those on bonds, that the party acknowledge himself bound in the sum in question, but only that he promised to pay it.

In this action upon a single bill for 250 dollars, the jury found a verdict for the plaintiff, for "the debt in the declaration mentioned, to be discharged by the payment of 46 dollars and 59 cents, debt, with interest thereon from the 6th of March, 1804;" on which the County Court gave judgment "that the plaintiff recover of the defendant the sum of 250 dollars, to be discharged by the payment of 46 dollars and 59 cents, with interest thereon from the 6th of March, 1804, and his costs." To this judgment the defendant obtained a supersedeas from the Superior Court, where the judgment was reversed on the ground that certain evidence offered by the defendant was, in its opinion, improperly rejected; and the same Court ordered a new trial to be had in which such evidence was to be received by the County Court. From this judgment of reversal, the appellant (the former plaintiff) appealed to this Court.

The first question which arises is, whether this Court can take jurisdiction in the case, so as to decide whether the said judgments, or either of them be erroneous. This is an inquiry which is always antecedent to, and exclusive of, every other. In making this inquiry, I beg to be understood as confining my remarks exclusively to the case now before us; that of a judgment rendered on a single bill, as if it were a bond with a penalty, and in which the sum, by the payment of which the defendant may discharge himself, is below
153 the limits of the jurisdiction *of this Court, although the penalty affixed, or assumed by the judgment is above it.

In chalking out the jurisdiction of the several Courts of this Commonwealth, there is a relative gradation in point of the value of the subject of controversy, beginning at the lowest, and ascending to the highest, with the exception of certain subjects; as freeholds and franchises, for example, as to which, on account of their dignity and importance, the standard of value is entirely disregarded. Thus, the County Courts had jurisdiction in all cases of more value than five dollars, (since extended to a larger sum;) as to which those Courts proceeded in general according to the course of the common law; but where the debt, or

penalty, or goods detained, &c. were not of greater value than twenty dollars, they were to proceed in a summary way by petition; with a provision that, if any person should bring any other action than a petition, and it should appear, by his own showing, or by the verdict of a jury, that he might have brought a petition, he should be nonsuit. Thus, it was the sum found by the jury in cases of recovery, and the sum sued for in other cases, which determined whether the jurisdiction should be sustained by way of action.

In relation to appeals from the County Courts to the District Courts, the same principle seems to be studiously kept in view, though under a varied form of expression. Thus, it is first said, generally, that appeals will only lie in this case where the causes amount to 30l. or 3,000 pounds of tobacco; but lest this general criterion might be liable to misconstruction, the law afterwards adds, that appeals will lie to the District Courts "where the debts or damages, or other things recovered or claimed, shall be of the value of 100 dollars," &c. I incline to think that this expression recovered or claimed, is to be taken distributively, as in the above clause relative to petitions, the former applying to cases of recoveries, in which the amount recovered must be of the value required by

the Act, and the latter applying to
154 cases in "which the plaintiff fails to recover any thing, if, upon his own showing, or the statement of his claim, he is entitled to come into the District Court. On any other construction, a plaintiff wholly failing to recover would be without any remedy by appeal. This principle, expressly enacted as to petitions, as aforesaid, and supposed to be kept up in relation to appeals from the County Courts to the District Courts, will, it is supposed, lose none of its force when applied to the Supreme Court of the Commonwealth, deeply engaged as that Court is in settling the principles of our jurisprudence, and deciding causes of considerable value, the legislature might with great propriety confide the inferior ones to the exclusive decision of the other tribunals. Is there any thing in the act establishing the jurisdiction of this Court which impairs the force of this principle? Quite the contrary. That act declares that appeals shall lie to this Court from decrees of the High Court of Chancery, and judgments of the General or District Courts, if the matter in controversy be equal in value, exclusive of costs, to 100 dollars, &c. or be a freehold or franchise. What is the matter in controversy in the case before us? That which is the essence and substance of the judgment, and by which the party may discharge himself; that is, 46 dollars and 59 cents with interest; and which is below the value required to give jurisdiction either to this Court or the Superior Court of Law. The form of the judgment holding up (I think erroneously in this case) a larger sum, as the sum for which the judgment is formally given, will not elude or evade those land marks by which controversies of small value are withheld from the cognizance of this Court.

But if the expressions in the act constituting this Court were even less definite than those contained in the other acts, as aforesaid, it will not readily be conceded, that a principle, running clearly through every other part of the system, would be lightly lost sight of, in relation to that

Court to which it is more important
155 than to any *other. If it be said that this construction would repel from the jurisdiction of this Court matters of great amount which have been illegally reduced by the inferior Court, below the limits of our jurisdiction; I answer, 1st. That this is an inquiry which is posterior and foreign to the inquiry whether this Court has jurisdiction, which depends only on the judgment, or declaration, as the case may be; 2dly. That this objection was urged and overruled in the case of *Hepburn v. Lewis*, (a) and many other cases in this Court; 3dly. That this objection is also expressly overruled in the aforesaid provision in the petition law, and also by the similar construction I have assigned to the act allowing appeals to the District Courts; 4thly. That a contrary construction would whittle down the jurisdiction of this Court to matters of the smallest amount; and, 5thly. That it is better that a particular mischief should ensue, than a general inconvenience, breaking down the barriers wisely erected between the several departments of the judiciary, and prostrating, as to one of them, a principle expressly applied by law to the others.

In strict conformity to this idea has been the decision of the Supreme Court of the United States, in the case of the *United States v. M'Dowel*, 4 Cranch, 316. That case is even infinitely stronger than the case before us; 1st. In being the case of a bond, in which a contrary principle might have prevailed, in consequence of the provision of the general law requiring judgments in such cases to be entered for the penalty;* and, 2dly. In this, that it depended upon a solitary provision in the judicial act of Congress, in substance precisely similar to the one in our act giving jurisdiction to this Court, whereas our act is corroborated and explained, as to the point now in question, by various other acts as aforesaid, forming one judiciary system.

156 *For these reasons, I am of opinion, that this Court has no jurisdiction in the Appeal before us, and that it should be dismissed.

Understanding this to be the opinion of a majority of the Court, I ought, here, regularly, to stop. It is not important to inquire whether the judgment of the Superior Court should be reversed for having directed improper evidence to be admitted on the future trial, or for not having reversed the decision of the County Court, so far as it gave a judgment for the penalty. If it were necessary, I might, perhaps, be of opinion, that this last error, being, possi-

bly, beneficial to the defendant, by limiting a sum, (a very remote one, indeed,) which might curtail the amount of interest recovered against him, should not, in his favour, be considered as a ground to reverse the judgment. As to these points, I mean not to give a decided opinion, as being unnecessary. The same remark applies to the question whether the judgment was legally entered in this case for the penalty: but, as that question is very important, and has been considered by the judges, I will give my present opinion upon it.

In the case of bonds with penalties, a judgment similar to the one before us, is not only called for by the express provisions of the statute, but establishes that standard of damage which (as was said by Judge Lyons, in the case of *Pane v. Elzey*, 2 Wash. 143,) was agreed upon by the parties themselves: whereas, in the case of a single bill, this last circumstance is not only entirely wanting, but such a judgment erects into a penalty, without any statutory requisition, a sum which, in event, abridges the principal and interest actually found due by the jury. I will put the case of an action on a single bill for 30l. in which the jury finds a verdict for 29l., with interest from a period five years antecedent thereto; if, in such case, the judgment is entered for the 30l. to be discharged by the payment of the 29l. and interest, the defendant may elect to
157 pay the 30l. and thereby *abridge the sum actually found due by the jury.

What is there in the nature of this action that leads, in the case of a single bill, to such a consequence? It is true, that it was formerly held that in an action of debt you must recover the whole sum claimed, or nothing. Without going into the reason of that doctrine, or stating the particular exceptions to it, the doctrine now is, that you may recover less, or, as Blackstone says, (vol. 3, 154,) if the defendant shows that he has discharged any part of the debt, the plaintiff shall recover "the residue." Throwing all other considerations out of the question, this result is clearly justified by the statutes of set-off in England, and the analogous acts concerning discounts in this country. Formerly, on a failure of payment, of any part of the sum due, at the day, the whole bond was forfeited, at law, and the defendant was forced to go into equity for relief: then came the statute allowing a plea of payment of the whole sum after the day; but that still not being sufficient, the statutes of set-off were passed in England, giving the defendant the benefit of partial payments, by pleading or giving in evidence his discounts. On general principles, as a payment of the whole sum might be pleaded in bar, and would extinguish the action, a payment of part (it would also seem) would extinguish it pro tanto and turn the plaintiff, in the foregoing language of Blackstone, to recover only "that residue." But this matter does not rest merely on the general principle. It is provided by the English statute of 8 Geo. II, concerning set-offs, that the judgment shall be entered "for no more than is justly due to the plaintiff," after setting off the mutual debt, or, in

(a) 2 Call. 497.

*Note. At this time, the case of *Newel v. Wood*, 1 Munf. 556, if published, was not recollected: in which it was decided by this Court that in the case of bonds, the Court has jurisdiction, if the penalty be sufficient.—Note in Original Edition.

other words, striking a balance; (a) and as it is held, under this statute, that setting off is equal, and only equal, to an actual payment. (b) I infer also, irresistibly, that in the case of a partial payment also, judgment is to be rendered for the balance only. Our act of discounts, (2 Rev. Code, 117,) is equally extensive with the English statute of set-off, to say the least. The words 158 of that act on the "subject of discounts are extremely latitudinarian; being that "the defendant shall have liberty to make all the discounts he can; and on proof thereof, the same shall be allowed in Court." How is it allowed, if the judgment is still to cover and comprehend the sum actually discounted under the act? As, therefore, in the case of bonds with penalties, there is not only an express legislative declaration that the judgment shall be entered for the penalty, and not the sum mentioned in the defeasance, which may be also very important, since the act has been held to extend to bonds conditioned to pay money by instalments; (c) and as, on the other hand, there seems to be a counter legislative declaration, that in the case of discounts, or payments, the judgment shall be rendered only for the balance that is justly due, subject to the exception in the case of bonds as aforesaid, how can this judgment, on a single bill, be justified?

In the case of *Ross v. Gill*, 1 Wash. 91, the sentiments of this Court, on the point in question, may be clearly perceived. In that case, which was debt for rent, and a judgment given for a certain sum, to be discharged by the payment of a smaller sum, this Court decided that this last was no part of the judgment, "for that, as there was no penalty in the case, the law does not warrant such an entry."

In the case of *Ashberry v. Calloway*, *ibid.* 72, this Court, so far from extending the principle now in question, so as to embrace the case of single bills as well as bonds, actually refused to apply it in the case of a bond with a penalty. In that case a judgment was given in the Court below, on a motion on a Sheriff's bond, for the penalty of the bond, to be discharged by a stated sum found due by the defendants. On an appeal to this Court, that judgment was reversed (*inter alia*) on the ground, "that the law, directing judgment to be entered for the principal sum with which the under sheriff is chargeable, and the damages, and not for the penalty, to be discharged by such payment, and 159 being a new law introducing "a new remedy contrary to the course of the Common Law, ought to be strictly pursued." This last reason was assigned, only because the motion was founded on a bond with a penalty: in the case of a single bill it would have been wholly unnecessary. The first reason equally applies to the case before us under the modern doctrine of recovering less than the sum demanded in an action of debt, and especially under the construction I have given to the act of discounts as aforesaid. I am inclined to think, that this construction conforms

to the practice in this country. I judge so from the forms in Robinson's Book of Entries, in which the judgment is rendered for the balance only.

I repeat it, therefore, as my opinion, that the appeal be dismissed.

JUDGE FLEMING concurring, the appeal was dismissed.

Moss v. Stipp.

Argued, Friday, Dec. 18, 1811.

1. Amended Declaration—Plea in Abatement Thereto.*

—If the plaintiff be permitted to amend his declaration, by consent of parties, after issue joined on a plea to the action: the defendant ought not to be permitted to plead in abatement any variance between the amended declaration and the writ, which equally existed between the writ and the original declaration. See *Pane and Fairfax v. Green*, 2 Munf. 297. and *Bradley v. Welch*, 1 Munf. 284.

2. Agreement for Sale of Land—Action on—Declaration—Allegation of Breach.—In an action upon a written agreement for the sale of a tract of land, setting forth that the vendor agreed to give the vendee possession, and a conveyance free of encumbrances, on or before a certain day: for which the vendee agreed to pay to the vendor part of the purchase money on the same day, and to give him for the balance a deed of trust or such other security as he might require; and that the conveyance was not to be executed until the first payment was made and security given; the declaration, in behalf of the vendor, sufficiently charged a breach by stating that the plaintiff was, on that day, in lawful and peaceable possession of the land and ready to give the defendant possession, with a proper conveyance, clear of all encumbrances; but that the defendant failed to make the payment and give the security.

3. Same—Same—Same.—What pleas to such a declaration are insufficient?

Upon an appeal from a judgment of the District Court holden at Haymarket.

The writ in this cause was (in consequence of some misinformation) issued in covenant, when it should have 160 *been assumpsit; and, after the return of the writ, a declaration in covenant was filed, and a writ of inquiry awarded. At the October term, 1805, the cause stood upon the trial docket; and the plaintiff, who lived at a very considerable distance from his counsel, attended, with the original article of agreement, upon which the suit was founded, or a correct copy thereof, whereby his counsel discovered that the said agreement was not under seal. In consequence of this discovery, the said counsel was about to apply to the Court for leave to amend his declaration, by striking out those parts of it which describe the said article of agreement as a covenant under seal; but, being informed, at the clerk's table, that the Court had, during the same term, declared that, when a suit stood upon a writ of inquiry, amendments might be made without troubling the Court; and this cause still standing on a writ of inquiry, he struck out those parts of the said declaration. Afterwards, at the same term, the defendant, by his counsel, set aside the writ of inquiry, and pleaded covenants performed. At May term, 1806, the defendant's counsel, not advertent to the circumstance of the said writ of inquiry having been already set aside, procured another order for setting the same aside,

(a) 6 Bac. 186. Bull. N. P. 179.

(b) 2 Burr. 876.

(c) *Bonafous v. Rybot*, 3 Burr. 1870.

*See generally, monographic note on "Abatement, Pleas in" appended to *Warren v. Saunders*, 27 Gratt. 259.

and again pleaded covenants performed, and obtained leave to file additional pleas at any time within three months. At October term, 1806, he withdrew his former plea, and, by another attorney, then first employed, pleaded non assumpsit, and two special pleas. The plaintiff joined issue to the plea of non assumpsit, and filed replications to the special pleas; which replications were followed by rejoinders, to which the plaintiff demurred.

The Court having, on the argument of the said demurrer, intimated that the declaration might possibly be defective, for want of a requisite averment; the plaintiff, at October term, 1706, moved for leave to amend: whereupon, the pleadings up to the declaration were set aside, by consent, and leave granted him to amend his

161 *declaration; which amended declaration he filed on the last day of that term, and gave the defendant a rule to plead: and the cause was continued, by consent, at the plaintiff's costs, without losing its place on the docket.

On the fourth day of May term, 1808, and before the cause was called for trial, the defendant, by his counsel, craved oyer of the writ and declaration, tendered a plea in abatement, on the ground of the variance between them, and moved the court to permit him to file the said last-mentioned plea; but the Court overruled the motion; to which opinion he filed a bill of exceptions, containing a statement of the circumstances herein recited.

The plaintiff's amended declaration was in the following words: "Fairfax County, to wit, John Stipp, jun'r, complains of Robert Moss, in custody, &c. of a plea, for that, whereas an article of agreement was made and concluded, on the 25th day of February, in the year of our Lord, 1804, at the County of Fairfax, aforesaid, between the said plaintiff of the one part, and the said defendant of the other part, which said article witnessed that the said plaintiff had that day bargained and sold to the said defendant the tract of land and plantation whereon he then lived, containing one hundred and seventy-six and one half acres, and to give peaceable and quiet possession, clear of all encumbrances, on or before the first day of May next ensuing the date of the said article: the crop of grain then sowed, and all other advantages arising from the premises, to go to the use of the said defendant; for which he, the said defendant did agree to pay the said plaintiff, the sum of six thousand four hundred dollars in the following manner; that is to say, two thousand four hundred dollars, on the first day of May next ensuing the date of the said article, and the balance of four thousand dollars in four annual payments from the said first day of May next ensuing the date of the said article. For which annual payments, the said

162 plaintiff a deed of "trust on the premises as security for said payment; or such other security as the said plaintiff might require. And further, the plaintiff was to have the liberty to remove the wood, that might at that time be cut up, and remaining on a piece of new

ground, cut down through that winter; but not to cut, sell, or dispose of any other whatever. It was also understood by the parties aforesaid, that the deed was not to be made until the aforesaid first payment was made, and the security given for the residue as aforesaid. In witness whereof, the parties did thereunto set their hands the day and date above written. Which said articles of agreement the said plaintiff bringeth here into Court, the date whereof is on the same day and year aforesaid. And the said plaintiff in fact saith, that, although he hath well and faithfully kept and performed all and singular the agreements in the said article of agreement contained on his part to be kept and performed, and was, on the first day of May, in the year 1804, in the lawful and peaceable possession of the tract of land and plantation in the said articles mentioned, and was, on the day and year aforesaid, ready to give to the said defendant peaceable and quiet possession of the said tract of land and plantation, with a proper conveyance for the same, clear of all encumbrances, if the said defendant had then and there paid to the said plaintiff the sum of two thousand, four hundred dollars, and given security for the residue of the purchase money. Yet the said defendant, not regarding the agreements on his part so as aforesaid made, but contriving to defraud and deceive the said plaintiff in this behalf, did not keep and perform the agreements in the said articles of agreement contained on his part to be kept and performed, but altogether broke the same, in this, to wit, that the said defendant altogether failed to pay to the said plaintiff the sum of two thousand four hundred dollars, on the first day of May next ensuing the date of the said article of agreement, according to the form and effect thereof,

and also, altogether failed to give the 163 said plaintiff a deed of "trust on the premises, or other security for the residue of his said payments, or any part thereof. By reason of which said breaches the said plaintiff saith he hath sustained damage to the value of ten thousand dollars; therefore he bringeth suit," &c.

The defendant's first plea to this declaration was non assumpsit. His second, "that the plaintiff ought not to have or maintain his action aforesaid against him, because, he says, that the said plaintiff never had a good and sufficient title to the tract of land and plantation, in the said articles of agreement mentioned, and could not give to the said defendant a proper conveyance for the same, clear of all encumbrances, according to the true intent and meaning of the said articles; and this he is ready to verify, &c."

His third was, "that he has been, on his part, always ready and willing to perform the stipulations in the said articles contained on his part to be done and performed, if the said plaintiff could have complied with his part of the said articles; but that the said plaintiff could not execute and deliver to him, the said defendant, a proper conveyance for the said tract of land and plantation, clear of all encumbrances,

according to the intent and meaning of the said articles, the said plaintiff having no sufficient title to the same; and this he is ready to verify," &c. His fourth was, "that on the said first day of May, in the year 1804, the said plaintiff was not ready to give him, the defendant, peaceable and quiet possession of the said tract of land and plantation, with a proper conveyance for the same, clear of all encumbrances, if the said defendant had paid the said sum of two thousand four hundred dollars, and given security for the residue of the purchase money, as the said plaintiff has, in his declaration, averred; and of this he puts himself on the country." His fifth was, "that, on the first day of May, in the year 1804, he demanded of the plaintiff peaceable and quiet possession of the said tract of land and plantation, 164 *which the plaintiff then and there refused to deliver; and this he is ready to verify," &c.

The plaintiff demurred specially to the second, third, and fourth pleas, and generally to the fifth; and the defendant joined issues in law upon the said demurrers. The causes of demurrer to the second plea were, "1st. Because the said plea is no answer to the said declaration: 2d. Because the said plea does not show and set forth that the said defendant was ready, and did offer to do and perform, on the first day of May, 1804, those things which, in and by the said articles of agreement, he was bound to do and perform on the said first day of May, 1804; 3d. Because the said defendant does not show in the said plea that he has done, or offered to do, those things which he was bound by the articles to do and perform; 4th. Because the said plea is double, in this, that it offers to put in issue, in the same plea, the title of the plaintiff to the land, and the ability of the plaintiff to make a proper conveyance for the said land, according to the true intent and meaning of the articles of agreement; 5th. Because the said plea is informal and insufficient in law."

The causes of demurrer to the third plea were, "1st. Because the said plea is no answer to the declaration; 2d. Because the said defendant does not show and set forth, by and in his said plea, that he was ready and did offer to do and perform on the first day of May, 1804, those things which, in and by the said articles of agreement, he was bound to do and perform, on the said first day of May, 1804, before the said plaintiff was bound to execute and deliver to him a proper conveyance for the said tract of land, clear of all encumbrances; 3d. Because the said defendant does not show in the said plea, that he has done, or offered to do, those things which he was bound by the said articles to do and perform; 4th. Because the said plea is double in this, that it offers to put in issue in the same plea, readiness and willingness of the defendant to do and perform those 165 things he was *bound to do, and the ability of the plaintiff to perform, on his part, those things which by the said articles he was bound to do and perform; 5th. Because the said plea is informal and insufficient in law."

The causes of demurrer to the fourth plea were, "1st. Because the breach alleged in the said declaration, is not answered by the said plea; 2d. Because the said defendant, by his said plea, alleges, that the said plaintiff was not ready to give the defendant peaceable and quiet possession of the said tract of land, and plantation, with a proper conveyance for the same, clear of all encumbrances, on the first day of May, in the year 1804, if he the said defendant had paid the plaintiff the said sum of two thousand and four hundred dollars; by which it appears, the defendant required the said plaintiff to give possession, and make conveyance before he paid the said 2,400 dollars; when, by the said articles of agreement, the said plaintiff was not bound to give possession, and make such conveyance, as is stated in the said plea, until the said defendant made the aforesaid first payment of 2,400 dollars, and security was given for the residue of the purchase money; 3d. Because the said plea is informal, insufficient, and uncertain; and, 4th. Because it concludes to the country, and not with a verification."

The matters of the law arising on the demurrers, having been argued, it seemed to the Court, that the law was for the plaintiff. The pleas, on which the said demurrers were joined were therefore overruled. A jury was then impanelled to try the issue joined on the plea of nonassumpsit. Verdict and judgment in favour of the plaintiff for 500 dollars damages, and costs. The defendant appealed.

Botts, for the appellant.

Edmund I. Lee and Wickham, for the appellee.

166 *On Saturday, the first of February, 1812, the Court (consisting of JUDGES FLEMING, ROANE, CABELL, and COALTER) affirmed the judgment.

The following observations were made by JUDGE FLEMING.

All contracts or agreements, are to be taken and construed according to the true meaning and understanding of the contracting parties.

In the latter part of the agreement before us, are the following plain words; to wit, "It is also understood by the parties aforesaid, that the deed is not to be made until the aforesaid first payment is made, and the security given for the residue as aforesaid. In witness," &c. The plaintiff in his declaration states, that he had kept and performed the said contract, in all parts by him to be kept and performed, &c. And according to the unanimous opinion of the Court, in the case of Rawson and Others v. Johnson, (1 East, 203,) "One man," says Lord Kenyon, "agrees to do a certain act in consideration of another man's doing another act; the acts are to be done at the same time and place; it is sufficient for the plaintiff to aver that he was ready at the time and place to perform the agreement on his part." In this case the defendant was, by the agreement, not only to pay before he received a deed for the land, 2,400 dollars, but also to give security for payment of the residue of the purchase money; to wit, 400 dollars more. And it is in proof, even by his own witness, that

he was unable to pay more than 1800, out of 2,400 dollars, which he had stipulated to pay on the 1st day of May, 1804. I am, upon the whole, of opinion, that the declaration is sufficient; that the demurrers to the second and other pleas, are good; and that the judgment be affirmed.

167 *Cooke v. Pope's Administrator.

Thursday, March 19th, 1812.

1. *Confession of Judgment—Release of Errors.*—A defendant's relinquishing his plea and agreeing to the plaintiff's damages, is a confession of judgment, and of course, a release of errors. See Rev. Code. vol. 1, c. 76, sect. 48, p. 118, and 2 Call, 88. Skipwith v. Morton & Co.

This was an action for covenant broken, instituted by John H. Pope, administrator of John Pope, deceased, against Stephen Cooke, in the Superior Court of Loudoun County. The defendant pleaded covenants performed; and a special plea, to which the plaintiffs demurred; and upon argument, the demurrer was sustained, the special plea overruled, and the cause continued. At a subsequent term, the defendant "relinquished his former plea, and it was agreed by the parties, that the plaintiff had sustained damages by occasion of the defendant's breach of the covenants in the declaration mentioned, to 510 dollars 20 cents, with legal interest on 320 dollars, being the principal sum due, from the 7th day of April, 1810, until payment, beside costs: therefore, it was considered by the Court, that the plaintiff recover against the defendant, his damages agreed as aforesaid, and his costs." By consent of parties, an appeal was allowed the defendant upon his entering into bond and security in the Clerk's Office within one month; which security was to be approved by the plaintiff's attorney; and was accordingly given by the defendant.

Wickham, for the appellant, contended, that the declaration was defective in not setting forth the gist of the action; and that he was not precluded from making this objection, by having agreed the damages.

Stanard, for the appellee, insisted upon the sufficiency of the declaration; and that, if it were otherwise, there was a confession of judgment, and therefore all errors were released.

Monday, March 23d, the following opinion of the Court was delivered by JUDGE ROANE.

168 "The Court (without considering, or deciding on any other questions made, or arising in this cause) is of opinion, that the confession of judgment, by the appellant, in the Court below, bars him from complaining of the errors, if there be any, in the proceedings; and, on this ground, affirms the judgment."

Hollingsworth v. Dunbar.

Thursday, March 19th, 1812.

1. *Covenant—Action of—Evidence.*—In an action of

*See monographic *note* on "Judgments by Confession" appended to *Richardson v. Jones*, 12 Gratt. 58. The principal case was cited in *M'Rae v. Turnpike Co.*, 3 Rand. 164.

†Joint Obligation—Suit against One Obligor—Plea in Abatement.—It seems to be now settled that in all

covenant the declaration describing the covenant as sealed, by the defendant, without mentioning any other person; and the plea being "covenants performed;" though without praying over; a joint and several covenant, sealed by the defendants, and others, but in other respects answering to the description in the declaration is admissible as evidence to the jury.

See *Meredit's administratrix v. Duval*, 1 Munf. 79, 82; *Winslow and others v. The Commonwealth*, 2 H. & M. 459, 468, and *Cabell v. Vaughan*, 1 Saunders, 288-291; and the notes to that case by Sergeant Williams.†

This was an action for covenant broken, brought by the appellants against the appellee in the District Court of Fredericksburg. The declaration set forth a covenant, bearing date the 3d of March, 1803, sealed by Robert Dunbar; without mentioning that any other person had sealed it. The pleas were, "not guilty," and "covenants performed;" but over was not prayed. At the trial, the deed produced, (being of the same date aforesaid,) was one from Francis Thornton and Sarah his wife, Robert Dunbar and Elizabeth his wife, in which they and each of them covenanted, that they and each of them, their, and each of their heirs, &c. would perform certain stipulations corresponding with those set forth in the declaration; which deed was acknowledged by all the parties, and recorded. To the admission of the said deed as evidence to the jury, the defendant objected; and the Court, upon his motion, excluded the same; whereupon the plaintiff filed a bill of 169 exceptions, and (a verdict and judgment being rendered against him) appealed to this Court.

Williams, for the appellants, observed that, the covenant, being joint and several, was improperly rejected by the court.

No counsel appeared for the appellee.

Monday, March 23d, the following opinion of this Court was delivered by JUDGE ROANE.

"This Court, being of opinion that the Court below erred in withholding from the jury the covenant in the bill of exceptions contained, reverses the judgment with costs, and awards a new trial, in which the said judgment is to be permitted to go in evidence."

Dunbar v. Linbenberger.

Thursday, March 19th, 1812.

Confession of Judgment—Action Sounding in Damages. § —A confession of judgment, for no certain sum.

cases of a joint obligation or deed or a joint contract in writing or by parol or *ex quasi contractu*, if one only be sued, he must plead the matter in abatement and cannot take advantage of it afterwards upon any other plea or in arrest of judgment or give it in evidence. *Reynolds v. Hurst*, 18 W. Va. 664, 665, citing principal case. See monographic *note* to "Abatement. Pleas in" appended to *Warren v. Saunders*, 27 Gratt. 259.

†Note. In *Cabell v. Vaughan*, 1 Saunders, 288, the declaration (as in this case) described the bonds as sealed by Vaughan, the defendant; saying nothing about any other obligors. Over was prayed; and the bonds appeared to have been sealed by two other persons, who bound themselves jointly; and not jointly and severally; but as the defendant did not plead in abatement, "that such was the fact, and that the other obligors were still alive," a general demurrer to the declaration was overruled, and judgment entered for the plaintiff.—Note in Original Edition.

§See monographic *note* on "Judgments by Confession" appended to *Richardson v. Jones*, 12 Gratt. 58.

in an action sounding in damages, is not sufficient to authorize the Court to assess the damages, and enter judgment for a certain sum; but a writ of inquiry should be executed.

In this case the action was indebitatus assumpsit, for non-payment of an inland bill of exchange, against Dunbar, the acceptor. The bill was described in the declaration, as drawn the 21st of October, 1807, for 374 dollars and 56 cents, payable nine months after date. A writ of inquiry of damages being awarded, the defendant "acknowledged the plaintiff's action," in general terms; but did not confess judgment for any particular sum. "It was therefore considered by the Court," (without having the writ of inquiry executed,) "that the plaintiffs recover against the defendant the sum of 374 dollars and 56 cents, with interest thereon, to be computed after the rate of six per centum per annum, from the 21st day of July, 1808, till paid, and their costs," &c. from which judgment the defendant appealed to this Court.

170 *Stanard, for the appellant.

William Hay, jun'r, for the appellee, was absent.

Thursday, March 26th, JUDGE ROANE pronounced the opinion of the Court, that, although the appellant acknowledged the action of the appellees, generally, yet he not having confessed a judgment for any particular sum, it was incompetent for the Court to supply that defect, and assess the damages. The judgment was therefore reversed, and the cause remanded, that the writ of inquiry might be executed.

Ross v. Norvell.

Tuesday, March 18th, 1812.

1. **Continuances—Bill Recently Filed for Discovery.**—A continuance ought not to be granted at law, on the ground that the party, a few days before that appointed for the trial, filed a bill in equity for a discovery of usury, as auxiliary to his defence at law: unless he make affidavit, that the usury therein charged, had recently come to his knowledge.
2. **Same—Refusal—Appeal—Bill of Exceptions.**—On a bill of exceptions to the opinion of the Court below refusing to grant a continuance: the Appellate Court ought not to reverse the judgment, for a ground of continuance not stated in such exceptions.
3. **Deed of Trust;—Ejectment—Against Debtor—Witness—Trustee.**—The trustee in a deed of trust, conveying property to be sold for payment of a debt, is equally the agent of the debtor and creditor, and a competent witness, in an action of ejectment against the debtor, in behalf of a purchaser from

*Continuances.—See monographic note on "Continuances" appended to Harman v. Howe, 27 Gratt. 678.
 †Bill of Exceptions.—See monographic note on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 387.

‡Deed of Trust.—See monographic note on "Deeds of Trust" appended to Cadwallader v. Macon, Wythe 188.

Same—Due Advertisement of Sale.—Onas Probandt.—In *Fulton v. Johnson*, 24 Va. 108, it was alleged by counsel that there is no presumption in favor of the regularity of a trustee's sale and Pollard v. Baylor, 4 Hen. & Munf. 223. *Ross v. Norvell*, 3 Munf. 170, and *Gibson v. Jones*, 5 Leigh 370, were cited to sustain the allegation. But in passing on the point, the court said "These Virginia authorities have been considered by this court, some of them on more than one occasion. The conclusion reached by this court is, that after a trustee has made a deed to the purchaser, and it has been recorded, it will be presumed, that it was made in accordance with the terms and conditions of the deed of trust, and that it was properly advertised. *Burk v. Adair*, 23 Va. 130."

himself, (to whom he has made a deed with a warranty against himself and his heirs only,) to prove that the sale of the property was advertised, according to the terms of the deed of trust. In *Quarles v. Lacy*, decided by the Court of Appeals, March 8th, 1814, it was again solemnly pronounced, that "trustees acting under private deeds of trust, as well as those acting under decrees of Courts of Chancery, should consider themselves impartial agents for both parties, and act in all sales for the interest of the debtor, as well as the creditor."

Thomas Norvell brought an action of ejectment in the Superior Court of law, for the County of Pittsylvania, against David Ross. The declaration was served the 16th of February, 1809. The defendant pleaded the general issue, &c. on the 25th of September following, when, on the plaintiff's motion, an order of survey was made; but whether it was executed or 171 not, *does not appear in the record.

The cause coming on for trial, September 28th, 1810, "the defendant, by his counsel, moved the Court, that the defence he relied upon was, that the debt for which the deed of trust, under which the lessor of the plaintiff claimed, was executed, originated in Usury; and that the lessor of the plaintiff was privy to the transaction, and supposed to be connected with it; that he had brought a suit in the High Court of Chancery, for the Richmond District, for the purpose of obtaining a discovery from them and others, touching the said transaction, as well as for general relief; a copy of the bill and the subpoenas, in which suit, (bearing date September 22d, 1810,) "with the schedules thereto annexed, marked A. and B., (one of which schedules was sworn to,) was exhibited to the Court; and that he was not able to establish the fact of usury, without the aid of a Court of equity. And this being all the reason offered for a continuance, he moved the Court to continue this cause until the lessor of the plaintiff, one of the defendants in the said suit in Chancery, had put in his answer. But the Court overruled the said motion, and ruled the defendant into trial; whereupon he filed a bill of exceptions."

On the trial of the cause, the plaintiff introduced a certain Edmund W. Rootes, (who was one of the trustees in the deed of trust aforesaid, and by whom, and the other trustee, the land in controversy was sold and conveyed to the lessor of the plaintiff, by a deed with special warranty against all persons claiming under them,) as a witness, to prove that the sale of the land was advertised, as required by the deed of trust; to which testimony the defendant, by his counsel, objected; "because the lessor of the plaintiff claimed solely under the deed from the said Edmund W. Rootes and Wilson Allen, trustees as aforesaid, and the said Rootes was interested in proving, that he had duly complied with the terms in the deed of trust,‡

§Note. The deed of trust empowered Wilson Allen and Edmund W. Rootes, the trustees therein mentioned, to sell the tracts of land on Staunton and Pligg river, thereby conveyed, (not conditionally, in the event that Ross should fail to pay the debt, intended thereby to be secured to Hancock, the cestui que trust, but,) positively whether he should pay that debt or not: such being declared to be the true intent and meaning of the parties; and that the whole, or the surplus, as the case might

and this was all the testimony offered 172 to *prove that the land was duly advertised, except a paper purporting to be a newspaper published in Richmond. But the Court overruled the objection, and received the testimony of the said witness;" whereupon the defendant again excepted.

Verdict and judgment for the plaintiff. The defendant appealed to this Court.

Williams, for the appellant, made three points:

1. The Court below ought to have continued the cause for the reasons stated in the first bill of exceptions. Ross moved for a continuance on the ground that he had filed a bill for discovery of usury. The affidavit annexed to the statement, showing the usury, was sufficient. I suppose it unquestionably true, that a man may go into equity to pray a discovery, in order to assist his defence at law. If it be objected that this bill in Chancery was filed only six days before the trial at law, several reasons may be assigned for the delay. Ross might have supposed, at first, that he could prove the fact upon the trial at law; and afterwards finding he could not, presented his bill in equity. The lessor of the plaintiff's obtaining an order of survey, induced the defendant to think that he did not intend to try the cause until the survey should be made. He therefore did not expect a trial. It should be considered, too, that the bill, being for a discovery, 173 *could have occasioned a delay for one term only, since Norvell, who was one of the defendants in Chancery, might have answered it immediately. For the purposes of justice, then, one term should have been allowed; especially as the cause had never been continued for the defendant.

2. Rootes, (the trustee,) was not a competent witness to prove that he had duly executed his authority. He was interested in establishing this; for if the jury had found a verdict for the defendant, on the ground that the advertisement, required by the deed, had not been made, that verdict would have been evidence in a suit against Rootes by Norvell, to recover back his purchase money. The case of Pollard v. Baylor, decided the 20th of October, 1808, (a) shows, that publication of the time and place is important, and essential to justify the sale, and enable the trustee to convey. A mere conveyance from him, without a compliance with the terms of the deed of trust, under which he acts, cannot be effectual to transfer the legal title.

3. The deed of trust did not authorize a sale without a decree of a Court of Chan-

be, should be applied to the discharge of a debt due to Gallego and Gibson, for the exoneration of a tract of land called Howard's Neck, from their debt, and the bettering the security on the deed of trust, on that tract, for the benefit of the said Hancock and others." The sale was to take place as soon after the 1st of April ensuing, as the trustees, or either of them, or the survivor of them, or the heirs of such survivor, should think proper, or the said Hancock should require, for ready money, at public auction, at the Eagle Tavern, in the City of Richmond or elsewhere, as they might think proper, after giving three weeks previous notice, of the time and place of sale, in one or more of the Richmond newspapers.—Note in Original Edition.

(a) 4 H. & M. 229, note (1.)

cery; such deeds being only a security for a debt. It has been decided, that where the deed is with power to the creditor to sell and pay himself, it is only a mortgage, under which he cannot sell without applying to a Court of Equity. And what is the difference between such a deed, and one which authorizes a third person to sell by direction of the creditor? The trustee has no right to determine what balance is due to the creditor. The creditor cannot be his own judge. The Court of Equity would direct an account to be taken, before it would decree a sale. Suppose Ross had paid the whole of the money, (and there is nothing in this record to enable the Court to presume the contrary,) would it be reasonable that he should be turned out of possession by his own trustee, without being allowed a previous opportunity to prove that fact? The Court of law should not permit the trustee to 174 sell and *turn his cestuy que trust out of possession. He could not convey such title to the purchaser as would enable him to maintain ejectment.

Hay, for the appellee. The appellant was not entitled to a continuance. The motion was addressed to the sound discretion of the Court; and, on this occasion, that discretion was correctly exercised. I admit the superintending power of the appellate Court, and approve the decision in Hook v. Nanny, 4 H. & M. 157. I do not set up the decision of the Supreme Court of the United States, (b) against it; but it is sufficient to show that the appellate Court ought not to set aside the judgment of the inferior Court on the ground that a continuance was refused, unless it plainly appear that injustice was done. The deed was executed in February, 1807; the sale took place in the month of May following: the suit was commenced in February, 1809; and in September, 1810, a bill for discovery of usury is filed. This unreasonable delay was, of itself, sufficient to preclude the defendant from a continuance on that account.

But what advantage could arise to Ross from a continuance in this case? The fact relied on, the institution of the suit in equity, led to the conclusion that there was no defence at law. Why then delay the judgment? He could only be entitled to an injunction upon the terms of confessing judgment at law.

This bill was for relief in equity, as well as discovery; not for a discovery as auxiliary to defence at law. Where a motion is made on special grounds stated by the party, he is bound by the terms in which he chooses to state his motion. (c)

The proposition, too, was unreasonable. If the ground alleged for a continuance was good for that term, it was equally good for continuing the cause until the suit in Chancery should be decided, however long it might last.

175 *2. Rootes was a good witness to prove that the sale of the land was duly advertised by him. In Goss v. Tracy, 1 P. Wms. 289, "it was declared that a grantee, when he appears to be a

(b) Woods & Bemis v. Young, 4 Cranch. 237.

(c) Buster v. Wallace, 4 H. & M. 80.

bare trustee, is a good evidence to prove the execution of a deed to himself;" and with very good reason; for such a trustee has no beneficial interest, but the legal right only. (a) *Abrahams v. Bunn*, 4 Burr. 2254, and *Peake's Cases at Nisi Prius*, p. 153, are cases similar in principle to this.

If Rootes had acted improperly, (being trustee for both parties,) he was liable in equity only. (b) The verdict given in that case could not operate in his favour, if Ross impeached his conduct in equity. Besides, if he had done wrong, he was liable to Ross, and was thus aggravating that wrong. Of course, he was swearing against his interest. But, at any rate, his evidence was superfluous, and unnecessary; for the title passed to Norvell by the deed from the trustees. Whether the sale had been advertised, or not, was immaterial as to the legal title. The error of the Court on this point was therefore immaterial, if there was an error. The rule is, that if improper evidence bearing on the issue be admitted, however unimportant it may be, it is error; (c) but it is otherwise, if it be totally irrelevant to the issue, (d) as well as unimportant. For example, in debt on bond, if the plea be payment, and the Court, on the plaintiff's motion, admit the assignor as a witness to prove that the defendant executed the bond; this, though an error, is immaterial.

Wickham, on the same side. Usury, or not usury, the Court did right in trying the cause. On a motion for a continuance, the party must show that he has endeavoured to be ready, and was guilty of no laches. There must be good ground for the continuance, taken in the abstract, and the party must have used due diligence and been prevented by circumstances not within his control. In *Hook v. Nanny*,

4 H. & M. 157, both these 176 "points were attended to: the materiality of the testimony wanted was sworn to: due diligence on the part of Hook appeared, and a recent discovery of the witness, who lived in North Carolina. But in this case, attention to dates will show that Ross had not used due diligence. On the contrary, he was guilty of the grossest and most palpable negligence, nay, of contrivance, to delay the trial unfairly. No fact is stated, or reason assigned, for not filing his bill sooner.

The argument of Mr. Williams concerning the order of survey, is far fetched. It does not appear that the cause was not tried upon the survey; for it was not said in the second bill of exceptions that all the testimony exhibited to the jury is spread on the record. Neither is the circumstance, that the order of survey had not been executed, alleged in support of the motion for a continuance.

It is not sworn that Norvell was privy to the usury; or that he had notice of it at the time of the sale. The man who executes a usurious deed of trust; and stands by, permitting a sale, cannot have any remedy

against the purchaser. This is not a bill for discovery, more than every bill in Chancery is. It prays relief in equity, and puts the plaintiff's whole case upon the event of the suit; declaring that he is remediless at law. So far from being a ground for a continuance, such a bill was the strongest reason against it. Ross, indeed, carefully steers clear of the prayer for an injunction; because the rule in granting injunctions is to do it upon the condition of confessing a judgment at law; which he wished to avoid: but an injunction might at any time have been granted on motion. Whenever a man is charged at law, he is not to be permitted to pray relief in equity without waiving his right to relief at law. Besides, the plaintiff in equity has not a right, under the Act of Assembly against usury, (e) to avail himself in a Court of law, of the defendant's answer to his bill for a discovery.

177 *2. I had supposed the question, whether Rootes was properly admitted as a witness, settled by the remarkable case of *Baring v. Reeder*. (f) He was a mere trustee; an agent chosen by both parties; and not responsible in the event of Norvell's being cast in the suit; for he warranted against himself and his heirs only. If Norvell should recover of Ross, and thereupon Ross should sue him for selling without advertising, he could not give this verdict in evidence in his defence, but would be driven to prove that he had not advertised. If interested at all, he was, therefore, interested against Norvell, and swore in opposition to his interest.

But the most that can be said, is, that he was equally responsible to both parties: and if so, he was a good witness, standing indifferent between them. (g) The position in *Busby v. Greenslate*, 1 Stra. 445, that "a vendor who does not covenant for the title, or enter into any warranty, is a good witness," must be understood to mean any warranty bearing on the case; that is, any such warranty as would subject him if the plaintiff failed to recover.

3. As to the right of the trustee to sell, I had thought it unquestionable that a deed of trust conveys the legal title to the trustee, and that a sale and conveyance by him passes the legal title to the purchaser; though the sale, if improper, may be set aside by a Court of equity. This is the first attempt to establish the doctrine that the trustee cannot sell without being authorized by a decree in Chancery. The practice has been uniformly otherwise, at least ever since the Revolution; and I believe before. In *Pendleton v. Wyld*, (MS.) *Call v. Scott*, (MS.) and *Wells's heirs v. Winfree*, 2 Munf. 342, sales made by trustees, without the sanction of a decree, were not attacked on the ground now taken, and were evidently considered valid by this Court. The same opinion has prevailed, without a single exception, in the Courts of Common Law and Chancery, and in the Federal Courts. In England it has not

(a) *Mabank v. Metcalf*, 8 Atk. 96.

(b) *Sturt v. Mellish*, 2 Atk. 612.

(c) *Smith and others v. Carrington and others*, 4 Cranch, 70; *Lee v. Tapscott*, 3 Wash. 281.

(d) *Turner v. Fendall*, 1 Cranch, 118.

(e) Revised Code, 1st vol. p. 207.

(f) 1 H. & M. 154.

(g) *Meade v. Tate*, 3 Call. 281; *Dixon and others v. Cooper*, 3 Wils. 40; *Bell v. Harwood*, 3 Term Rep. 208; 2 Bac. 585; *Peake on Evid.* 170.

178 been customary until *lately, to give deeds of trust to secure the payment of debts. The fashion there has been, where the borrower of money wished to allow the lender a more speedy remedy than he could have upon a mortgage, to give him a bond for a title and power of attorney to sell. But deeds of trust have been executed for many other purposes, and sales by the trustees have been good without any previous application to a Court of equity. It appears from 5 Bac. p. 5, that of late the practice is to make such deeds instead of mortgages; and no reason can be assigned for denying the trustees the power to sell, where the deed is to secure a debt, and allowing him that power where it is to raise money for payment of legacies, or for other purposes.

If it be said that the trustee might sell, when nothing was due; the answer is, get your injunction, or give notice, and forbid the sale. The want of a previous account is no argument; or, if it be, the debtor, before he agrees to the deed, ought to consider that. One of the rights of property is that of parting with it; and he has full power to make such a contract, however improvident it may be. The argument, that an account should be taken, proves too much; for the same argument would equally apply, after an account taken and decree for a sale. It might still be contended, that subsequent payments had been made, and that a further account was needed, before the sale should take place.

But this question is foreign to the subject in controversy; for even if the deed of trust had only the effect of a mortgage, the debtor's remedy would not be at law, but in equity; since the legal title passes by the deed. Besides, the point concerning the legal effect of the deed, and the power of the trustee, is not reserved in either of the bills of exceptions.

As to the materiality of the advertisement of sale; it was not decided in the case of Pollard v. Baylor, 4 H. & M. 229; but only that the jury ought to have 179 found *the fact, and not evidence merely.* That circumstance being immaterial, the error of the Court in receiving testimony concerning it, was unimportant. (a)

Williams, in reply. If there was any contrivance in this case, it was on the part of Norvell, who lulled Roas into security by obtaining the order of survey; of the time of executing which he was to have notice. Insisting upon the trial without the survey, was a surprise upon him. The rule, that a judgment must be confessed at law, when application is made to equity for relief, is not universal. The case of Long v. Colston, (b) is a direct authority to the contrary. The grounds for a continuance, were full as strong as in Hook v. Nanny. Whenever the discovery called for should be made, there would be no preterpse for any further continuance.

*Note. JUDGE BROOKE observed, that his impression of the decision in that case was different. The Court considered the circumstances important, which should have been found by the jury.—Note in Original Edition.

(a) 2 H. & M. 550, Faulcon v. Harris.

(b) 1 H. & M. 111.

2. As to the competency of Rootes to be a witness; the cases cited by Mr. Hay do not apply. In Goss v. Tracy, 1 P. Wms. 289, the question was, whether a deposition, taken before the witness became interested, could be afterward read in his favour: and the Chancellor determined that it could: the reporter adds, that "in the principal case it was declared, that a grantee, when he appears to be a bare trustee, is a good evidence to prove the execution of the deed to himself."† This is a mere obiter dictum: and at any rate, does not justify the admission of such a trustee to prove the propriety of his own conduct in making the sale.

In Abrahams v. Bunn, 4 Burr. 2254, the Court state a case in which "the witness, having administered under the first will as agent to the executor, or as executor de son tort, was admitted to prove a codicil subsequent to the second will, setting up again the first will." There it was said, the objection went to the creditor, and not 180 to *the competency. The judges, however, were divided in opinion.

But that case is not like this; for since he was only an agent to the executor, (there being an executor,) he was equally disqualified to be administrator, whether the first or second will was established. The case of Mabank v. Metcalf, 3 Atk. 96, merely states, that there is an established difference in the Court of Chancery between a trustee having only the mere legal right, and an executor, with respect to admissibility to give evidence: but how far such a trustee is admissible is not stated. In Weller v. The Governors of the Foundling Hospital, 6 Peake's N. P. Cases, p. 153, the objection was not on account of interest, but because the witnesses offered were, in form, defendants on the record. The objection was overruled, because they were sued in their corporate, and not in their natural and individual capacities.

Baring v. Reeder, and the other cases cited by Mr. Wickham, are, also, not like this case. It is a rule that a man is not to be received as a witness to prove that he has himself done what he ought to have done. He has no right to justify his own conduct by his own testimony. It is not true that Rootes bound himself for nothing, by the warranty against himself and his heirs only. He bound himself to comply with the trust, and to pass by the deed whatever he could legally pass. According to the authority of Pollard v. Baylor, he could pass nothing without advertising. If he failed to advertise, and his deed passed nothing, he was liable to Norvell for damages. He could not, therefore, be a witness to prove the fact of advertisement.

If his evidence was illegal, it is error sufficient to reverse the judgment, upon the authority of Lee v. Tapscott, 2 Wash. 281; even admitting it were immaterial.

3. Notwithstanding the formidable phalanx of all the lawyers on both sides of the water, I shall still contend that a sale by the trustee in a deed for securing the payment of a debt, cannot, with propriety, be

†Note. See Craft v. Pyke, 3 P. Wms. 181, accordant.

made, without a previous decree of a Court of equity.

181 "The rule in equity is, that no act of the trustee can vary the right of the cestuy que trust. (a) And even at law, in *Doe, Lessee of Gibbons, v. Pott* and others, Doug. 710, it was decided, that if the mortgagee convey the legal estate in trust for the mortgagor, upon his paying off the mortgage, such conveyance shall not, in ejectment, prevent the devisee of the mortgagor from recovering; the rule being, that "in a clear case, the trust estate shall not be set up in an ejectment to defeat the cestuy que trust." The case of *Pollard v. Baylor*, before cited, shows this at any rate; that a mere deed from the trustee to a third person, does not transfer the legal estate, so as to enable the plaintiff in ejectment, claiming under such bargainee, to recover.

In this case, Ross was, equally with Hancock, a cestuy que trust; perhaps, I should say more so. But, certainly, he was as much so as Baylor was. They stand on the same ground.

If, then, a mere deed be not sufficient; but it was necessary to prove the advertisement of the sale; this proof should be established by matter of record; for which a decree in equity is necessary. Again; according to *Pollard v. Baylor*, the question whether the debt has been paid, ought to be determined before a sale. This proves that the trustee is not authorized to settle the accounts. If so, who is empowered to make the settlement? Surely, the Court of equity; not the creditor; for, as well might the mortgagee claim a right to settle the accounts between himself and the mortgagor.

This question, having never been decided by this court, ought now to be considered and met upon principle, without regard to a practice which, in this country, has been acquiesced in without discussion. It is admitted, that in England there has been no such practice, until lately, as Mr. Wickham contends. But, with respect to the recent practice, he appears to be mistaken; for the invention mentioned in 5 Bac.

182 p. 5, is only for the benefit *of the mortgagor; not of the mortgagee. I suppose that, at all times, a mortgagor might sell his lands, pay off the debt, and pocket the balance. What I contend for is, that the mortgagee cannot sell, by himself, or his agent, the trustee; that the creditor cannot compel a sale, without resorting to a court of equity.

Hay referred to the case of *Moore's Executor v. Aylett*, 1 H. and M. 29, as showing clearly that, by agreement, a mortgagee might be empowered to sell.

Curia advisari vult.

On Tuesday, November 17th, 1812, the following opinion of the court was delivered by JUDGE ROANE.

"The court is of opinion, that the appellant, not having stated, in his first bill of exceptions, that the usury therein charged, or spoken of, had recently come to his knowledge, there was a negligence in his failing to file his bill to establish the same, until a period so near to the time of

trial, which ought to bar him from alleging the same as a just ground of continuance: and as to the allegation of the appellant's counsel, that the appellant may have been deceived and lulled into security by the order of survey made in the cause, at the instance of the appellee; while it is not perceived that this circumstance, so common to all causes in which the title or bounds of land may come in question, could have had that effect, it is a conclusive circumstance, in this case, in favour of the judgment of the superior court, that this was not stated as a ground of continuance at the time of trial, as appears by the bill of exceptions; which, if it had, the adverse party might possibly have shown that he had done away that inference, or undeceived the appellant in that particular.

"As to the second bill of exceptions: as the witness, Rootes, was a mere trustee and agent for the parties, and as the verdict in the case before us could not be 183 used by *him in a subsequent action brought against him for the same cause, the court is of opinion, that he was a competent witness, and that therefore, there was no error in permitting him to give testimony in the cause.

"With respect to the general question, supposed by the appellant's counsel to have arisen in this cause, touching the necessity of the trustee having the sanction of a court of equity to enable him to sell, the court is of opinion that it either does not necessarily arise in this case, or that, under the particular circumstances thereof, it ought to be adjudged against the appellant in a court of law; and, upon the whole, that the judgment should be affirmed."

Poindexter v. Wilton and Others.

Friday, March 20th, 1812.

Apprenticeship—Action on Indenture.—An action in behalf of an apprentice, upon his indenture of apprenticeship, ought not to be brought in the name of the overseers of the poor, but in his own name.†

In this case an action for covenant broken was brought against the appellant, in the county court of Bedford, "for the benefit of John Gowing," in the name of William Wilton, James Ayers and others, overseers of the poor of said county, successors of David Saunders and others. The declaration charged, that, on the 15th day of May, 1793, Thomas Leftwich and Charles Moorman, then acting in the office of overseers of the poor for the county aforesaid, by a certain indenture sealed with their seals, &c., bound the said John Gowing until he should arrive at the age of twenty-one years; "and the said Samuel

***Apprenticeship—Action on Indenture—In Whose Name Action Should Be Brought.**—Covenant will not lie in the name of an apprentice on an indenture of apprenticeship entered into by the overseers of the poor without any previous order of court binding out the apprentice; such indenture is not a statutory deed; and therefore, covenant can only be maintained on it in the name of the overseers who are the parties to it. *Bullock v. Sebrell*, 6 Leigh 580, 581, citing the principal case. See monographic note on "Infants" appended to Caperton v. Gregory, 11 Gratt. 506; monographic note on "Covenant, The Action of" appended to *Lee v. Cooke*, 1 Wash. 806.

†Note. As to the proper form of an indenture of apprenticeship, see *Hening's Justice*, 2d ed. p. 68, 67.

(a) *Selby v. Alston*, Vesey, jun. 344.

Poindexter covenanted and agreed with the said Thomas Leftwich and Charles Moor-
man, then acting as overseers of the poor,
to learn the said John Gowing the carpen-
ter's trade, and also to learn him to write,
and read the Bible, and common
184 arithmetic, including the "rule of
three; and, during his apprenticeship,
to find him sufficient diet, clothing,
lodging, and washing; and, at the expira-
tion of his apprenticeship, to pay him his
freedom dues according to law;" and that
the said Samuel Poindexter had altogether
broken his said covenant in every particu-
lar.*

The defendant pleaded that he had not
broken his covenant. A general verdict
was found for the plaintiffs, and damages
were assessed to two hundred dollars.
Judgment was entered accordingly, and,
on appeal, affirmed by the district court;
whereupon the defendant appealed to this
court.

Friday, March 20th, 1812, JUDGE
BROOKE reported the court's opinion to
be, (without deciding any other point in
the cause,) that the appellees could not
maintain this action. The judgments of
both the courts below were, therefore,
reversed, and judgment was entered for the
appellant.

Webb, Executor of Osborne, v. M'Neil.

Friday, March 20th, 1812.

1. Appellate Practice—Reversal of Judgment.—If a
judgment on a summary motion be reversed, on
the ground that the plaintiff's claim is not sup-
ported by evidence, the appellate Court should
proceed to enter judgment, that the plaintiff take
nothing by his motion. And such judgment would
be a bar to another motion for the same cause
of action. But if such judgment be not entered,
the judgment of reversal is too imperfect to be a
legal bar. See *Mantz v. Hendley*, 2 H. & M. 318,
and *Darby v. Henderson*, and others, ante.

Under the second section of the act "to
empower securities to recover damages in a
summary way," (a) the appellant made a
motion in the Nottoway County Court
against the appellee, for 22,183 pounds
185 of inspected tobacco, *and two dollars
and seventy-six and an half cents,
"being one half of the amount of a judg-
ment, rendered in the Court of the said
County, in favour of Archer Jones, executor
of Robert Jones, deceased, against the said
Conrad Webb, executor of Abner Osborne,
on a bond executed by Robert Watkins,
with the said Hector M'Neil and Abner Os-
borne his securities, to the said Robert
Jones; which judgment the said Conrad
Webb had fully paid." Upon the hearing
of this motion, the plaintiff having pro-
duced a copy of the judgment, and receipt
for the same, mentioned in the notice, and
an execution on a judgment rendered in
his favour, against Robert Watkins, which
execution was returned "no effects;" and

having also proved that the defendant and
the plaintiff's testator were co-securities
for the said Watkins in the bond whereon
the first-mentioned judgment was rendered;
the defendant produced in evidence, in bar
of the said motion, "a transcript of the
record between the plaintiff and defendant
for the same cause of action;" from which
it appeared that a judgment before obtained
in the County Court, by the plaintiff
against the defendant, had been reversed
by the Superior Court, on the ground that
the same had been rendered without any
evidence to prove the securityship of
M'Neil, or the insolvency of the principal
obligor; but the Superior Court in revers-
ing that judgment, had failed to enter such
judgment, in lieu thereof, as the County
Court ought to have rendered. It was con-
tended by the defendant, that this judgment
of reversal was a bar to the plaintiff's re-
covery on the present motion: but the Court
gave judgment for the plaintiff, according
to notice; to which opinion the defendant
excepted; and a bill of exceptions was
signed, &c. This judgment was reversed
by the Superior Court, upon a writ of su-
peredeas, on the ground "that the judg-
ment, in the bill of exceptions in the record
set forth, having been given on the merits
of the case, was a bar to any future motion
for the same cause;" and it was further
considered, "that the defendant
186 *in error take notice by his motion,"
&c. Whereupon he appealed to this
Court.

Call, for the appellant. The first judg-
ment in favour of the plaintiff was re-
versed, expressly on the ground of a mere
failure to produce certain evidence: but
judgment was not entered that he take
nothing by his motion. The case was
therefore left open, and there was nothing
to prevent his renewing the motion. (b)

G. K. Taylor, contra. A trial on the
merits, and decision against the plaintiff
is conclusive, though on defective testi-
mony. The necessity of suffering a non-
suit in order to bring a new action is
founded on this principle. The general
rule, that "nemo debet bis vexari" is laid
down in 3 Wils. 308, Kitchen and others v.
Campbell; and the only exceptions to it are
there stated.

Call, in reply. The case in Wilson is
not apposite to this. In that case the right
in controversy had been tried and deter-
mined in the previous action: but in this,
it does not appear that the Superior Court
passed any sentence upon the claim now
exhibited, which is supported fully by
evidence. I believe that Court intention-
ally omitted to give such a judgment as
would destroy the claim; in order that the
plaintiff might be permitted to prosecute
again.

Friday, March 27th, JUDGE ROANE de-
livered the following opinion of this Court.

"Although the judgment of reversal,
offered in bar of the motion now in ques-
tion, was for the same matter, and the
judgment therein referred to was reversed
on the merits; as appears from the reasons
assigned therein; yet, the Superior Court
not having entered such judgment on the

*Note. The indenture in this case appears to
have been defective. The covenant on the part of
Poindexter should have been "to and with the
said overseers of the poor." &c. "and to and with
the said John Gowing." &c. See Hening's Justice, p.
67.—Note in Original Edition.

†See monographic note on "Appeal and Error"
appended to Hill v. Salem, etc., Turnpike Co., 1
Rob. 288.

The principal case is cited in Anderson v. Com., 18
Gratt. 301.

(a) Revised Code, 1st vol. ch. 145, p. 281, 282.

(b) 5 Bac. 440.

reversal as the County Court should have rendered (which, in this case ought to have been, that the plaintiff should take nothing by his motion;) the Court 187 *is of opinion, upon authority, that that judgment of reversal is too imperfect to form a legal bar to the motion aforesaid. On that ground, the judgment of the Superior Court is reversed with costs, and that of the County Court affirmed."

Newman v. Graham.

Tuesday, March 10th, 1812.

1. Joint Obligation—Debt against One Obligor—Declaration.*—In an action of debt against one obligor only, if the declaration describe the bond as joint, and do not state the other obligor to be dead, it is a fatal error, though not pleaded in abatement, and is not cured by verdict.†

Several important points were made in this case, which was argued by Williams, for the appellant, and Wirt, for the appellee: but the Court decided the cause on one point only.

The declaration (being in debt on a bond against Richard Newman only) charged "that the said defendant, together with one Catesby Graham, on the first day of June, in the year of our Lord 1801, at the County aforesaid, by his certain obligation, here to the Court shown, sealed with his seal, and dated the day and year aforesaid, bound himself, together with the said Catesby Graham, to pay &c.: nevertheless, neither the defendant, nor the said Catesby Graham, though often requested, have paid, &c. And for breaches of the condition of the writing obligatory in the declaration mentioned, the plaintiff sheweth the following, to wit, that the said Catesby Graham did not prosecute his appeal, from the judgment of the District Court of Dumfries, rendered against him at the suit of Robert Graham, with effect; but the said judgment was in all things affirmed; and the said Catesby did not perform the judgment of said Court, nor pay the amount of the recovery, and all costs and damages adjudged against him in the said Court, upon his being cast in said appeal; but he utterly failed in paying and performing the same."

The defendant did not prayoyer of 188 the bond; a copy *of which was, nevertheless, annexed to the transcript of the record by the Clerk, and appeared to be an appeal bond in which the obligors bound themselves jointly and severally. His plea filed, whereon the plaintiff joined issue, was, "that the said Catesby did prosecute the said appeal with effect." A verdict was found, and judgment rendered for the plaintiff for 800 dollars, the debt in the declaration mentioned, to be discharged by the payment of 583 dollars 55 cents damages, and costs. The defendant appealed to this Court.

Williams, for the appellant. The decla-

*See monographic note on "Debt. The Action of" appended to Davis v. Mead, 13 Gratt. 118.

†Note. See the case of Horner v. Moore, 5 Burr. 2614, and 1 Saund. 291 a. b. notes (2) and (4) but according to the case of Meredith's Administratrix v. Duval, 1 Munf. 76, if the bond be spread on the record by oyer and appear to be a joint and several bond, the defect in the declaration is obviated.—Note in Original Edition.

ration in this case is bad, upon the authority of Leftwich v. Berkeley, 1 H. & M. 62. It should have contained an averment that Catesby Graham was dead; the bond, described in the declaration, being joint. The bond which appears to be joint and several, is no part of the record; not having been made so by oyer.

Wirt, contra. Combining the assignment of breaches with the body of the declaration, they show, that the action was on an appeal bond, which, in its nature, is joint and several. The case of Leftwich v. Berkeley, only shows that an action on such a bond must be brought against all jointly, or one singly. The action here was against one singly. The declaration does not describe the bond, in general terms, as the obligation of both, but as the bond of Richard Newman.

Williams, in reply. I shall not stop to inquire whether the assignment of breaches is necessarily part of the declaration. Admitting it to be so; there is no law declaring that an appeal bond is to be joint and several. No particular form is prescribed by law for such bonds, or for forthcoming bonds. In this case, it is described as a joint bond. The declaration says, that he bound himself, together with Catesby Graham. This is charging it as the bond of both.

189 *Tuesday, March 17th, JUDGE ROANE pronounced the following opinion of this Court.

The declaration in this case, having stated, that one Catesby Graham was jointly bound with the appellant, in the bond on which this suit is founded; and the said Catesby Graham not being shown to be dead, the Court (upon the authority of the case of Leftwich v. Berkeley) is of opinion, that it was not competent to the appellee to maintain his action separately against the appellant: on this ground, (without deciding on any other,) the Court is of opinion to reverse the judgment of the Superior Court with costs, and enter judgment for the appellant.

Garland v. Davidson.

Friday, March 18th, 1812.

Debt—Action against Parties—Declaration—Averment.†—A declaration in debt against two partners in trade, charging that one of them executed the bond for himself and another, (without any other averment,) is too defective to support a judgment against such other partner, though he pleaded payment, and a verdict was found against him.

See the case of Ball v. Dunsterville and another, 4 T. R. 818: from which it appears that the proper mode of declaring in such a case is, to state that the bond was made "by the defendants, sealed with the seal of one of them for and on behalf of himself and the other, and by the authority of the other."‡

In an action of debt against William Walker and Clifton Garland, merchants, and partners, the declaration described the

‡See monographic note on "Debt. The Action of" appended to Davis v. Mead, 13 Gratt. 118; monographic note on "Partnership" appended to Scott v. Trent, 1 Wash. 77.

§It appears from that case, that a parol authority from one partner to another to execute a bond for the partnership is good, if it be executed in his presence. Otherwise, it would be necessary to prove such authority by a power of attorney under seal. See 7 T. R. 200, 210, citing Horsley v. Rush & Tollotson.—Note in Original Edition.

bond as executed by Walker, for himself and Garland. The plea of "payment" was put in by Garland alone as surviving partner. Verdict and judgment for the plaintiff; to which a writ of supersedeas was awarded by a judge of this court.

Wirt, for the plaintiff in error. This is almost the case of *Shelton v. Pollock & Co.*, 1 H. and M. 423. There is no averment in the declaration that Walker & Garland bound themselves to pay the money. An undertaking by inference or implication 190 is not sufficient: there must "be a positive averment." (a) One partner cannot bind another by his deed. (b)

Williams, contra. This is not like the case of *Shelton v. Pollock & Co.*, in which no plea was filed, but judgment was entered in the clerk's office. The plea of "payment" admits the execution of the bond. The court, therefore, will not inquire whether Garland sealed it or not. The plea admits that Walker was authorized to seal it for him. In 7 T. R. 207, the plea was non est factum.

Wirt, in reply. The declaration itself does lay a cause of action. On the face of the declaration, one partner is said to have given bond for the other; which he could not do, so as to bind him.

Wednesday, March 18th, JUDGE ROANE delivered the court's opinion.

"The court (not deciding any other question occurring in this case) is of opinion that the declaration is defective in this, that it is not expressly averred therein that the appellant Clifton Garland, or the firm of Walker & Garland, promised to pay the debt in the declaration mentioned; but that William Walker only so promised. The judgment is, therefore, to be reversed, and entered for the appellant."

191

*Medley v. Medley.

Wednesday, October 9th, 1811.

Ejectment—Appeal—Abatement.*—An appeal from a judgment in ejectment does not abate by the death of the lessor of the plaintiff; notwithstanding such lessor claimed the land for life only.

See Thrustout on the demise of Turner v. Grey, 2 Stra. 1056; Kinney v. Beverley, 1 H. and M. 531, and Mooberry v. Marye, 2 Munf. 453.

From the declaration in ejectment in this case, it appeared that Elizabeth Medley, the appellee, who was the lessor of the plaintiff, claimed as tenant for life. While the appeal was pending in this Court she died; and Botts, for the appellant, contended that, as her title to the land expired at her death, the appeal ought to abate.

The Court, after taking time to consider the point, decided that the appeal had not abated, and that the cause might be called for trial; saving to the appellant the liberty to move for security for costs; as to the propriety of which, no opinion was then given.†

(a) New doctrina placitandi, p. 180, Styles 91.

(b) Lex Mercatoria Americana, p. 457, Harrison v. Jackson, 7 T. R. 207, Gerard v. Basse, 1 Dallas 119.

*See monographic note on "Ejectment" appended to Tappscott v. Cobbs, 11 Gratt. 172; monographic note on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 233.

†Note. In this case, no motion for security for costs was made; and the judgment was afterwards affirmed without it. See Carter v. Washington and

Shelton v. Cocke, Crawford, & Co.‡

Monday, March 23d, 1811.

1. **Instruction—Abstract Question.**—A point on which a party requested the Court to instruct the jury, is not to be regarded as a mere abstract question, concerning which the Court was not bound to give an opinion, if it appear from the pleadings that such point might have applied to the case before the jury, and the contrary be not stated. See Pickett v. Morris, 3 Wash. 255, 272.

2. **Partnership—Acknowledgment of Debt after Dissolution—Effect.**—Although the acknowledgment of a debt by one or more of the partners of a mercantile firm, after the dissolution thereof, is competent to do away the bar of the Act of Limitations, in an action brought against the firm: the existence of the debt being first proved by other testimony or admitted by the pleadings; yet such acknowledgment is not proper evidence of the existence of the debt, so as to charge the other partners.

At the trial of an action of assumpsit, upon an inisimul computassit, by Cocke, Crawford, & Co. against Lanier, Skelton, and Cocke, merchants and partners; the plea being the general issue; the defendants, by their counsel, moved the Court to instruct the jury, that "after

192 *the dissolution of a mercantile firm, and that dissolution properly published, the acknowledgment by a partner, or partners, of a debt due from the firm prior to the dissolution, (the person to whom such acknowledgment is made knowing of such dissolution,) is not such evidence of the existence of a debt, as will charge a partner, not present at such acknowledgment, nor consenting thereto, in an action against the firm;" which instruction the Court refused to give, "being of opinion that such acknowledgment was evidence in such action;" to which opinion a bill of exceptions was filed. Verdict and judgment for the plaintiffs for \$221. 17s. 7d. damages and costs: to which judgment a writ of supersedeas was awarded by a judge of this Court.

Wickham, for the plaintiff in error. I understand it settled, that the acknowledgment of a person, formerly a partner with

others, 2 H. & M. 81, and Purvis v. Hill, Ibid. 614: from which cases it appears that security for costs, if required, must be given; but it is not error to proceed without it, if not required.—Note in Original Edition.

†For sequel of principal case, see *Shelton v. Cocke*, 6 Munf. 580.

‡**Instructions—When Not Abstract.**—An instruction is not considered as abstract where the pleadings show that it might apply to the case. *Johnston v. Moorman*, 80 Va. 143, citing the principal case as authority. See further, monographic note on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.

Same—Presumption in Appellate Court.—It must be presumed that the court below acted correctly in refusing instructions to the jury unless it appear by facts or testimony incorporated in the bill of exceptions that the instructions were relevant or irrelevant to the cause. *Shepherd v. McQuilkin*, 2 W. Va. 100, citing the principal case, and *Fitzhugh v. Fitzhugh*, 11 Gratt. 308.

See further, foot-note to *Fitzhugh v. Fitzhugh*, 11 Gratt. 300: monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 887; monographic note on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.

§**Partnership—Admissions of Partner of the Dissolution—Effect.**—The admissions of one partner after dissolution of the partnership, are no evidence against the other partners whether the partners be defendants or plaintiffs. *Munford v. Overseers of Poor*, 2 Rand. 319, citing principal case, and *Rootes v. Wellford*, 4 Munf. 215. To the same point the principal case is cited in *Dade v. Madison*, 5 Leigh 403; *Henrico Justices v. Turner*, 6 Leigh 127; *Blispham v. Patterson*, 3 Fed. Cas. 456. See further, monographic note on "Partnership" appended to *Scott v. Trent*, 1 Wash. 77.

another, will not bind that other person, being no longer a partner; if it relate to the existence of the debt. The case of *Whitcomb v. Whiting*,^(a) which is the leading authority on this subject, goes only to prove, that where a debt is first established by other testimony, such acknowledgment will prevent the operation of the Act of limitations. And a similar point is decided in *Jackson v. Fairbank*.^(b) But in *Abel and another v. Sutton*,^(c) it was ruled by Lord Kenyon that, after the dissolution of the partnership, one of the persons who composed the firm cannot put the partnership name on any negotiable security; even though such existed prior to the dissolution, or was for the purpose of liquidating the partnership debts; and notwithstanding such partner may have had an authority given him to settle the partnership affairs. The case of *Bland v. Hasselrig*^(d) is, also, in opposition to that of *Whitcomb v. Whiting*.

In *Evans v. Beattie*,^(e) it was ruled by Lord Ellenborough, that, on a guarantee to pay for goods sold and delivered to a third person, what such third person has said, "respecting the goods sold to him, is not evidence to charge the person giving the guarantee; but the delivery of them must be proved; because "there might be collusion between such third person and the plaintiffs." The same reason strongly applies in this case. So, in *Helyear v. Hawke*,^(f) where a principal employed an agent, or servant, to sell for him, what such agent said as a warranty or representation, at the time of the sale, respecting the thing sold, was determined to be evidence against the principal; but not what he had said at another time; and *Peto v. Hague*^(g) is to the same effect. In *Gray v. Palmer & Hodgson*,^(h) the admission of one of the defendants, that he signed a note, (though such admission was made by his plea,) was held not to bind the co-defendants. A confession of judgment by one would not bind the others. A fortiori, then, a confession in pays will not. If one partner cannot, after the dissolution of the partnership, bind the others by his act, he cannot bind him by his evidence, so as to establish the existence of a debt, which is denied.

Wirt, contra. The acknowledgment of a partner, after dissolution of the partnership, that a debt was contracted by the firm prior to its dissolution, will bind the other partners; because his acknowledgment binds himself at the same time; and therefore his own interest would prevent his making such an acknowledgment if it were not true. The cases cited by Mr. Wickham do not apply. Copper, the acknowledging person in 5 Esp. 26, had no joint interest with the rest, and did not bind his own interest. The same observation applies to *Helyear v. Hawke*, *ibid.* 72, and *Peto v. Hague*, *ibid.* 134. The case in 1 Esp. Cases,

135, is not a case of partnership, but of a sham plea by a co-defendant, by which plea the others were not bound, as they had pleaded severally. *Abel and another v. Sutton*, 3 Esp. 108, contains a principle which we cheerfully admit; but it is the case of the creation of a new debt by the partner, not of the acknowledgment of 194 a pre-existing debt. I grant, that after dissolution, none of the partners can create a new debt against the firm. If they could it would abrogate the dissolution. *Bland v. Hasselrig* has, unquestionably been overruled by *Whitcomb v. Whiting*, and subsequent authorities.

Notwithstanding the dissolution of a partnership, there remains a privity among the partners as to certain purposes. It is not total, retrospectively, as well as prospectively. They are still existing partners as to past transactions, to recover and pay existing debts, &c.; though not to create new ones. In *Whitcomb v. Whiting*, the acknowledgment of the partner as effectually bound the partnership by reviving a debt, which by the act of limitations was defunct, as it could have been done by proving the existence of the debt in the first instance. In *Jackson v. Fairbank*, 2 H. Bl. 340, the partnership had been dissolved by an act of bankruptcy of one of the partners; (i) yet an admission by the assignees of the bankrupt was received as sufficient evidence to bind the other partner, by taking the case out of the act of limitations. In *Grant v. Jackson*,^(k) the acknowledgment of a partner, made after he had become a bankrupt, (of course, after the partnership had been dissolved,) but before he had obtained his certificate, was received as evidence against the other partners, in consideration of the interest remaining in him, small as it was. It follows then, a fortiori, that, where all are able to pay, one who binds himself at the same time, may bind the rest.^(l) *Brockenbrough v. Hackley*,^(m) in this Court is also a strong case. It is true, that there the only plea was the act of limitations; but that makes no difference; because the only evidence was the written acknowledgment, at the foot of the account, by one of the partners, long after the dissolution of the partnership.

Wickham, in reply. The position, that participation of interest is sufficient to enable one to bind himself and others, goes too far: it would prove that a man 195 might, "in all cases, bind other persons, by confessing a judgment against himself and them; or that he could bind them by his note or bond, without their signatures. What cannot be done, directly, by giving a note or bond, or bond, or confessing a judgment, cannot be done, indirectly, by acknowledging the existence of a debt. Suppose the debt was due from himself in his individual capacity, would he not be interested to fix it on the partnership instead of himself alone? The argument that his acknowledgment is only

(a) 2 Douglas, 651.

(b) 2 H. Bl. 340.

(c) 3 Esp. Cases, 108.

(d) 2 Vent. 151.

(e) 5 Esp. Cases, 36.

(f) Esp. Ca. 72.

(g) *Ibid.* 134.

(h) 1 Esp. Cases, 185.

(i) Watson's Law of Partnership, 232-3.

(k) Peake's Cases, N. P. 203.

(l) Lex Mercatoria Americana, p. 650.

(m) September Term, 1806 Order Book. No. 5, p. 278.

evidence of a pre-existing debt, begs the question; for the question is, whether the debt existed or not? It does not follow, because such an acknowledgment is sufficient to take a case out of the act of limitations, that it ought to be sufficient to prove the existence of the debt in the absence of other testimony. The power to create a debt is very different from that of reviving a debt; for the act of limitations is governed by an equity; and after legal proof that the debt originally existed, any acknowledgment, however slight, is sufficient to prevent its recovery from being barred by the act. (a) The case of *Jackson v. Fairbank*, H. Bl. 340, is clearly in my favour. It proves that Mr. Wirt's rule is not the true one. There is no privity between the assignees of a bankrupt, and the persons who were his partners in trade before his act of bankruptcy. They had no interest in the action against those partners, and might have been sworn as witnesses. They could not, by their acknowledgment, create a debt, even against the bankrupt himself; much less against his partners. It follows, then, that their acknowledgment was admitted only to revive a debt barred by the act of limitations. The case, therefore, plainly shows the distinction between such recognition of a pre-existing debt as will establish it without other proof, and such as will be sufficient to take it out of the act.

Lex Mercatoria Americana is a book of no authority in this Court. The case of *Grant v. Jackson*, (b) is very vaguely reported; for it does not appear to what 196 point the evidence was introduced; and the authority of Lord Kenyon in that case is opposed to his own authority in *Abel v. Sutton*, 3 Esp. Cas. 108. In *Thwaites v. Richardson*, (c) his lordship even doubted whether the admission of an existing partner could bind the other.*

The principle decided in *Brockenbrough v. Hackley*, as reported in Mr. Call's MS. is very different from what might be inferred from the record. Judge Lyons, in delivering the opinion of the Court, said, "the evidence of a declaration made by the partner, was admissible to take the case out of the act of limitations, because the plea had admitted the original existence of the debt." The conclusion drawn by Mr. Call is, that "the plea of the act of limitations is an admission, that a proper assumpsit was once made." That case, therefore, so far as it is an authority, is directly in my favour. And so is the case of *Hackley, survivor, &c. v. Patrick and Hastie*, 3 Johnson's New York Reports, p. 536.

Saturday, March 28th, JUDGE ROANE pronounced the following opinion of this Court.

"It appearing that the question propounded to the Court below, for its opinion

(a) 4 Bac. 488; 2 T. R. 762. *Lloyd v. Maund*.

(b) *Peake's Cases*, 208.

(c) *Peake's Cases*, 16.

*Note. In that case, Lord Kenyon said he thought, that though in cases where an action is brought against several partners, the admission of any one might be given in evidence to prove all liable; yet, when one only was sued, the admission of the other could not be given in evidence to charge him.—Note in Original Edition.

and instruction, was a mere abstract question,† on which the said Court was not bound to give an opinion; and it not appearing that the instruction actually given by the said Court produced, or could have produced, any injury to the appellant; this Court, without, considering the rectitude of that instruction, (for the reason aforesaid,) affirms the judgment of the Superior Court.

197 *Wednesday, April 8th, for reasons appearing to the Court, it was ordered that the judgment entered in this cause on the 28th day of March last, be set aside.

Tuesday, February 16th, 1813, JUDGE ROANE delivered the following opinion of the Court.

"The Court is of opinion that, although the acknowledgment of a debt by one or more of the partners of a mercantile firm, after the dissolution thereof, is competent to do away the bar of the act of limitations, in an action brought against the firm; the existence of the debt being first proved by other testimony, or admitted by the pleadings; yet that such acknowledgment is not proper evidence of the existence of the debt, so as to charge the other partners; and that the said judgment is erroneous. It is therefore reversed with costs: and it is ordered that the jury's verdict be set aside, and the cause remanded to the Superior Court for a new trial to be had therein; on which trial, if requested, an instruction shall be given conforming to the principle above declared."

198 **Cavendish v. Fleming*.

Friday, March 20th, 1812.

1. *Executors—Liability for Debts of Estate.*—An executor is not to be charged with the debts due to the estate of his testator, at the time when they became due, but only at the time when he actually received them; except such debts as are lost by his negligence or improper conduct.
2. *Same—Account—Effect as Evidence.*—An executor's account, rendered on oath is prima facie evidence of the sums received by him for the estate of his testator, and of the times when received.
3. *Same—Interest on Actual Receipts.*—An executor, except as to debts lost by his negligence or improper conduct, is chargeable with interest only on his actual receipts; and, generally, where interest is charged, the rule established in the case of *Granberry v. Granberry*, 1 Wash. 349, ought to be observed.

†Note. See *Buster's Executor v. Wallace*, 4 H. & M. 82, pl. 4. But the instruction requested in this case, did not appear to have been upon a mere abstract question; for the Court below refuses to give the instruction, not on the ground that the question propounded was merely abstract, or did not apply to the case, but "because that Court was of opinion, that such acknowledgment was evidence in such action."—Note in Original Edition.

‡*Executors—Liability for Debts of Estate.*—For the proposition that an executor or administrator is not to be charged with the debts due the estate of his testator at the time when they became due, but only at the time when he actually received them, except such debts as are lost by his negligence or improper conduct, the principal case is cited in *Reitz v. Bennett*, 6 W. Va. 423; *Anderson v. Piercy*, 20 W. Va. 324; *foot-note* to *Southall v. Taylor*, 14 Gratt. 269 (containing quotation from *Anderson v. Piercy*, 20 W. Va. 324); *Hooper v. Hooper*, 33 W. Va. 541, 9 S. E. Rep. 943; *Ruhl v. Berry*, 47 W. Va. 824, 35 S. E. Rep. 899. See further, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

§*Same—Interest on Actual Receipts.*—See principal case cited in *foot-note* to *Dillard v. Tomlinson*, 1 Munf. 183; *Reitz v. Bennett*, 6 W. Va. 423; *M'Call v. Peachy*, 3 Munf. 289.

4. **Same—Interest on Legacies.**—An executor is not chargeable with interest on a legacy payable to an infant, before a guardian has been appointed, and he has received notice of such appointment.
5. **Same—When Not Charged with Loss of Debt.**—Under what circumstances an executor is not to be charged with the loss of a debt, contracted with him on behalf of the estate of his testator, or for a loss incurred by his entrusting an agent with bonds for collection.
6. **Same—Compensation—Commission—Ten Per Centum.**—An executor may reasonably be allowed a commission of ten per centum on moneys received by him, where the debts were very small and numerous, and the debtors presumed to have been much dispersed.

See *Fitzgerald, Executor of Jones, v. Jones*, 1 Munf. p. 150, and *Triplett's Executors v. Jameson*, 3 Munf. 242.

Francis Mara, of Greenbrier County, who died in the year 1791, bequeathed his property to be equally divided between his widow Hannah, and his daughter Margaret; appointing the widow executrix, and William H. Cavendish executor. Thomas Fleming intermarried with the widow, and claiming also as guardian of the daughter, filed a bill in the Superior Court of Chancery, for the Staunton District, against Cavendish, for an account and distribution; alleging that his wife, the executrix, had never acted, and that the executor was responsible for the whole estate.

Cavendish answered, in part, denying such sole responsibility; but declaring his willingness to render a fair account; stating too, that he was not informed of the plaintiff's authority to receive the daughter's part, until 1805.

The plaintiff replied generally, and an account was directed. The Commissioner made a report, to which the defendant filed sundry exceptions. In the account stated by the Commissioner, the defendant was charged with all the debts due on the testator's books, and with the whole amount of the sales of a store of goods, and all the other property, as becoming due 199 on the 1st of October, *1792; "at which time it was presumed the money arising from the sale of the estate was all due;" and from that day interest was charged on the total sum; all subsequent payments by the executor were applied in the first place to the discharge of interest; and interest was continued on whatever surplus of principal was left.

One Hutcheson was indebted to the testator in 9l. 0s. 4d. He purchased from the executor, articles to the amount of 7l. 9s. 1d. :

[**Same—Interest on Legacies.**—On the authority of the principal case, it was held in *Johnson v. Mitchell*, 1 Rand. 209, 210, that where a legacy is left in trust and the trustee refuses to act, the executor is not bound to pay the legacy until a new trustee is appointed by the court of chancery, and is not chargeable with interest, before the decree. See further, monographic note on "Legacies and Devises" appended to Early v. Early, Gilmer, 124.

[**Same—Compensation—Commissions Ten Per Cent.**—An executor may reasonably be allowed a commission of ten per cent. on moneys received by him, where the debts are very small and numerous, and the debtors presumed to have been much dispersed. *Beecher v. Foster*, 57 Va. 605, 42 S. E. Rep. 664, citing principal case on the same point. The principal case is cited in *Gregory v. Parker*, 87 Va. 456, 12 S. E. Rep. 801; *foot-note* to *Fitzgerald v. Jones*, 1 Munf. 150; *Estill v. McClintic*, 11 W. Va. 412. See further, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Grant. 6.

Same—Admissions of—Admissibility as Evidence.—See *Gilmer v. Baker*, 24 W. Va. 87; *foot-note* to *Cox v. Thomas*, 9 Gratt. 233 (containing an excerpt from *Gilmer v. Baker*, 24 W. Va. 87).

he also received from the executor, two bonds for property sold, amounting to 46l. 1s. 4½d. for collection, and executed a mortgage for the whole amount; but it turned out, that there was a prior mortgage and the debt was lost by insolvency. The Commissioner, although he had charged the defendant with all the debts, refused to credit these sums.

He likewise refused to credit 14l. 6s. 9d., the amount of three small purchases by Edward M'Kinstry, Isaac Reamy, and Abraham Thompson. The first was (as the exception states) to have given bond the next day after the sale, but absconded that night: the other two entered in the western army before any suit could be instituted.

The defendant claimed credit for certain book debts included in the charges made against him: but the Commissioner being of opinion, that those debts had, in all probability, been collected, refused the allowance.

He would not allow the defendant 4l. 12s. 3d., for the amount of a note of one James Boyer, which the defendant thought could not be made, and therefore did not sue.

He allowed only five per cent. commission for the trouble of collection, and responsibility for all the claims and debts; notwithstanding they were numerous and small, and the debtors probably much dispersed at the time of collection.

On all these points, except the mode of charging interest, the defendant excepted formally. And, at the hearing he tendered an additional exception; viz.

"that the account was not taken, or 200 the interest charged agreeably to the rules laid down by the Court of Appeals in the case of *Granberry v. Granberry*, 1st Washington." This exception was not received by the Court, because, "1st. It had not been offered in due time, agreeably to the rules of Court;" and, 2d. "Because the Court considered this a case in which all the moneys belonging to the estate were either in the hands of the executor before interest was charged against him, or of debtors who were properly chargeable with interest."

The Chancellor sustained the exception as to the 9l. 0s. 4d. part of Hutcheson's mortgage; allowed ten per cent. commission; and, overruling all the other exceptions, decreed the balance to be paid to the plaintiff, including the infant's part; without annexing a condition, that a bond should be given for refunding in the event of debts arising to charge the estate.

From this decree the defendant appealed. Mr. Botts, who was counsel for the appellant, being dead, Williams, on his behalf, submitted the following points:

1st. That if the defendant is taken to have admitted the authority of the plaintiff to receive the infant's part, the chancellor, who was ex officio her guardian, ought not to have hazarded the sacrifice of her fortune upon the uncertainty of the plaintiff's authority, as to which such admission could not bind her.

2d. That the admission of the defendant, that he had been informed of the plaintiff's

right to receive the infant's part, was no admission of the correctness of that information.

3d. That the ward ought to have sued by her guardian, in order that the suit might survive to her if she attained her age, or in case of the guardian's death before it ended.

4th. That there was error in subjecting the executor to the loss of the book-debts, without any proof that a witness existed to support a suit for any one of them.

201 5th. That the other exceptions should have been sustained by the chancellor.

And 6th. That there was error in distributing the estate without directing, as a condition, that a bond for refunding should be executed.

No counsel appeared for the appellee.

Thursday, March 10th, 1814, the president delivered the opinion of the Court.

"The court is of opinion that the decree is erroneous in charging the executor with the debts, either old or new, due to the estate, at the time when they became due; except in those cases where the debts were lost by his negligence or improper conduct. They should have been charged to him at the time when actually received; of which his account, rendered on oath, would be prima facie evidence. The decree is also erroneous in charging the executor with interest from the time the debts became due, without any proof of their having been then received. (a) An executor, except as to debts lost by his negligence, or improper conduct, is chargeable with interest only on his actual receipts; and, even as to the receipts, the Court sees nothing in this case to justify a more rigid rule than that established in the case of *Granberry v. Granberry*, in 1st Washington. The decree is also erroneous in not having distinguished that portion of the money which was to be paid to the appellee in right of his wife, and that which was to be paid to him as guardian of the daughter of the testator; and the Court is of opinion that, as to the latter portion, the executor is not chargeable with interest, except from the time when the guardian was appointed, and notice thereof given to the appellant. (b) The Court is also of opinion, that the appellant's exception, as to the money intended to have been secured by *Hutchinson's* mortgage in the proceedings mentioned, should have been

202 wholly *sustained.* It approves the allowance of a commission of ten per centum under the particular circumstances of this case, where the debts were very small and numerous, and the debtors presumed to have been much dispersed. And (without deciding on any other point, as before stated) it is decreed and ordered, that the said decree be reversed and annulled, and that the appellee pay to the ap-

pellant his costs by him expended in the prosecution of his appeal aforesaid here. And it is ordered, that the cause be remanded to the said Court of Chancery, to be finally proceeded in, according to the principles now declared."

Hutchinson v. Kellam, and Lymbrick v. Seldon.

October, 1811.

1. Court of Appeals—Jurisdiction—Freehold.†—To give the Court of Appeals jurisdiction, on the ground that the matter in controversy is a freehold, or franchise, the right to the freehold, or franchise, must be directly the subject of the action, not incidentally or collaterally.
2. Same—Same—Same—Trespass—Case at Bar.—If, therefore, in an action of trespass quare clausum fregit, the damages recovered be less than one hundred dollars, the defendant cannot appeal to this court; notwithstanding it appears from the record that the title, or bounds of land, were drawn in question.

These causes were argued together, December 16th, 1811, in the Reporter's absence. The single point on which the Court decided, was, whether it had jurisdiction of the appeals in question. In both cases, the action was trespass quare clausum fregit, and the damages recovered less than one hundred dollars; but it appeared from the records, that the titles or bounds of lands were drawn in question.

203 *Tuesday, March 31st, 1812, the judges delivered their opinions seriatim.

JUDGE COALTER. These are actions of trespass quare clausum fregit, in which the damages found are below 100 dollars;

†Court of Appeals—Jurisdiction—Freehold.—To give the appellate court jurisdiction on the ground that the controversy concerns a freehold, it must be directly the subject of controversy. *McClagherty v. Morgan*, 26 W. Va. 193, 14 S. E. Rep. 993; *Clark v. Brown*, 8 Gratt. 551, both citing the principal case.

‡Same—Same—Same—Trespass.—The action of trespass is one in which damages alone can be recovered, and, although title or bounds of land may be incidentally or collaterally brought into question, yet the value of the matter in controversy is from the nature of the action, the value of the damages sustained by the trespass, and this as well where the title or bounds of land may be drawn in question as where they may in no manner be involved. Thus in such case if the damages recovered be less than one hundred dollars, the defendant cannot appeal to the court of appeals, notwithstanding it appears from the record that the title, or bounds of land were drawn in question. See, citing principal case with approval, *Clark v. Brown*, 8 Gratt. 551; *Umbarger v. Watts*, 25 Gratt. 177; *Buckner v. Metz*, 77 Va. 125; *Greathouse v. Sapp*, 26 W. Va. 89.

In *Skipwith v. Young*, 5 Munf. 376, it was held that in an action on the case for consequential damages, occasioned by the erection of a mill, if the damages recovered be less than one hundred dollars, the defendant cannot appeal to the court of appeals, notwithstanding it appears from the record that the right to erect the mill was drawn in question. JUDGES CABELL and ROANE considered the principle involved to be the same as that in *Hutchinson v. Kellam*, and base their opinion on this case. JUDGE BROOKE, who concurred with JUDGES CABELL and ROANE in dismissing the appeal, did not consider it necessary to adopt the whole course of reasoning pursued by the judges in the principal case, nor did he consider it material to inquire whether the case at bar differed from the principal case; but JUDGE COALTER in his dissenting opinion, distinguished the two cases.

See further, monographic notes on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 263.

Appellate Practice—Dismissal of Appeal—Costs.—See monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720. See principal case cited on this subject in *Ayres v. Lewellin*, 8 Leigh 616.

(a) *Dillard v. Tomlinson*, 1 Munf. 183.

(b) *Dillard v. Tomlinson*, 1 Munf. 183.

*Note. The defendant in this exception contended, that he ought to be allowed a credit for the sum intended to be secured by *Hutcheson's* mortgage, "as, from the credit before given him by the testator, and his rank in life, (he being high sheriff of the county,) there was a reasonable presumption that he might be trusted."—Note in Original Edition.

and the question is, whether the appeals are to be dismissed, the Court not having jurisdiction? According to my opinion, another question arises, and that is, whether the freehold, or the title, or bounds of the land, were drawn in question; and if so, that we should take jurisdiction of the cases, notwithstanding the smallness of the damages: but I am arrested in this inquiry, because the other members of the Court are of opinion, that, although the freehold may have been in controversy, and decided on by the Court, yet the damages are to be the sole criterion by which we are to be governed, as to the point of jurisdiction; and they being under 100 dollars, the appeals must be dismissed.

After the most careful examination of which I am capable, and although I have had the benefit of the most patient and able advice of my brethren, I have not been able to satisfy myself, that the damages are the sole criterion by which we are to determine our jurisdiction in these cases; and it therefore becomes my duty to deliver my opinion; satisfied, when the opinion of others are delivered, I shall be found wrong, although, at present, I have not the good fortune to perceive it.

The Act of Assembly, (a) entitled, "An act for reducing into one act, the several acts concerning the Court of Appeals, and the special Court of Appeals," and which passed in October, 1792, in the 2d section enacts, That the Court of Appeals, amongst other things, shall have jurisdiction, "also in such cases, as are now pending therein, or shall be brought before them by appeals, writs of error, or supersedeas, to reverse decrees of the High Court of Chancery, or judgments of the General Court, or District Courts, &c. if the matter in controversy be equal in value, exclusive of costs, to

204 100 dollars, *if the judgment sought to be reversed shall be rendered in the District Court, or 150 dollars if in the General Court, or High Court of Chancery, or be a freehold, or franchise." (b)

The 14th section of the same law enacts, "That appeals, writs of error, and supersedeas, may be granted, heard, and determined by the Court of Appeals, to, and from any final decree, or judgment of the High Court of Chancery, General Court, and District Courts, in the same manner, and on the same principles, as appeals, writs of error, and supersedeas, are to be granted, heard, and determined by the High Court of Chancery, and District Courts, to, and from any final decree or judgment of a Chancery Court," &c.

The District Court law contains two sections, which it may be proper to advert to. (c) This law passed the same session with the other, and is entitled, "An act, reducing into one, the several acts, concerning the establishment, jurisdiction, and powers of the District Courts. The 9th section declares, "That the Court, when a question, new or difficult, arises, may adjourn any matter of law, to the General Court; or any party, thinking himself aggrieved by the judgment of the

District Court, may appeal therefrom, as of right, or obtain a writ of error thereto, from the Court of Appeals, not of right, but at the discretion of the Court."

By the 53d section, it is enacted, "That where any person, &c. shall think himself aggrieved by the judgment of a County Court, &c. in any action, suit, or contest whatsoever, where the debt, or damages, or other thing recovered, or claimed, exclusive of costs, shall be of the value of 100 dollars, or 3,000 pounds of tobacco, or where the title, or bounds of land, shall be drawn in question, or the contest shall be concerning mills, roads, the probat of wills, or certificates for obtaining administration, such person may appeal, &c. to the District Court."

205 *Under these Acts of Assembly, the question now before the Court, arises; and, before I come particularly to consider them, it may not be impertinent to observe that, in my humble opinion, it would frequently save the Courts' much perplexity and doubt, were the legislature, in passing laws to organize and establish a particular Court, to enact, positively in one act, all the provisions relative to that Court, instead of applying the provisions for establishing other Courts to it. The contrary course of legislation, however, has been long pursued, and doubtless for wise reasons: this is abundantly manifest, not only from the laws now immediately under consideration, but from all the laws relative to the judiciary department, in all its branches.

Thus the legislature having established a certain principle as to one Court, which it finds would properly apply to another, instead of re-enacting it as to that other, adopts and applies it, by a general clause, to that other. This may, in some respects, not be an unsafe course. The uniformity of the principle, as to both Courts, is a desideratum, which might be put to hazard by slight variations in phraseology, were a new bill drawn; but, be this as it may, this course of legislation has been adopted, and it becomes us, according to our best judgment, to discover the intention of the legislature, and pursue it. To return, however, to the question before the Court, I understand this position to be maintained, as to the jurisdiction of this Court, in actions of trespass quare clausum fregit: that although, in such action, the defendant may plead that the freehold is in him, or if the action be between two coterminal tenants, each holding in fee, relative to their boundaries, in which cases, the title to the freehold is directly litigated, and decided on; that yet this Court has not jurisdiction, to reverse an erroneous judgment, thus settling the title to lands, unless the damages recovered be 100 dollars, or upward. That, as the words of the Act of Assembly require that the matter in controversy shall be equal in value, ex-

206 clusive *of costs, to 100 dollars, or shall be a freehold, or franchise, that the matter in controversy, in this action, is the damages to the freehold; and although the title to the freehold may be collaterally decided on, yet that is not the matter in controversy, and so these cases

(a) Revised Code, 1st vol. p. 60.

(b) Revised Code, 1st vol. p. 62.

(c) Ib. p. 72.

fall within the first member of the sentence, and require that the damages should be 100 dollars, or upward. In short, although the right to the freehold is decided on, that, yet, as possession cannot be recovered by this action, the freehold is not the matter in controversy, within the meaning of the act.

I shall first consider this general position, under the words of the second section of the act above quoted, concerning the Court of Appeals; and, secondly, I shall consider how far those words have been explained, or enlarged by the other clauses and acts; premising, however, that there is no doubt entertained, as I understand, that an appeal would lie to the District Courts formerly, and to the Circuit Courts now, in actions of this nature, where the title, or bounds of lands, are drawn in question, even if the damages recovered be but a cent.

I shall not stop to inquire, whether the verdict and judgment, in this action, can be pleaded in bar of any action for another trespass, on the same lands, but shall content myself by admitting, that the verdict is only evidence to another jury, as the verdict in ejectment; but it may not be improper to make a few observations as to the nature of this action, as laid down in the books. In *Bac. Abr.* it is said, that this action, as well as those of ejectment and waste, is a mixed action, and must be brought where the land lies; and in the 3d vol. of *Black. Com.* p. 214, it is said, relative to this action, "That it is one of the ways devised, since the disuse of real actions, to try the property of estates; though it is not so usual as that by ejectment; because that not only gives damages, but also possession of the land: whereas in trespass, which is merely a personal suit, the right can only be ascertained, but no possession delivered."

207 Also in Gilbert's *Law of Evidence*, p. 208, it is laid down, that the defendant in an action of trespass, may prevail, on the plea of not guilty, by making title to the land, for then he satisfies the declaration, as he proves that he did not enter into the plaintiff's close, but his own, and, consequently, that is a very just disproof of the plaintiff's declaration.

It will be my first object, then, to consider, whether a fair construction of the second section of the act of 1792, will not authorize this Court to take jurisdiction in this action when the freehold is drawn in question? And, secondly, if it will not, how far that section has been explained, or amended and enlarged, by the clause authorizing appeals to this Court, in the same manner, and on the same principles, as appeals are granted from the County Courts to the District Courts.

In construing statutes, it is proper, that all acts in *pari materia*, though some of them may be out of force, are to be consulted in forming a conclusion. (a) By the act of 1705, (b) for establishing a General Court, an appeal lay in every case to that Court, of what nature or value soever the cause should be; but in personal actions,

where the judgment or decree was for any sum under 20l., or 4,000 pounds of tobacco, the appellant could only assign error in matter of right; if above that, but under 50l., or 10,000 pounds of tobacco, he could only assign error in matter of right, and such errors in form as had been insisted on in the Court below; but where above 50l., and in all real actions, of what value soever, he might assign any errors, either of form or substance.

The damages in personal actions was fifteen per cent., and in real actions, 2,000 pounds of tobacco: mixed actions, such as ejectment and waste, and trespass *quare clausum fregit*, if that be a mixed action, do not seem to be expressly provided for, but, partaking of the reality, probably were embraced in the clause relative to real actions.

208 *By the act of 1748(c) for establishing a General Court, where any person, &c., is aggrieved by the judgment of any other Court of record, &c., in any action or suit whatsoever, where the debt, or damages, or other matter recovered in such action, exclusive of costs, shall exceed 10l., or 2,000 pounds of tobacco, or where the title or bounds of land shall be drawn in question, such party may appeal, &c.; but it is restrained in assigning errors between 10l. and 20l., and between 20l. and 50l., in the same manner as stated in the act of 1705: but where the judgment or decree is for more than 50l., or 10,000 pounds of tobacco, and in all real actions of what value soever, any errors may be assigned.

Damages on affirmance in personal and mixed actions are fifteen per cent.; and in real actions 2,000 pounds of tobacco: and where the plaintiff or demandant appeals, and judgment is affirmed, he pays damages amounting to 500 pounds of tobacco; and no appeal shall be valid, or writ of error, or supersedeas granted, where the debt, damages, or other matter recovered, shall be of less value than 10l. or 2,000 pounds of tobacco, exclusive of costs, unless, in such suit, the title or bounds of land shall be in question.

This last law was re-enacted verbatim in 1753, as to these matters, and so the law remained until the acts of 1777, October session: whereby the jurisdiction of the General Court, which was theretofore, as well in common law as Chancery cases, and was the supreme Court, on this side the water, was divided; by the first of which, (Ch. Rev. 14,) a Court of Chancery was established, and by the second, (Ch. Rev. 17,) the General Court, having only common law, and criminal jurisdiction.

By the 42d section of this latter act, it is provided, That if any person, &c. shall think themselves aggrieved by the judgment or sentence of any Court, &c. in any action, suit, or contest, where the debt, or damages, or other thing, recovered or claimed, exclusive of the costs, shall

209 *be of the value of 10l. or 2,000 pounds of tobacco, or where the title, or bounds of land, shall be drawn in question, or the contest shall be concerning mills, roads, the probat of wills, or certificates

(a) *Gaskins v. Commonwealth*, 1 Call, 198.

(b) Edition of 1734, p. 168.

(c) Edition of 1748, p. 245.

for obtaining letters of administration, such person may appeal, &c. By the 43d section, where the defendant, in a personal action, appeals damages, on affirmance, shall be ten per cent., and when in a real or mixed action, 10l. or 2,000 pounds of tobacco; and where the plaintiff appeals, and in contests about mills, &c., where the judgment is affirmed, the party appealing shall pay 5l.

The word claimed, united with the thing recovered, occurs first in this law, as also the jurisdiction in cases of mills, &c.; and mixed actions are by express provision put on the same footing with real actions, as to the damages on affirmance.

This Court, as to common law cases, then remained the Court in the last resort, until May session, 1779, when an act passed (Ch. 22,) constituting the Court of Appeals, to consist of the Judges of the High Court of Chancery, General Court, and Court of Admiralty: which law provides, that the Court so organized, shall have jurisdiction, inter alia, in all suits brought before them by appeals, and writs of error, to reverse decrees of the High Court of Chancery, judgments of the General Court, and sentences of the Court of Admiralty, &c. if the matter in controversy be equal in value, exclusive of costs, to 50l. or be a freehold or franchise; here the words now under consideration first occur.

Under these laws, it will be admitted, I presume, that the General Court, prior to the year 1779, that is to say, from the year 1748, until that time, had jurisdiction by appeal, being the Court in the last resort, in all actions, whether real, personal, or mixed, let the damages be what they may, provided the title, or bounds of lands, were drawn in question; and, of course, that the Court would have taken jurisdiction in these cases.

210 *It is said though, that the legislature intended a change in this respect in the Court of the last resort, and to confine the jurisdiction, unless the damages were 100 dollars, or upwards, to such real actions, and at most to such mixed actions, as ejectment and waste, where possession of the land itself might be recovered. The fact is, that for near half a century, in the disputes concerning land, the value of the subject matter of dispute, not the value of the particular tract, has given the appellate Court jurisdiction. (a) The action of trespass quare clausum fregit, as all the books say, may decide the right to the freehold. It is an action, which, in all times, has been much used in this country, to settle titles, and particularly disputed boundaries; and in these actions, where the freehold is in controversy, and the principal matter in controversy, and, as in actions real, the damages, as well as the right to the freehold, are also in controversy, but the latter, the principal matter, I cannot see why we should stick in the letter, and say, that, though the freehold has been litigated, and decided on, yet, because possession could not be delivered, that the freehold was not the matter in controversy. If we take the letter of the act, this Court ought not to take ju-

risdiction in ejectment cases, because that action is not for a freehold, but for a term of years, and judgment is given for the term, which is not a freehold; yet, because the title of the lessor of the plaintiff to the freehold, as well as that of the defendant are incidentally drawn in and decided on, this Court always takes jurisdiction in those cases. Taking it therefore, either according to the reason or letter of the law, I cannot see why jurisdiction should be taken in one of these actions, and not in the other; the rights of the parties are equally decided in both actions; and as the Supreme Court had jurisdiction in both cases equally for near half a century, as I can see no reason for changing the law, and as such change, if it did take place, is rather to be inferred than found in the ex-

press letter of the act, the law, supposed to *change the former, not declaring, that it is in those cases, and those only, in which the freehold or franchise is not only controverted, but possession delivered or restored; I am not disposed to think that the jurisdiction of the Court, in the last resort, was intended to be narrowed as to this subject, within what it had formerly been. Why does this Court take jurisdiction in actions of false imprisonment, where the defendant justifies because the plaintiff is his slave, and where the very finding of damages to 100 dollars, perhaps, would be error? It is not because there is judgment to deliver the plaintiff from imprisonment; but because the right of freedom, the loss of which would completely disfranchise him, is incidentally and collaterally decided.

In the case of *Hutcheson and Kellum*, if the Court had instructed the jury as to the law of the case, and under that instruction, they had found for the defendant, this Court would have had jurisdiction. (2 Call, 508; 3 Call, 181.) But if A. sues B. for a trespass on 100 acres of land; the defendant claims the whole tract, and the Court, erroneously, instruct the jury, that he has title to ninety acres of the tract, so that the damages to the ten acres only amount to ten dollars, the plaintiff has no redress, although, but for that erroneous instruction, he would not only have had his title correctly established to the 100 acres, but would probably have got 100 dollars damages, or more; so that establishing his title to the ten acres would be a real misfortune to him; for, had the Court decided against him, as to the whole tract, the whole error would have been corrected here. But if I had any doubts upon this subject, they are not only removed, as to cases of freehold, but as to all cases where the title or bounds of land are drawn in question, by the 14th section of the act of 1702, which gives this Court jurisdiction, in appeals, writs of error, and supersedeas, in the same manner, and on the same principles as appeals, &c., are granted to the District Courts, from judgments of the inferior Courts.

212 *As this act professes to be, an act for reducing into one act the several acts concerning the Court of Appeals, &c., it will be proper to look back to the time and occasion when the clause in question was originally enacted. It will be

(a) 3 Call, 470-4.

recollected, that from 1779 until 1788, the Court of Appeals consisted of the judges of the General Court, High Court of Chancery, and Court of Admiralty: but on the 22d day of December, 1788, two acts passed, the one (ch. 67,) to establish District Courts; the other (ch. 68,) to establish a Court of Appeals, to consist of five judges, to be elected according to the constitution, by joint ballot of both houses.

By the first of these acts, (sec. 16,) it is declared, that questions of difficulty may be adjourned, &c. &c.; where a party thinks himself aggrieved by the judgment of the District Court, he may appeal thereupon as of right, or obtain a writ of error thereto, from the Court of Appeals, not of right, but at the discretion of the Court. Thus it would seem, that by this section, an appeal would be allowed in all cases in which that Court had jurisdiction, even in actions of slander, where the damages were under 100 dollars. This general right, however, was afterwards restrained, as will be seen. By the 87th section of the same law, it is declared, that where any person thinks himself aggrieved by the judgment of the County Court, &c., in any action, suit, or contest whatever, where the debt, or damages, or other thing recovered, or claimed, in such suit, exclusive of costs, shall be of the value of 30l. or 3,000 pounds of tobacco, or upwards, or where the title, or bounds of lands are drawn in question, or the contest shall be about mills, roads, the probat of wills, or certificates for obtaining administration, such person may appeal to the District Court.

By the 2d of these acts, to wit, that organizing the Court of Appeals, it is enacted, after directing how the judges are to be elected, &c. (in sec. 12,) that the several acts of assembly, concerning the Court of Appeals, as it is at present constituted, shall be pursued, *mutatis mutandis*, as far as it is not, or shall not be otherwise directed by this or a future act or acts. This, then, would adopt the former law of May, 1719; and had the right of appeal been intended to remain the same as under that act, if it was not considered as altered by the section above noted, there would have been no necessity for any further provision; but the district law above cited (sec. 16,) had given a general appeal, and the former law, establishing the Court of Appeals, had neither provided for the cases of tobacco debts, nor caveats, nor for those arising in disputes about mills, roads, &c. The section, therefore, further declares, and enacts thus: "provided, always, that appeals, writs of error, and supersedeas may be granted, heard, and determined, by the Court of Appeals, to and from any final judgment of the District courts, in the same manner, and on the same principles, as appeals, writs of error, and supersedeas, are to be granted, heard, and determined, by the District Courts, to and from final judgments in the County Courts. According to these acts, then, this Court took jurisdiction in all cases of caveats, cases of roads, mills, &c. in cases of tobacco debts, to the amount of 3,000 lbs. and upwards, and in other cases where the sums recovered, or claimed,

were 30l. and upwards. As to this latter point, to wit, extending the jurisdiction to cases as low as 30l., it will be seen by recurrence to the order book, (No. 2, p. 90,) in the case of Yancey v. Johnson, that there was a judgment recovered in the Charlottesville District Court, by the appellee, against the appellant, on the 2d of September, 1790, for 30l. 11s. 10d. damages and costs, in an action of assumpsit; which judgment was reversed in this Court in June, 1791. In the case of Lee v. Gale, in the same book, p. 140, 21l. 2s. 1d. were recovered in the County Court, in March, 1788; also, in an action of assumpsit, an appeal was taken to the General Court, then having cognizance *as low as 10l.; it was, of course, transferred to the District Court, where, in 1791, the judgment was affirmed; and that judgment was affirmed in this court; its jurisdiction, as to appeals, being co-extensive with that of District Courts. Thus the Court of Appeals, prior to the acts of 1792, took jurisdiction in cases below 50l. But it may be said, that these cases passed sub silentio, and that the court, in reality, at that time, had not jurisdiction below 50l. It can scarcely be supposed that they passed without observation, and if observed, could not have passed without some consideration. I have no doubt the Court considered their jurisdiction enlarged, by that clause, to cases of 100 dollars in amount: but the case of Gaskins v. Commonwealth, 1 Call, 194, in a solemn adjudication, that this clause did operate on the jurisdiction of this Court, and, I think, the jurisdiction taken in caveats, (a) in which cases neither party has the freehold, unless where the caveator may claim by prior patent. The cases of roads, mills, probat of wills, and granting letters of administration, particularly the two latter, together with tobacco debts; for, in these last, the jury does not find the value, but the debt, to the amount of so many pounds of tobacco, as the bond specifies, must all depend on this clause.

The legislature, too, considered the jurisdiction as extended by that law to cases of 100 dollars; for, in 1792, when they come to reduce the general acts into one, they insert that sum in the law. But it may be said, as they changed the sum, why did they not change the other phraseology of the section, so as to make it the same as the section in the District Court law? I answer, that had they done so, it would have been necessary to have inserted several clauses from the District Court law, which the legislature wished to avoid, by retaining the clauses in question, and particularly as they were professing simply to reduce into one the several acts, &c.: but there may have been another reason; the word franchise was not in the District Court law. This is certainly an important subject of jurisdiction; and, therefore, without altering the laws as they therefore stood, the legislature satisfied themselves by reducing them into one act.

Upon the whole, I can see no reason for confining the jurisdiction of this court to cases of freehold, where, as well the title as possession, is adjudged to the one party

(a) Currie v. Martin, 3 Call 40.

or the other. I think I am not impelled to a contrary decision by the 2d section of the Court of Appeals' law; and that, if that section was more express, yet it must be taken in conjunction with the other sections and laws; and all must be construed together as forming one system, and so to have their respective operations. I think, therefore, that the court may have jurisdiction in these cases, if the freehold, or title, and bounds of lands, are in question, and that we ought to look into the records to see if such is the case.

JUDGE CABELL. These were actions of trespass *quare clausum fregit*, in which the damages recovered were less than 100 dollars; and the only question is, whether this court can take jurisdiction; it appearing from the records that the title or bonds of lands were drawn in question in the inferior court.

I consider this question as lying within a very narrow compass, and susceptible of a ready solution, by reference to the clause in the act of assembly regulating the jurisdiction of this Court, as contrasted with that regulating the appellate jurisdiction of the District Courts. To give this Court jurisdiction, the matter in controversy must be equal in value to 100 dollars, or must be a freehold or franchise. The action of trespass is one, in which damages only are recovered; and, although the title or bounds of lands may be incidentally and collaterally brought in question, yet the value of the matter in controversy is, from the very nature of the action, the value of the damages sustained by the trespass; and this, as well where the title or bounds

216 of land may be drawn in question, as where they may in no manner be involved in the dispute. To give this Court jurisdiction on the ground of freehold or franchise, the language of the law is express, not that the matter in controversy must have relation to, or concern a freehold or franchise, but must be a freehold or franchise. I consider, therefore, that it must be directly the subject of controversy, and not incidentally and collaterally, as in actions of trespass. This destination seems to have been particularly attended to by the legislature, as appears from the marked difference in the phraseology of the two acts regulating the jurisdiction of this court, and the appellate jurisdiction of the District Courts. In the latter, the expressions "be a freehold or franchise," are dropped, and others adopted, viz. "the title or bounds of land shall be drawn in question." I cannot conceive that they meant the same thing by this essentially different form of expression. It is not for me to assign the reason of the difference; it is sufficient that the legislature has determined that the difference shall exist. I am, therefore, of opinion, that the appeals be dismissed.

JUDGE ROANE. As to the subject of the jurisdiction of this Court in general, I beg leave to refer to the opinion I have just delivered in the case of *Lewis v. Long*. The result of that opinion is, that where the matter in controversy is of less value than 100 dollars this court has no jurisdiction, unless that matter be a freehold or

franchise. This is expressly laid down in the 2d section of the act constituting this Court, and is not changed or varied by the 14th section of the same act, declaring that appeals, writs of error, or supersedeas, shall be granted, heard, and determined, by this Court, to and from the judgments of the General Court, District Courts, and High Court of Chancery, in the same manner, and on the same principles as they are granted, heard, and determined, by the High Court of Chancery and District Courts, to and from the judgments of 217 the County Courts. *These terms,

"manner and principles," may be abundantly satisfied without impugning or doing away the criterion of jurisdiction expressly established by a former section of the same act; and it is presumed that this Court went full far enough, in the case of *Gaskins v. Commonwealth*(a) in construing this provision to embrace the limitation of time prescribed in relation to the other Courts; in a case, too, in which there was no conflicting provision, as to appeals allowed to this Court, but which (to say the most) was merely an omitted case: although, as to the County Courts, an appeal lies to the District Courts, in cases in which the title or bounds of land shall be drawn in question, (probably because questions of this kind, being generally intricate, should, in no event, be submitted to the final decision of those tribunals) it does not follow that the same provision was necessary in relation to trials in the District Courts, or Superior Courts, had there been no provision to the contrary. Those Courts, being more skilled in the law, might, in the opinion of the legislature, well be trusted with the final decision of questions of that nature, except where the sum found is over the general limits of the act, or where the controversy is for the freehold or franchise itself.

It is said that, in relation to the old General Court, appeals lay in all cases where the titles of land came in question. This is admitted; and that for the very reason that they now lie from the County Courts to the District Courts. And the reason why the present Supreme Court is narrowed in its jurisdiction in this case, from that which formerly belonged to the old General Court is, because of the establishment of the intermediate District Courts, which, as I have already said, are made final as to their jurisdiction, unless the freehold itself be the direct object of the action.

If we attend to this distinction in the two acts, and reject the construction contended for under the term "manner and principles," we are then brought to the 218 "single point, whether the matter in controversy in an action of trespass *quare clausum fregit* is the freehold itself.

This is expressly shown to be otherwise by all the elementary writers. In 3 Bl. 213, we are told that in this action "nothing is recovered but damages for the wrong committed," though it is readily admitted that in this action the title or bounds of the land do sometimes come in question. In the County Courts, when the title or bounds of land do come in question, (or

(a) 1 Call, 194.

where the adequate damages are found,) an appeal lies to the District Courts; and in the District Courts, when the freehold or franchise itself shall be the matter in controversy, (with the same exception as to damages) an appeal lies to this Court. The latter not being the case, in the present instance, though it be admitted that the controversy was one in which the title or bounds of land may have been drawn incidentally and collaterally in question; and the damages found in both these cases being below the limit marked out for the jurisdiction of this Court; I am of opinion that both appeals be dismissed.

JUDGE FLEMING. These being actions of trespass *quare clausum fregit*, sounding altogether in damages, which were assessed at less than one hundred dollars; and neither a freehold nor a franchise being in controversy, I am of opinion that this Court has no jurisdiction of the causes, and that the appeals be dismissed.

By the Court, appeals dismissed.

219 *Milstead v. Redman.

Thursday, March 26th, 1812.

1. **Breach of Promise to Marry—Declaration—Blank—Effect after Verdict.**—After verdict in an action for breach of a promise to marry, judgment ought not to be reversed on the ground that the time when the marriage was to be solemnized is left blank in the declaration.

See *Darby v. Henderson*, &c. ante, p. 115, and the cases there cited; also *Harris v. Cage and Wife*, 5 Mod. 411, *Carth. 467*, *Bac. 580, 581*, and 2 *Chitty*, 89, 92.

2. **Continuances—Several Continuances Already Granted.**—Under what circumstances a party having been repeatedly indulged with continuances of a cause, may with propriety be refused a further continuance.

See *Ross v. Norvell*, ante, p. 170, and *Hook v. Nanny*, 4 H. & M. 167.

The declaration in this case was in the following words; "Jane Redman complains of Joseph Milstead, in custody, &c. for that, on the day of , in the year of our Lord , in the Parish of , and County aforesaid, he, the said Joseph Milstead, then being sole and unmarried, in consideration that the said Jane, she being also then sole and unmarried, at the special instance of the defendant, had then and there agreed and undertaken, and faithfully promised the said defendant, that she, the said Jane, the plaintiff, would take the said defendant to be her husband within the space of months then next following, he, the said defendant, undertook and

then and there faithfully promised the said plaintiff, Jane, that he the said Joseph, the defendant, would take to his wife the said Jane, the plaintiff, within the space of months, then next following; and the said Jane, the plaintiff, confiding in the said promise and undertakings of the said defendant, hath always, from thence hitherto, refused to contract matrimony with any other man whatsoever, and still remains, and is sole and unmarried, and always, from the time of making the promises and undertakings aforesaid, for the space of months, then next following, and always from thence afterwards hitherto, she, the said plaintiff, being sole and unmarried, was, and is ready to take to her husband the said defendant, and very often within that time, offered to take, to be her husband, the said defendant; yet the said defendant, not in the least regarding his many promises or oaths, but contriving, and fraudulently has deceived the said plaintiff, and within the time aforesaid, nor at any time since, hath the said defendant taken to wife the said plaintiff, although often required so to do, but he wholly hath refused, and still doth refuse to take her, the plaintiff, to wife, whereby she, the plaintiff, is damaged one thousand dollars, and therefore she sues."

Plea the general issue.

In the County Court of Amherst, in which the suit was instituted, the defendant obtained a continuance at his costs in November, 1805. A verdict was found for the plaintiff in March, 1806, for one thousand dollars damages; whereupon a new trial was granted the defendant, upon condition of his paying the costs of that trial. At May term following, the cause was again continued on his motion, and at his costs. At August term he moved for a further continuance, on the following grounds, to wit; "that Mary Deversier was a material witness for his defence, and that he could not go to trial without her testimony; also, that Thomas Coleman was a material witness in this case; that he could not go safely to trial without his evidence; that they were served with a subpoena in this case to this term by the defendant, who had given the subpoena to the sheriff, but that the same was given back to him to serve at the sheriff's request; and they did, on the back, acknowledge the same; which was admitted before the Court by the plaintiff; and the defendant was sworn in Court, and on oath stated the above facts; also John Deversier, husband to the said Mary, being sworn, stated on oath, the said Mary was so ill with a bad fever, she was unable to attend Court, and that this was the reason she did not attend." The Court overruled the motion; to which opinion the defendant excepted. Another verdict was then found for the plaintiff, assessing his damages to 750 dollars. Judgment was entered accordingly; which being affirmed by the Superior Court of law, the defendant obtained a writ of *supersedeas* from a judge of this Court.

The following errors were assigned in the petition. First, that the declaration does not set out a cause of action. The

***Continuances—Several Continuances Already Granted.**—The principal case was cited on this point in *Brooks v. Calloway*, 12 *Leigh 478*; *Logie v. Black*, 24 *W. Va. 28*. See further, monographic note on "Continuances" appended to *Harman v. Howe*, 37 *Gratt. 678*.

Appellate Practice, Review of Matters of Discretion.—It was anciently held that whatever vested in the discretion of the court could not be reviewed. But this doctrine was repudiated in *Milstead v. Redman*, 8 *Munf. 219*, and it is now well settled that, whenever a subject of discretion is decided by the court below, the decision must be in accordance with sound judicial discretion, governed by established rules and principles, or at least, it must not be palpably in violation of established rules and precedents; and if it is such decision, though on a subject within discretion, as it has been called of the court below, will nevertheless be reviewed and reversed by the appellate court. *Welch v. County Court*, 20 *W. Va. 69*, 1 *S. E. Rep. 341*. See further, monographic note on "Appeal and Error" appended to *Hill v. Salem, et al.*, *Turnpike Co.*, 1 *Rob. 268*.

action purports to be one for a breach
221 of *marriage promise: but, by reason
of the blanks in the declaration, nothing
is so definitely charged as to present a
cause of action.

1. The promise is laid to marry the plaintiff within [blank] months: and the declaration proceeds to state, that the plaintiff remained sole from the time of the promise aforesaid for [blank] months: but there is nothing to identify the two periods; not even the formal particle "said:" and hence it results, that there is no breach of promise laid in the declaration.

2. This action will lie in three cases only; 1st. Where the promise is not restricted to a marriage within a given period; in which case the law construes it to mean a reasonable period; 2dly. Where the promise is to marry within a limited time; in which case the action lies as soon as the time expires; 3dly. Where, upon either of those promises, the defendant marries another; in which case the action lies immediately on the event of such marriage. Here the declaration does not pretend to make the first case, of a promise to marry within a reasonable time. It does not pretend either to make the third case, of a marriage to another; and, for ought that appears to the contrary, the promise may still be executed. It attempts to make the second case, of a promise to marry within a limited time; but there is no express averment that the time has expired; nor is there any thing which, by grammatical construction presents a necessary inference that the time has expired although, if there were such inference, it is presumed that would not supply the place of a direct and positive averment. The time being blank, and the defendant still not charged to be married, there is not only nothing on the face of the declaration, to show the promise broken, but nothing to show that it may not yet be fulfilled.

Secondly, the petitioner having, before the inferior County Court, brought himself strictly within the rule of law, was entitled to a continuance; and the denial of a hearing on his evidence, was a denial of
222 one of the *first privileges of a free man, as secured by the bills of rights.
Wirt, for the plaintiff in error.

No counsel on the other side.

Thursday, March 26th, the Court affirmed the judgment.

Baker v. Baker and Others.

Tuesday, March 31st, 1812.

1. *Executors**—Claim against Estate Depending on Quantum Meruit—Bill in Chancery.—Where an executor has a claim against the estate of his testator, depending on a quantum meruit only, he may exhibit a bill in equity against his co-executors and legatees, to have such claim established and fixed at a certain sum.

2. *Same—Same—Same—Amended Bill.*—In such case, he ought to state the claim with reasonable certainty, by setting forth his own estimate of his

services; but, should he fail to do so, his bill ought not to be dismissed, but leave to amend it should be granted on motion.

The appellant, John Baker, exhibited his bill in the Superior Court of Chancery for the Staunton district against Henry W. Baker, who, and himself, were executors of Henry Baker, their father, deceased, and against the said Henry W. Baker and others, who, with himself, were devisees and legatees of the said decedent, claiming to be paid a compensation from his estate, for services performed for him in his trade of a butcher from November, 1788, to December, 1795; for which services the said decedent had promised to compensate the plaintiff, (being then of full age,) if he would not leave him, (which he was about to do,) and would continue his exertions for him in that business; but no specific sum was agreed upon between them; that after he left his father, having formed a matrimonial connexion, he forebore to press the payment, or adjustment, of the compensation, confidently relying that his father would do it at some convenient time; which, however, he failed to do, and departed this life in the year 1807, leaving, by his will, to the plaintiff, property inferior in value (as he contended) to what was left to any other of his children; in which will nothing was said about the plaintiff's claim to compensation as aforesaid. The bill charged a knowledge of the agreement and services by the defendants,
223 *and prayed a decree for a reasonable compensation out of the assets unadministered, or, in case of a deficiency of such assets, a contribution from the legatees and devisees to make it good, and for general relief.

Joseph Stover, and Elizabeth, his wife, (late Elizabeth Baker) filed an answer, in which she denied any knowledge of such promise by her father, or that he induced the plaintiff to remain with him; alleging also, that she had often heard him say, that he paid the plaintiff, from time to time, the full value of his services. Her husband stated his belief that her answer was true; and could not admit the justice of the claim.

The other defendants, together with Stover and wife, filed a demurrer to the bill; and, for causes of demurrer, insisted, that no particular sum was averred to have been agreed upon; and that the devise and bequests to the plaintiff, in the decedent's will, fully satisfied the claim, if any he had.

The cause was heard July 25th, 1810, upon the bill and demurrer; when the chancellor sustained the demurrer, and directed the bill to be dismissed with costs. The next day, during the same term, the plaintiff moved for leave to amend his bill, which was refused. An appeal was taken to this Court.

Williams, for the appellant, contended that the bill made a sufficient case for a Court of equity to afford relief, and therefore the demurrer should have been over-

**Executors*.—See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

†*Chancery Practice—Amended Bills*.—Ordinarily, if a bill in chancery shows that the plaintiffs have just cause of action, the bill ought not to be dismissed when a demurrer is sustained; but leave should be given to amend the bill. Rowland v. Rowland, 11 W. Va. 274, citing the principal case.

To the same effect, the principal case was cited in Welton v. Hutton, 9 W. Va. 343. See further, on the subject, monographic note on "Amended Bills" appended to Belton v. Apperson, 26 Gratt. 207.

ruled, and the defendants decreed to answer.

2. That if the demurrer was a sufficient bar, the Court should have suffered the plaintiff to amend his bill.

Wickham, contra. The chancellor was clearly right in dismissing this bill on the face of it. It is a mere case of quantum meruit for services rendered by a son to his father. It is true that he could not sue at law, because he was executor: but he might have retained assets to pay himself.

224 No want of assets is alleged in *the bill. He does not say that the subject within his control was insufficient.

The bill is defective, also, in not claiming any particular sum. Certainty, to a reasonable extent, is always required: but in this case there is none; for the plaintiff does not pretend to put any estimate on his services.

Upon the merits, there never was a more unfounded claim. It is evident the plaintiff's object was to conciliate, by his services, the good will of his father, and that he expected to be compensated by his will. He took his chance, and did not put it on the footing of a contract. He has now no right to change his ground, and appeal to a court of justice. He has made his election, by acquiescing in the will, and not offering to give up the estate devised to him.

Williams, in reply. Where an executor has a claim against the estate of his testator, depending on a quantum meruit only, his proper remedy is in equity. If he made a certain charge, the other legatees might sue him in equity for a settlement of his account. He may, therefore, apply to equity for the same purpose; making them all parties.

His omitting to state any certain sum in his bill is unimportant. The whole subject should have been referred to a master.

Taking this bill as admitted to be true by the demurrer, it is as fair a case as ever was. The presumption of the testator's intention, to give the legacy as satisfaction for the services, might be rebutted by evidence.

At any rate, leave to amend the bill should have been granted, to enable the plaintiff to state what compensation other people received for similar services. But, in my opinion, it needed no amendment, as the whole subject might have been inquired into by a master.

Friday, April 3d, the president pronounced the Court's opinion, that the decree was erroneous in sustaining the demurrer, and dismissing the bill. 225 It was, therefore, reversed, *the demurrer overruled, and leave granted the appellant to amend his bill; for which purpose, and further proceedings, the court remanded the cause.

Saunders v. Gaines.

Monday, March 30th, 1814.

Action of Covenant—Judgment by Default—Death of Defendant before Writ of Inquiry—Scire Facias.—If the defendant in an action of covenant die, after

judgment by default against him as the bail for his appearance, and before a writ of inquiry executed: the plaintiff cannot have a scire facias against the bail, but only against the executors or administrators of the defendant.†

Stephen Saunders was appearance bail for a certain William Murray, at the suit of Philip Gaines, in an action of covenant in the District Court holden at Washington Court-house. At Rules in the Clerk's office, in September, 1807, a judgment by default was entered against the defendant and bail, and a writ of inquiry awarded, and at October term, 1808, (the writ of inquiry not having been executed, and no defence having been made by the bail;‡ but the defendant having departed this life since the judgment by default,) the suit was entered, "abated as to the defendant,"§ and on the motion of the plaintiff, a writ of scire facias was awarded against the bail, which being returned executed, 226 he afterwards *pleaded, and a verdict and judgment were obtained against him.

To this judgment a writ of supersedeas was granted by a judge of this Court.

Wickham, for the plaintiff in error, observed that, by the defendant's death after the writ of inquiry awarded, and before it was executed, the appearance bail was discharged.

No counsel appeared on the other side.

Thursday, April 2d, the president pronounced the Court's opinion, "that the plaintiff in error could not be legally proceeded against by scire facias." The judgment was therefore reversed, "the verdict and all the proceedings subsequent to the awarding of the scire facias, (including the order, set aside, and the cause remanded for further proceedings against the representatives of William Murray, for whom the plaintiff was appearance bail,) according to the Act of Assembly."||

†Note. The bail in such case appears to be discharged altogether, as no mode of proceeding against him is given by law; the writ of inquiry, being against the defendant and the bail, cannot be executed as to the bail alone, and judgment entered against him thereupon, separately from the defendant; (see Wallace and others v. Baker, 2 Munf. 384:) neither can he be included in the judgment against the executors or administrators; because the judgment against them is de bonis testatoris or intestati, and that against the bail de bonis propriis, which two different modes of recovery would be incongruous, and cannot be joined in one judgment. But where the bail has defended the suit and pleaded, if the defendant die at any time pending the suit, I apprehend the bail is not discharged; because the Act of Assembly declares "he shall be subject to the same judgment and recovery as the defendant might, or would be subject to, if he had appeared, and given special bail." And if the defendant die between the verdict on the writ of inquiry, and the judgment thereupon, it seems that judgment is to be entered against him and the bail, in like manner as if he were living. See Revised Code, 1st vol. p. 110, the latter part of the 20th section. Where the bail, having defended the suit, and pleaded while the defendant was living, waives his plea after the defendant's death, I presume the writ of inquiry is to be awarded, and judgment entered against the bail alone; because, in that case, it cannot be entered against the defendant as in Wallace and others v. Baker.—Note in Original Edition.

‡Note. See Revised Code, 1st vol. p. 78, ch. 66, sect. 26; and p. 87, ch. 67, sect. 20.

§Note. The suit ought not to have been entered "abated" in this case. See Revised Code, 1st vol. p. 110, ch. 76, sect. 20.—Note in Original Edition.

||See Revised Code, 1st vol. p. 110, ch. 76, sect. 20.

*See monographic notes on "Covenant, The Action of" appended to Lee v. Cooke, 1 Wash. 306.

Hume v. Beale.

Monday, March 30th, 1813.

Appellate Practice*—Costs—Presumption.—Where, "for reasons appearing to the Court," (though not specified,) a verdict is set aside, without requiring payment of costs, the appellate Court will take it for granted those reasons were sufficient; no bill of exceptions being filed.

Upon a writ of inquiry in an action of assumpsit, the plaintiff's damages were assessed by a jury to 327 dollars and 50 cents; with legal interest thereon from the 1st of November, 1806, till paid, beside his costs; and judgment was entered thereupon. But, at the same term, "on motion of the defendant, by his attorney, and for reasons appearing to the Court, the verdict 227 and judgment *was set aside; and the defendant pleaded non assumpsit, to which the plaintiff replied generally." No exception was taken to the Court's opinion. A general verdict was afterwards found for the defendant, and judgment accordingly; from which the plaintiff appealed.

Wickham, for the appellant, made a point that the Court below erred in granting a new trial without directing the payment of costs, no reason being specified.

But, on Wednesday, the 1st of April, the president pronounced the following opinion of this Court.

"It appearing, in this case of record, that there were sufficient reasons to justify setting aside the verdict, without the payment of costs by the appellee, this Court is of opinion that there is no error in the judgment, and that it be affirmed."

Campbell v. Price and Others.

Wednesday, April 1st, 1813.

Decree of Court of Appeals—Apparent Error—Correction.—The Court of Chancery cannot correct on motion, or by bill of review, any error, apparent

***Appellate Practice—New Trial—Presumptions.**—Where a new trial is granted in a case appearing clearly within the jurisdiction of the court it is not necessary for the court to state in the record the grounds for granting it, as it will be presumed it was correct, unless the contrary appears. *Shrewsbury v. Miller*, 10 W. Va. 123, citing the principal case. See further, monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268.

†**Costs.**—See monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

‡**Decree of Court of Appeals—Apparent Error—Correction.**—Where the court of appeals makes a decree, and sends the cause back for further proceedings, there cannot be a bill of review to correct the decree of the court of appeals for error apparent. *Henry v. Davis*, 18 W. Va. 253, citing principal case; *White v. Atkinson*, 2 Call 376; *Price v. Campbell*, 6 Call 115; *McCall v. Graham*, 1 Hen. & M. 13; *Bank of Va. v. Craig*, 6 Leigh 399; *Towner v. Lane*, 9 Leigh 362; *Newman v. Mollohan*, 10 W. Va. 488; *Western M. & Co. v. Va. C. C. Co.*, 10 W. Va. 260; *Pinkney v. Jay*, 13 Gill & J. 69. To the same effect, the principal case is cited in *Reld v. Strider*, 7 Gratt. 82; *Campbell v. Campbell*, 22 Gratt. 666; *N. Y. Life Ins. Co. v. Clemmitt*, 77 Va. 374; *foot-note* to *White v. Atkinson*, 2 Call 376; *foot-note* to *McCall v. Graham*, 1 Hen. & M. 13; *foot-note* to *Towner v. Lane*, 9 Leigh 362. But there may be such a bill to correct the decree on the ground of after-discovered evidence. *Campbell v. Campbell*, 22 Gratt. 674, citing the principal case to the same effect. The principal case is cited in *Reld v. Strider*, 7 Gratt. 83; *foot-note* to *Randolph v. Randolph*, 1 Hen. & M. 181. See further, monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268; monographic note on "Bills of Review" appended to *Campbell v. Campbell*, 22 Gratt. 649; monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

on the face of the proceedings, in a decree which has been affirmed by the Court of Appeals.

After the affirmance, by the Court of Appeals, on the 15th of November, 1799, of the late Chancellor Wythe's decree in this case, (bearing date the 14th of March, 1797, for which see *Price v. Campbell*, 2 Call, 116,) it was discovered that a mistake had been committed in that decree; the sum decreed being currency when it should have been sterling money; as incontestably appeared from the documents spread on the record. The Chancellor "being of opinion that such an error, discoverable at the first glance, might be corrected without a formal procedure by bill of review," made an order, on motion, to that effect on the 6th of

March, 1800. Upon an appeal, this 228 order was reversed by this Court, *the 15th of May, 1804, without any reason assigned. The plaintiff (*Campbell*) was, on the 8th of June following, allowed, by leave of the Court of Chancery, to file a bill for reviewing, as well the decree pronounced the 14th of March, 1797, as the order made the 6th of March, 1800, setting forth in his bill the error above mentioned in the original decree, and that the correction thereof by the Chancellor had been disapproved by the Court of Appeals, merely "because it had not been done by means of a bill of review." To this bill the defendant demurred; and the cause coming on to be heard the 27th of February, 1809, Chancellor Taylor dismissed the bill with costs; "being of opinion, that after an affirmance of a decree by the Court of Appeals, a bill of review should not be received, but for new matter which could not be produced or used by the party claiming the benefit of it at the time when the decree was pronounced, and proved to have been discovered since;‡ and not for errors of law, or fact, which appear upon the face of the proceedings and decree." Whereupon, the plaintiff appealed to this Court.

Williams, for the appellant.

Warden, for the appellee.

Thursday, April 2d, the president reported the opinion of the Court, that after a decree of the Court of Chancery has been affirmed by the Court of Appeals, a bill of review cannot be received, on the ground of any error in the decree, which is apparent on the face of the record.

Decree dismissing the bill of review affirmed.

229

***Stanard v. Brownlow.**

Monday, April 6th, 1812.

Appellate Practice—Reversal of Decree.—In a decree of reversal, the appellate Court will if requested, farther direct, that in case the money and costs recovered by the appellee shall have been paid, the same be refunded, with lawful interest from the time of payment.

In this case, a decree of the late High Court of Chancery, dismissing a bill of Review, was reversed by this Court; the original decree was also reversed; and it

§**Note.** See *Winston v. Johnson's executors*, 2 Munf. 306-310.

¶**See foot-note** to *Branch v. Burnley*, 1 Call 147; *foot-note* to *White v. Jones*, 1 Wash. 116; monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 268.

was ordered that the injunction awarded the appellee, to stay proceedings on a judgment recorded against him by the appellant, be dissolved, and his bill dismissed with costs.

Tuesday, April 7th, Stanard, for the appellant, moved an addition to the order made yesterday; that in case the money decreed to the appellee shall have been paid, it be decreed back.

JUDGE ROANE observed, that a similar order had been made in the case of Branch v. Burnley, 1 Call, 160.

The following addition was therefore made to the order: "And if the amount of the money and costs recovered by the decree in the original suit, and of the costs recovered by the original decree on the bill of the review, shall have been paid to the appellee, it is further decreed, that he do repay the same to the appellant, with interest thereon, after the rate of six per centum per annum, from the time of the receipt thereof, till it be repaid."

230

*Woodson v. Johns.

Wednesday, April 8th, 1812.

1. **Injunction Bond—Liability of Surety.***—The security in a bond for the prosecution of an injunction is not liable for the costs and damages, which may accrue on an appeal to a Superior Court.
2. **Bond with Condition—Debt—Recovery.**†—In debt on a bond with collateral condition the plaintiff cannot recover any damages not demanded in the declaration, or in the assignment of breaches.
3. **Statute—Damages—Retrospective Effect.**—The act of assembly allowing damages on the affirmation of decrees in Chancery does not authorize the recovery of such damages of a security in a bond bearing date before that act.

This was an action of debt in the late District Court holden at Prince Edward Court-house, in the name of John Johns and John Benning, (who sued for the benefit of John Benning,) against William Meridith and Benjamin Morris, on a bond, dated the 2d day of July, 1791, in the penalty of one thousand pounds, conditioned for the prosecution of an injunction in the High Court of Chancery, to stay proceedings on a judgment obtained by John Johns against Peter May, and Charles May, John Benning, and William Meridith, his securities, and on a judgment in favour of John Benning against said William Meridith. The breach of the condition set forth in the declaration was "that the injunction aforesaid was dissolved, and the said William Meridith did not pay unto the said John Benning five hundred pounds current money, &c. (stating the amount of the debt and costs of the judgment,) and the cost that was awarded the said John Benning upon the dissolution of the said injunction, according to the condition of the said writing obligatory above set forth." The suit abated as to William

Meridith and Benjamin Morris, they being returned by the Sheriff "no inhabitants," and also as to the plaintiff, John Benning, by his death.

The defendant John Woodson pleaded conditions performed.

On the trial of the cause the plaintiff offered as evidence, on which to recover ten per cent. damages, (and the costs expended in the court of appeals,) during the continuance of an appeal from the High Court of Chancery to that Court, a copy of the record, showing that after the dissolution of the injunction, the bill was dismissed with costs: from which decree in September, 1802, the complainant prayed an appeal, "which was allowed him without security, none being required by the 231 defendant's *counsel, and that on the 17th of November, 1807, that decree was affirmed by the Court of Appeals; to the introduction of which evidence the counsel of the defendant objected, "upon the ground that the defendant, against whom the suit now stands, is not liable for the costs and damages of the Court of Appeals;" which objection was overruled by the Court, and the said record suffered to go to the jury as evidence. To which opinion a bill of exceptions was filed.

A verdict was thereupon found, and judgment rendered, for the debt in the declaration mentioned, to be discharged by 682l. 16s. 9d. damages, with five per cent. interest on 379l. 16s. 3d. part thereof from the 2d day of July, 1791, to the 29th day of September, 1802, and with like interest on the like sum from the 17th day of November, 1807, till paid; ten per cent. damages, on the debt and costs originally due, from the 29th of September, 1802 to the 17th of November, 1807, being included in the said sum of 682l. 16s. 9d. as appeared by a statement delivered to the jury on the trial of the cause; which statement was annexed to the transcript of the record as an exhibit to this judgment and a writ of superseas was awarded by a judge of this Court.

Samuel Taylor, for the plaintiff in error. No counsel for the defendant.

Thursday, April 9th. The president pronounced the Court's opinion, "that the said judgment is erroneous; 1st. Because the security in a bond for the prosecution of an injunction, is not liable for the costs and damages which may accrue on an appeal to a Superior Court; 2dly. Because the defendant, neither in his declaration, nor in his assignment of breaches of the condition of the bond, demanded such costs and damages; and, 3dly. Because no such damages on the affirmation of a decree 232 "in Chancery, were allowed at law, at the time of executing the said bond."‡

Judgment reversed, and new trial directed, "on which trial the jury is to be instructed according to this opinion."

Moseley's Administrators and Heirs v. Buck and Brander.

Saturday, April 4th, 1813.

1. Principal and Agent—Purchase of Principal's Land

*See 1 H. & M. 585-601.

‡See Rev. Code, vol. 2.

*Injunction Bond—Liability of Sureties.—See the principal case cited in Jeter v. Langhorne, 5 Gratt. 200, 209, 210; Bailey v. McCormick, 23 W. Va. 98, 99, 100. See further, monographic note on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

†Sheriff's Bond—Assignment of Breaches.—The assignment of breaches is the essence of the action on a sheriff's bond. Com. v. Fry, 4 W. Va. 727, citing principal case as authority. See generally, monographic note on "Sheriffs and Constables" appended to Goode v. Galt, Gilm. 152.

by Agent—Fraud.*—If an agent employed to sell a tract of land, become himself the purchaser by bargaining with his employer, from whom he conceals the fact that a better price could be got from another person, he is guilty of fraud, and the contract ought to be vacated.

2. Same—Same—Equitable Relief.—In such case the Court of Equity will compel him to recover the land, on receiving back his purchase money, with interest, and make him account for the rents and profits.

This was a bill exhibited by the administrators and heirs of Benjamin Moseley, deceased, against Buck and Brander, merchants, and partners, to have a contract for the sale of 2,666 $\frac{2}{3}$ acres of military land in the State of Kentucky, rescinded, on the ground of fraud, and the land reconveyed.

The equity stated was, that the defendants were appointed by the said Benjamin Moseley, and undertook, as his agents, to sell the land in question, for the best price they could get in his behalf, and apply the proceeds to his credit; that he had previously been offered 2s. per acre by Hicks and Campbell, agents for Charles Copland, and having reason to believe they would give more, refused to take it, but, at their special request, promised them the refusal if a price should be offered which he was disposed to take; that he informed the defendants of this offer, mentioned his opinion that they would give more than 2s. per acre, and his wish that they should have the refusal; that afterwards, from time to time, the defendants made sundry communications to the said Benjamin, through a certain Robert Kincaid, concerning the said land, in which they constantly stated they had offered the land to Hicks and

233 Campbell, and to various *other persons, and found it impossible to get more than 2s. per acre: they then came forward with a proposal to purchase the land themselves, and the said Benjamin, having confidence in their assertions, was induced to accede to their proposal; that since his death, the plaintiffs had come to the knowledge of a suit brought in the said Superior Court of Chancery by Charles Copland, against the said Buck and Brander, concerning the said land; (a) from the proceedings in which it appears, and so the plaintiffs charge the fact to be, that the said Charles Copland was accordingly desirous to purchase the said land, and by himself and his agents, Hicks and Campbell, made repeated applications to the said Buck and Brander, for the said land, and expressly informed them, that they were ready to give more than 2s. per acre; that they were desirous of fixing on a price above that sum, but were prevented for doing so by the evasive conduct of Buck and Brander, who, instead of acting the part of faithful agents to the said Benjamin Moseley used very undue means to prevent the said Copland, or his said agents, from purchasing, and at the same time concealed these offers from the said Benjamin, stating to him, untruly, that it was impossible to get more than 2s. per acre; their object being to get the land for themselves at a price less than its value,

which conduct of theirs ought, in equity, to avoid their said purchase.

The defendants, by their answer, admitted their agency for Benjamin Moseley; but insisted upon the contract for the land; denying all fraud and concealment on their part.

The bill was supported by the deposition of Charles Copland, (to the same effect, in substance, with his bill against Buck and Brander, 2 Call, 218, 220,) and by a transcript of the bill and answer in that suit.

The cause coming on to be heard the 26th day of February, 1811, the following opinion and decree were delivered by CHANCELLOR TAYLOR.

234 *The case reported in 2 Call, between these defendants and Charles Copland, does not apply here, as these plaintiffs, or the person they represent were not parties to that suit, in which the Supreme Court only determined, that if these defendants had committed the fraud with which they stood charged, any benefit arising therefrom should not be transferred to Mr. Copland but that Mr. Moseley, on whom the fraud was said to have been principally committed, should be relieved against it. This was correct. But a different construction seems to have been put upon that decision, which, perhaps, has given rise to the present suit; in which the only inquiry is, whether, as stated in the bill, the defendants were offered more than 2s. per acre, and concealed it from Mr. Moseley, at the time of their purchase from him at that price. They deny it in their answer. But the plaintiffs rely much upon the defendant's former answer, to Mr. Copland's bill, to convict them of the alleged fraud. Let this part of the case be examined. The suit referred to, in which that answer was filed, contained all the evidence (as it appears) that is in this, except the deposition of Mr. Copland. In that suit, the answer was held responsive to the bill, and being not disproved by any evidence in the cause, was very properly taken to be true, against Mr. Copland, and in favour of the defendants: and, as that answer is now relied upon by the plaintiffs, it must be taken all together, and not garbled: and, under the influence of this rule, the effect is as clearly in favour of the defendants in relation to Mr. Moseley, as it has been held in relation to Mr. Copland: and more especially, when considered in connexion with the answer in this case. Here let it be remarked, before the other testimony is examined, that all the defendants undertook to do, was to sell Mr. Moseley's military land for the best price that they could get, and to give Hicks and Campbell a preference; that, finding that they were steady in their first offer to Mr. Moseley of 2s. per acre, the defendants, through their agent, Mr. Kincaid,

235 made the representation *to Mr. Moseley, and proposed, if it was agreeable to him, to take the land at that price themselves, to which he acceded: and whether this conduct of the defendants deserves to be branded with the epithet of fraud, depends entirely upon the evidence of Mr. Campbell and Mr. Copland. Mr. Campbell proves, that Hicks and Campbell

*See foot-note to Wellford v. Chancellor, 5 Gratt. 39; monographic note on "Agencies" appended to Stillman v. Fredericksburg, etc., R. R. Co., 27 Gratt. 119.

(a) See the case reported in 2 Call 218, 220.

had offered Mr. Moseley two shillings, and that Buck and Brander had promised them a preference in the sale; but that Mr. Campbell did not mean to discover to them that Hicks and Campbell would give more than that price; although Mr. Campbell says that he intended it, if the land had been again offered; but, as it was not in the nature of things for Buck and Brander to know what Hicks and Campbell secretly intended, it was not their duty to renew the offer; and if they had, they might have been deemed impertinent. From this evidence, then, it seems, that the defendants were justified in their representation to Mr. Moseley. But Mr. Copland proves that the defendants were to give him a preference; and that he intimated very plainly, that if Mr. Moseley would not take two shillings per acre, he, Mr. Copland, would give more; and that he is under an impression that the defendants so understood him. But surely this impression of Mr. Copland is incorrect, as he did not say at any time how much more he would give: for after the defendants had made the purchase on their own account, he tendered to them, according to his own statement, only two shillings per acre, as the sum which he had offered. If, then, this was the highest price he had offered, it still seems that the defendants were correct, in saying, through Mr. Kincaid, that they could get no more for Mr. Moseley's land; and the correspondence with Mr. Kincaid certainly proves it, and proves also, that Mr. Brander acted in a manner as friendly to Mr. Moseley as it was honourable to himself; and Mr. Kincaid's testimony is in confirmation of it; nay, after the purchase by the defendants, Mr. Brander informed Mr. Kincaid that if Mr. Moseley was dissatisfied, he should *not be bound. This was the last act by which this transaction was closed, and certainly had nothing like fraud in it. Upon this view of the case, the Court doth adjudge, order, and decree, that the bill of the plaintiffs be dismissed, and that the administrators of the said Benjamin Moseley, out of the goods and chattels of their testator, in their hands, to be administered, if so much they have, if not, then out of their own estates, and the next friend of the infant plaintiffs, pay to the defendants the costs by them, in their defence, expended."

From this decree the administrators appealed; and by consent of parties in the Court of appeals, the heirs were afterwards received as appellants.

Wickham, for the appellants. This case is stated substantially in 2 Call, 218-230, *Buck and Brander v. Copland*. The Court there say that if the fraud was proved, Moseley's representatives were entitled to the land. I admit this is not authority, because they were not parties to that suit. But the answer in that suit of the present defendant is conclusive evidence that they were guilty of fraud. The general rule is that papers filed in one suit are not to be received as evidence in another, between other parties; but evidence of what a party has been heard to say on his oath is good

against him. (a) If Mr. Buck's admission in a conversation in the street would be received as evidence against him, his answer on oath should, a fortiori, be so received. The declarations of the defendants in their letters to Moseley through Kincaid, are in direct opposition to their answer to Copland's bill. From that answer, and Copland's deposition, they appear evidently to have been unfaithful agents. The land ought therefore to be decreed to us.

Williams, contra. Their answer to Copland's bill shows clearly there was no fraud. They no where admit they were ever offered more than 2s. per acre. Copland in his deposition, only says he

237 insinuated that, if he *could not get the land at 2s., he would give more. This insinuation was not understood by Buck and Brander. The only means for them to divine that he would give 2s. 6d. was Campbell's declaration that Hicks and Campbell would give as much as any body else. Moseley himself had declared that Buck and Brander should have the refusal. They were to sell only in the event of their determining not to keep the land themselves.

Wickham. In their answer to Copland's bill, it is expressly said, that Copland told Buck that he would give more than 2s. per acre, (b) and that Hicks and Campbell and he were the same person.

Williams. No offer of any definite sum was made. He surely did not mean to bind against himself; and no person offered any more. It appears from the correspondence through Kincaid, that they offered to let Moseley take the land back, if he chose it. But he approved of their conduct in every respect. The very circumstance of their detailing every thing they knew about the transaction shows they intended no fraud. Their answer to Copland's bill (if evidence at all) must be taken altogether. If so, it shows that no larger sum than 2s. was ever offered.

Even admitting the defendants have acted improperly, ought the contract to be rescinded? The utmost that can be claimed is the difference between 2s. per acre, and the price which might have been obtained.

Wickham, in reply. As agents for Moseley, it was the duty of Buck and Brander to get the best price they could. But they avoided Copland: endeavoured to have no communication with him, considered his conduct "ungentlemanly," because he interposed to prevent their getting the land, and did not tell him that any other person would give 2s. Fraud consists in suppression of truth, as well as affirmation of false-

238 hood. Here, both are found. *Buck perhaps went further in the fraud than Brander; but although one partner is not punishable criminally for a fraud committed by another for their joint benefit, he is liable for the civil consequences. Indeed, they both hugged the fraud, and cheerfully participated in its fruits. They told Moseley by their letter that no person

(a) Peake's Evidence, 54; *Grant v. Jackson*, Peake's Rep. 208.
(b) 2 Call, 222.

had offered more than 2s.; yet they admit in their answer to Copland's bill, that he had offered more. He says in his deposition that he "intimated this very plainly"; they say that "he said he would give more." They were bereft of common prudence, as well as integrity, in swearing as they did; but they threw it into an answer to be filed in the Court of Chancery in a cause to which Moseley was no party, and of which he might never have heard. He indeed approved of their conduct, and never complained of the fraud, because he never knew it. And it never would have been known, but for such a work as Call's reports in which the substance of their answer was published.

In case of fraud the contract is to be rescinded altogether. The Court cannot make a new contract for the parties. They are not to be permitted to reap any profit from their fraud.

The following was delivered by JUDGE ROANE, as the opinion of this Court.

"An appeal having been allowed, by consent, from the decree in this case, as far as it relates to the heirs of Benjamin Moseley deceased; and the cause coming on to be heard, as well in relation to the said heirs as to the present appellants: the Court is of opinion that the contract, for the purchase of the land in the proceedings mentioned, was made under such circumstances of fraud and concealment, that the same ought to be vacated. The decree of the Court of Chancery is therefore reversed with costs; and this Court proceeding, &c. It is further decreed and ordered, that the said land be re-conveyed to the said heirs of Benjamin Moseley, on the appellees' receiving *back their purchase money with interest; and that an account of the rents and profits of the said land be also taken, if the appellants shall desire it; the said money to be paid on or before a day to be limited by the said Court of Chancery, and the land aforesaid to remain ultimately liable for the payment thereof; and the cause is remanded to the said Court of Chancery to be finally proceeded in pursuant to the foregoing principles."

Murphy, Brown & Co., v. Staton.

Tuesday, April 7th, 1812.

1. **Common Carriers—Liability.**—A common carrier is liable for all accidents to goods entrusted to him for transportation, except such as arise from the act of God, the act of the enemies of the commonwealth, or the act of the owner of the goods.

Same—Same—Onus Probandi.—In such case, if a loss happens, the onus probandi lies on the carrier, to exempt him from the liability. And it is not enough for him to prove, (where the goods are carried by water) that the navigation is attended with so much danger, that a loss may happen notwith-

***Common Carriers—Liability.**—By the common law, a carrier is treated as an insurer against all damages to, or loss of, goods entrusted to him for transportation, except such as may arise from the act of God, the act of the enemies of the country, or the act of the owner of the goods; and the liabilities of common carriers upon navigable streams, are fixed by this common-law rule, and losses arising from the ordinary dangers of the navigation, however great and however carefully guarded against, do not fall within the exception. As so holding, the principal case is cited with approval in *Friend v. Woods*, 6 Gratt. 192. See further, monographic note on "Common Carriers" appended to *Farish v. Reigle*, 11 Gratt. 607.

standing the utmost endeavours of the waterman and crew to prevent it, that the person conducting the boat possesses competent skill; has used due diligence, and provided hands of sufficient strength and experience to assist him.

In an action on the case against the appellee as a common carrier, employed to bring ten hogsheads of tobacco by water from Tye River warehouse in Amherst county to the city of Richmond, for negligently ducking and thereby damaging sundry of said hogsheads; on the trial of the cause, the plaintiff's counsel moved the Court to instruct the jury, "that a common carrier is liable for all accidents to goods, entrusted to him for transportation except such as arise from the act of God, the act of the common enemy, or the act of the owner of goods;" but the Court refused to give such instruction; to which opinion of the Court the plaintiffs filed a bill of exceptions. But the Court was of opinion, and so instructed the jury, "that as the upper navigation of James River is proved to be attended with so much danger as that a loss may happen, notwithstanding the utmost endeavours of the waterman and the crew to prevent it, therefore, when a loss happens in such a case, the defendant ought to be excused; but this indulgence ought not to be allowed, *unless it appears that the person conducting the boat possesses competent skill; that he has used due diligence, and has provided hands of sufficient strength and experience to assist him in the conduct of the boat."

Verdict and judgment for the defendants, from which the plaintiffs appealed.

Wirt, for the appellants, insisted that the instruction prayed for by their counsel was not on a mere abstract question of law; the point being necessarily presented by the declaration. And, as to the liability of a common carrier he quoted 1 Bac. Abr. 555, to show that "inevitable accident, happening by any human means, or irresistible force, if not occasioned by the King's enemies, will not excuse him: (for the carrier is in the nature of an insurer;) and 1 Term Rep. 27, *Forward v. Pittard*, being a case in which the carrier was holden liable through actual negligence, was expressly negatived by the jury."

In the case before us, the judge has decided in favour of the boatman, on the ground that the upper navigation of James river is dangerous! What is to become of the navigation of this river, if such a principle should be established? The standing danger of the navigation through which a man undertakes to convey goods can surely be no reason for exempting him from responsibility; especially as such standing and paramount danger is always considered in estimating the extent of his compensation.

Call, for the appellee. The similitude between this case and that of *Shelton v. Cocke, Crawford, & Co.*, decided the 28th of last month, is so striking, it is impossible to point out a difference. The point in that case necessarily arose; yet this Court decided that it was an abstract question.†

†Note. The opinion delivered in *Shelton v. Cocke, Crawford, & Co.*, March 28th, 1812, was set aside April 8th. See Ante, p. 191.—Note in Original Edition.

The point was equally predicated upon the declaration in that case as in this.

241 The rule is, "that a party wishing to get the opinion of the appellate Court on a point, in relation to which he prays the Court to instruct the jury, must give a brief statement of the evidence, and show how the point was presented in the cause. Here the plaintiffs did not state the evidence. The point on which they requested the Court's instruction was a general, abstract, question; and, in the terms stated, was not law. For the term "common enemy," did not necessarily mean "enemy of the commonwealth." A man of Mr. Wirt's discriminating mind could draw a distinction between them.

2. As to the 2d point, I do not contend that a common carrier is not responsible to the extent contended for by Mr. Wirt. But the opinion, as given, is just as referrible to the act of God as to the act of man. Can the Court infer that the loss was not from an accident similar to that by which the carrier was excused in *Amies v. Stevens*, 1 Str. 128? For any thing that appears to the contrary, I have a right to say, it arose from an accident that could not be controlled. In 2 Bulst. 280, cited 1 Bac. Abr. 555, it was decided, that where a ferryman was carrying over passengers and goods, and a wind arose, and they, being frightened, flung the goods overboard, the ferryman was not responsible.

Besides, in this case, the bill of exceptions does not show that Staton carried the tobacco for hire. In the case of *Coggs v. Bernard*, (2 Ld. Ray. 909,) it was settled, that a bailee, undertaking gratuitously, is liable only for gross negligence, or wilful injury.

Wirt, in reply. No answer has been given to the distinction which I drew between this case and that of *Shelton v. Cocke, Crawford & Co.* There, the question might not have arisen under the declaration; here, it must. The question of the extent of a common carrier's liability was inevitably presented. If this be considered an instruction upon an abstract question, I will venture to affirm, that not one bill of exceptions in five thousand

242 *can be sustained. Parties and counsel do not think it necessary to state that the point did arise, when, from the construction of the declaration, and nature of the action, it appears that it must have arisen. The instruction given was clearly erroneous. The presumption is always against the carrier. To exempt himself, he must prove that the loss was occasioned by a public enemy, or by the act of God. Such was the case of *Amies v. Stevens*. (a) The doctrine laid down in this instruction is in direct opposition to that of Lord Mansfield in 1 Term. Rep. 33, according to whom the burden of proof lies on the carrier: but, according to this instruction, he is not liable, unless it be proved that the loss was not by the act of God.

The case reported in 2 Bulst. 280, (cited 1 Bac. Abr. 555,) is contradicted by the authorities in the note; (b) if, in fact, it re-

lated to a ferryman who carried goods for hire. The distinction is between a ferryman who carries goods for hire, and one who does not. The former is liable though compelled by storm to throw the goods overboard; for he is considered an insurer against this danger.

Now it sufficiently appears that Staton was a carrier for hire; for the bill of exceptions calls him "a common carrier;" which is a technical phrase implying a carrier for hire.

Call. The case in *Bulstrode* plainly supposes the ferryman was one who carried goods for hire. The note in *Bac. Abr.*, contra to that case, is not law; for the loss arose from the act of God: the danger being occasioned by tempest, and the goods thrown overboard to save the lives of the passengers, the ferryman was not to answer for it.

Monday, February 15th, 1813, the president delivered the Court's opinion, that the judgment was erroneous, "in this, that the judge of the Court below refused 243 to *give the instruction to the jury, required by the counsel for the plaintiffs, in the bill of exceptions mentioned," and also erred in the instruction he actually gave.

Judgment reversed; verdict set aside, and a new trial directed; "on which trial no such instruction as the latter is to be given to the jury."

Mayo v. Purcell.

Monday, March 30th, 1812.

1. *Sale of Land—Purchase with Knowledge of Defects—Equitable Relief.*—A purchaser of land being thoroughly informed of defects in the vendor's title, and agreeing nevertheless to pay interest on the purchase money from a certain day, shall not be relieved from paying such interest, on the ground that he could not get possession of part of the land, which he knew at the time of entering into the agreement, was held by another person.
2. *Same—Agreement by Purchaser to Discharge Encumbrance—Effect.*—If the purchaser agree to pay a certain sum, in discharge of an encumbrance, for which sum he is to have a credit, in part of the purchase money; and it does not appear that the vendor deceived him with respect to the sum for which the removal of such encumbrance could be obtained; he is not to be credited for any larger sum which the encumbrancer may compel him to pay.
3. *Same—Decree for Specific Performance—Effect.*—A decree in Chancery, declaring the Court's opinion that an agreement for the sale of a tract of land should be specifically performed by both the parties, and directing the vendee to execute a mortgage of the same land to secure the purchase money, is to be understood, as requiring the vendor, in the first place, to make a title to him.
4. *Appellate Practice—Affirmance of Decree.*—The Court of Appeals, in affirming a decree, will add any explanation, which may be necessary to make it correctly understood.

A contract in writing, (without being sealed,) was made between John Mayo and Charles Purcell, as follows:

"Mr. Charles Purcell, sells to Col. Mayo his land purchased from Fortunatus Sydnor, lying on James River, bounded by the Westham road on the North, Daniel Hylton on the West, the river on the South, and Francis Watkins on the East, supposed to contain 500 acres, at six pounds per acre,

*See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 243.

†See monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., Turnpike Co., 1 Rob. 268.

(a) Str. 128.

(b) Allen, 98, Law of Bailments, 108.

payable in twenty years; interest being paid half yearly at 5 per cent. for the first ten years, and six per cent. thereafter, on so much of the principal as shall then remain unpaid. Col. Mayo to be at liberty to pay the principal at any time within twenty years. The land to be surveyed. Col. Mayo agrees to pay Mrs. Sydnor 200l. within 9 months after her relinquishment of dower; to be deducted from the principal sum payable to Mr. Purcell. Interest to commence in three months from this date, which is 22d April, 1799. Mr. Purcell to finish cutting a ditch which is begun. Payment to be secured by mortgage.

"John Mayo.

"Charles Purcell.

"Teste, J. Marshall.

"Received five dollars in part of the above contract."

Out of this contract, two subjects of controversy arose.

In the first place, Mayo contended, that he was not liable to interest until he obtained complete possession of the land, which, (as he insisted) was not until the 26th of January, 1801. Purcell, on the other hand, claimed interest from July 22d, 1799. Secondly, Mayo claimed a credit for 1260 dollars, actually paid by him to Mrs. Sydnor for her dower in the land, instead of the sum of 200l. mentioned in the contract.

A bill was thereupon filed by Purcell, against Mayo, in the Superior Court of Chancery for the Richmond district; setting forth that the land in question was purchased by the plaintiff under a decree of the said Court; that Fortunatus Sydnor owned two hundred acres, which he mortgaged to the plaintiff; that, many years ago, he purchased two hundred acres of his brother Robert Sydnor, before the said Robert married, and paid him therefor; that the said Fortunatus purchased one hundred acres of Miles Selden, but not having paid for it, the title was retained by Selden, but the plaintiff had paid the money and obtained a conveyance to himself, since the decree; that a deed had also been made to him by the commissioners of the Court; whereby he became seized in fee of the said five hundred acres of land; that, before and at the time of the agreement, Mayo was well acquainted with all the circumstances of the plaintiff's title; that he had paid him, at different times, about 200l. in part of the interest; that about the beginning of the year 1801, he found fault with Sydnor's retaining possession, and with the plaintiff's title; that in May, 1801, arbitration bonds were executed, but Mayo repeatedly evaded, and put
245 off a settlement of the points in dispute; that he had broken the contract in not paying the interest, and not executing a mortgage; that the plaintiff had, years ago, a deed drawn from himself to the defendant, as well as a mortgage to be executed by the defendant, to secure the purchase money, which he could not prevail on him to do; that Fortunatus Sydnor told the defendant that if he would pay for Mrs. Sydnor's dower, and his growing crop, he would leave the place; "the defendant sent

hands there to ditch in the plantation, some time before July, 1799; Sydnor did not cultivate more than about ten or twelve acres of land; the defendant then sent for the key of the house at Sydnor's Point, and on the 22d of July, 1799, the plaintiff sent it to him to put a tenant in the house; that he took possession, and cut down a considerable quantity of timber trees off the said land, for his bridge, during Sydnor's residence there. In the latter end of the year 1800, the defendant applied to the plaintiff to know how Sydnor could be got off the land: the plaintiff told him that he might apply to the Court of Chancery, and he would enforce Sydnor to deliver up the possession; or, if the defendant desired it, the plaintiff would distrain for the rent that he owed to the plaintiff, and that had accrued since the sale of the land to the defendant, and would give the defendant credit for all the rent he could get effects to pay; to wit, all the rent that the plaintiff got, over and above the rent that Sydnor owed to the plaintiff;" (which, it seems, was a sum in arrear before the sale of the land to Mayo;) "to this the defendant readily agreed, and the plaintiff did obtain for the defendant, for his rent, about the sum of ———, which he placed to his credit. The defendant had the land surveyed several years ago; so that he cannot give the uncertainty of the quantity as a reason for the non-payment of the interest thereon."

The prayer of the bill was, that the agreement be cancelled, on account of wilful breaches thereof on the part of the defendant; and that he should pay
246 for the rents and profits of the land; that sundry special damages, which the plaintiff sustained by the non-payment of the interest be inquired of by a jury in an issue at law; that if the said contract be carried into effect, liberty be allowed the plaintiff, on the failure of payment of the interest, every six months, to enforce the payment thereof by an attachment, or execution, (to issue, with leave of the Court from time to time,) and also to issue execution for the purchase money, when the same shall become due; concluding with a prayer for general relief. The defendant, by his answer, referred to the written agreement between the complainant and himself for the particulars of their contract; averring that he was assured by the complainant that the eventual dower of Mrs. Sydnor might be purchased for 200l., and the crop then growing at a fair valuation, and immediate possession obtained; that, under the impression of an immediate surrender of the possession, he agreed that interest should commence three months from the date of the purchase aforesaid; that he had paid, on account of the complainant, monies to a considerable amount, notwithstanding which, he never could obtain the possession of any part of the said land, except one, which was entirely unproductive, and which, being a house, on an exposed part of the land, was placed by him in the hands of a protector from destruction; that he had frequently made application for the possession of the useful part of the said land in vain,

and never gained possession thereof until about the 26th day of January, 1801, between which time and the date of the agreement, much waste and dilapidation were committed, occasioning great expense to the defendant to repair them; "that the complainant had often admitted that he could not claim interest during the time when possession was retained by the said Sydnor;" that the defendant had been threatened with eviction from possession, for want of a legal title; that he was ready to execute the agreement on his part, faithfully, when a perfect title should be secured to him; that, "until the execution of the deed from Miles Selden, (bearing date the 5th of June, 1803,) the complainant had no legal title to the most valuable part of the land; and that the defendant had been under the necessity of giving to Mrs. Sydnor 1260 dollars for her dower; for which he claims credit.

Sundry depositions of witnesses were taken, the purport of which is sufficiently stated in Judge Fleming's opinion.

The Court of Chancery referred the accounts between the parties to a commissioner, who made a report exhibiting them in three views: the first, (which he thought correct,) crediting the defendant with the sum which he paid for the dower, and charging him with interest from July 22d, 1799; the second, (for which the defendant contended,) crediting the dower as in the first statement, and charging the interest from three months after January 26th, 1801; the third, (as contended for by the plaintiff,) crediting the defendant with 200l. only for the dower, and charging interest, according to the agreement, from July 22d, 1799. Whereupon, the Court, on the 28th of May, 1807, rejecting the first and second statements, and confirming the third, decreed that the defendant do pay unto the plaintiff the sum of 780l. 18s. 10½d., the balance of interest found to be due to him on the 22d day of January, 1806; "that he do also pay the interest which hath grown due upon the balance of principal since that time to the 22d day of January last: and the Court being also of opinion that the agreement ought to be specifically performed by both parties," decreed, "that the defendant do execute to the plaintiff a mortgage on the lands in the proceedings mentioned, for the payment of the said balance of principal, and the interest, which might become due after satisfaction of this decree; that the plaintiff be at liberty to resort to the Court, as occasion might require for the performance of the decree; and that the defendant pay to the plaintiff the costs by him expended in prosecuting this suit."

248 *From this decree the defendant appealed.

The case was submitted, by Wirt and Wickham for the appellant, and Hay for the appellee.

Monday, March 30th, the Judges pronounced their opinions seriatim.

JUDGE BROOKE. I am of opinion that the Chancellor's decree be affirmed, with the explanation, agreed upon, to be expressed in the entry of the decree of this Court.

JUDGE ROANE concurred in affirming the decree with that explanation.

JUDGE FLEMING, being of a different opinion expressed himself as follows:

However painful it may be to my feelings to dissent from a majority of the Court, a sense of duty impels me to do so, on the present occasion.

This suit is founded on a contract in writing, without a seal, for the sale and purchase of a tract of land, purchased by the seller from Fortunatus Sydnor, supposed to contain 500 acres. The Vender charges the Vendee with breaches of the contract, of which he loudly complains; and, instead of bringing his action at law for damages, he comes into a Court of Equity, and, in the first instance, prays that the contract may be cancelled; and that the defendant allow him for rents and profits of the land, and that special damages &c. may be inquired of by a jury; but, if the said contract is to be carried into effect, then for other relief. It is a maxim too well established to be controverted at this day, and very applicable in the present case, that whoever comes into a court of Equity, to ask relief, must first do equity. Let us examine whether the complainant, in the case before us, has done so?

And here I must recur to the contract itself, which, though hastily, and imperfectly drawn, I construe upon equitable principles, and according to what I conceive to have been the true intention and understanding of the parties at the time of making it; the substance of which is briefly this: Purcell sells to Mayo the land purchased of Fortunatus Sydnor, (describing the boundaries,) supposed to contain 500 acres, but to be surveyed, to ascertain the true quantity; for which Mayo was to give him 6l. per acre; the principal to be paid at any time, or times, within 20 years, at the option of the vendee, who, in the mean time, was to pay interest; to commence three months after the date of the contract; and payment to be secured by mortgage.

It must be understood, then, especially in a Court of Equity, where the vendee is brought by the vendor for relief, that the latter was to make him a good and indefeasible title, clear of all encumbrances, and to give immediate possession, or, at farthest, within three months from the date of the contract; as that was the time the interest to be paid on the purchase money was to commence; no particular time being mentioned in the writing, for giving possession.

It was known to the parties, at the time of the contract, that Mrs. Sydnor had not relinquished her right of dower in the premises, which the vendor asserted might be had for 200l., which sum Mayo agreed to pay nine months after her right of dower should be relinquished; to be deducted out of the principal purchase money. The next inquiry is, on whom was it incumbent to procure that relinquishment? I answer, on the vendor, who was bound in conscience to make a complete and perfect title to the purchaser.

Mayo having waited long for Purcell to

obtain the relinquishment of dower, which he failed to do; and being (I suppose) unwilling to receive a deed for land thus encumbered, was at length obliged to give 1,260 dollars, instead of 200l., to Mrs. Sydnor, for her right, after many efforts to obtain it for less: and he swears, in his answer, that Purcell assured him it might be purchased for the "latter sum, (which I believe to be true, as that much he agreed to pay out of the principal,) and that the growing crop might be purchased of Sydnor at a fair valuation.

From this view of the case, two questions seem to arise:

1st. Whether Mayo ought not to have full credit for the 1260 dollars, instead of 200l.? and,

2d. Whether he ought to pay interest on the purchase money, before he was put in full possession of the premises?

As to the 1st point, I am clearly of opinion that the appellant ought to have full credit for the sum he was obliged to pay for Mrs. Sydnor's right of dower, as it was the duty of the appellee to clear the land from all encumbrances; and there is no evidence that he ever applied to Mrs. Sydnor, or to her agent, on the subject; and it is in proof that under the then existing circumstances, the dower right was purchased at a low price; Sydnor being a dissipated, sickly man, and his wife a hale, healthy woman.

With respect to the 2d point, I also think, upon sound principles of equity, that is also in favour of the appellant; for although, by the agreement, interest was to commence in three months from the date thereof, which was the 22d of April, 1799, it must have been understood that possession was to be given accordingly; and it is in evidence, by the depositions of Charles Smith and Elisha Williams, that Purcell himself so considered, and understood the contract, both of whom depose to that effect. Elisha Williams, "in the year 1800, heard Purcell wish that Fortunatus Sydnor would remove from the land, as he paid him no rent; and that his being there as a tenant would prevent his drawing the interest from Col. Mayo, who (he supposed) would not be chargeable with interest while said Sydnor stayed, nor until he, Mayo, had quiet possession." Charles Smith heard Purcell express himself to the same effect; does not remember the particular words made use of, "but that he so expressed himself, as to convey the idea that interest would not be chargeable to Col. Mayo until Sydnor removed."

251 If, then, a party deeply "interested in a contrary construction, so understood the contract, well may his judges do so likewise; especially, as it is agreeable to sound principles, both of law and equity, as laid down by all the judges in the case of *Raun v. Hughes*, cited 7 Term Rep. 350, that a promise must be coextensive with the consideration. The promise here was, that the appellant should pay interest, to commence in three months from the date of the contract; and the implied consideration was, that he should then have possession of the property, for which that interest was to be paid; and so Purcell him-

self understood the contract, as before noticed. He, indeed, charges in his bill, that in July, 1799, he gave up the keys and possession of a house; and then Mayo sent hands there to ditch in the plantation; and that before Sydnor moved off the land, Mayo cut timber thereon, for his bridge. Let us see how that matter stands, upon the evidence. The land thus sold, and supposed to contain 500 acres, consisted of three distinct parcels, or tenements; one, the manor plantation of 200 acres, where Fortunatus Sydnor lived; a 2d, of 200 acres, formerly purchased by him of Robert Sydnor, on which was a small unfinished dwellinghouse; and the 3d, of 100 acres, he purchased of Miles Selden, but was never conveyed to him; but a deed made to Purcell for the same, on the 5th day of June, 1803, more than 4 years after the contract; until which time, he could not have made a valid title to Mayo.

The delivery of the keys, and possession of the house charged in the bill, was of the unfinished house on Sydnor's Point, formerly Robert Sydnor's, in which he, Mayo, put one Jones, who paid no rent, but was put there merely to prevent the destruction of the house by watermen, who had done it great injury; and, as to the "ditching in of the plantation," spoken of in the bill, it is in full evidence that the ditch was on the main road, purely to prevent the upland wagoners from trespassing on the land, on which they had already committed great "waste; and which ditch Purcell himself contracted to finish; it having been already begun.

He further charges in his bill that, in the latter end of the year 1800, the appellant applied to him, to know how Sydnor was to be got off the land; and he told him, "he might apply to the Court of Chancery, and he would enforce Sydnor to deliver up possession." So, by the complainant's own showing, Mayo was, by his advice, to be involved in a tedious and expensive chancery suit, to obtain that possession which he ought to have secured to him long before; and, by an after thought of his, charged him with interest all the while; which he had repeatedly acknowledged he had no right to demand. I am, upon the whole, of opinion that the decree is erroneous; 1st, In not allowing the appellant the full sum he was obliged to pay Mrs. Sydnor for her right of dower: 2dly, In compelling him to pay interest before he was put into full possession of the premises, contrary to the understanding of the contract by the appellee himself, as at different times, and to different people, he confessed; and, lastly, That the appellee is not decreed, in any event, to make the appellant a title to the land in question which he sold him.

In the case of *Grantland v. Wight*, the former purchased of the latter a lot in the city of Richmond, and gave his bond for the purchase money. Possession of the ground was immediately given to Grantland, who built a large brick house upon it, for which he was receiving rent. A suit was brought, and judgment obtained on the bond; which he enjoined, on a sugges-

tion that there was a deficiency in the quantity of ground. The Chancellor dismissed the bill, and Grantland appealed to this Court, which directed the injunction to be reinstated, until Wight should tender him a good and sufficient deed in the opinion of the Chancellor, to whose Court the cause was remanded, for that purpose, and for that alone.

253 *I am of opinion that the decree in this case ought to be reversed, and the cause remanded to the Superior Court of Chancery for further proceedings, according to the foregoing principles; but, a majority of the Court being of a different opinion, the decree is affirmed.

Friday, April 3d, an argument took place, on a point propounded by the Court; whether the Chancellor having omitted to direct, expressly, that a deed be made from Purcell to Mayo, this Court ought to reverse the decree; or to affirm it, and add the direction which the Chancellor should have given?

Wirt, for the appellant, contended that the decree ought to be reversed. It does not provide for making a deed. It directs the payment of a specific sum by Mayo, and that he shall make a mortgage to Purcell; but it says nothing about Purcell's making a deed to him. The Court's opinion, "that the agreement ought to be specifically performed by both parties," cannot be considered as directing a deed to Mayo; 1st, Because these words are no part of the decree itself; they are only a recital of the motive which led to the decree; not a direction of what shall be done; 2dly, Suppose these words a part of the decree, they determine nothing: the suit calls for a construction of the agreement: these words say, that the agreement shall be executed by both parties, without deciding what the construction is. In the agreement nothing is said about Purcell's making a title: that he should make a title is a legal inference from the contract of sale: the words in question leave this inference just where the agreement left it. If Mayo had waited on Purcell with a copy of this decree, and, relying on those words, called on him for a title before he paid the money; might not Purcell well have answered, that the agreement did not say that he should make a deed; and, therefore, the Chancellor had not said so?

254 *It is not by this general mode of expressing an opinion, that the Court of equity makes a decree: it is by directing what is to be done; it is the order given to the parties under the opinion, which shows what they are to do. (a) It may be said, that the direction that Mayo shall make a mortgage of the land to Purcell, implies that Purcell shall previously make a deed to Mayo: but what sort of a decree is that in which the duties to be performed on one side are expressed, and those on the other side are left to implication? Such implication may be denied. Its necessity does not appear: for Mayo may make a mortgage, subjecting his equitable title, without having any legal title himself. This would be incorrect to be sure; but that is the very subject of complaint. It

is the province of a decree to leave nothing to dubious implication; to put every thing out of dispute by the clearness of its orders.

It may be objected, that this decree is interlocutory; and although it omits to provide that a title shall be made to Mayo, the chancellor may provide for it by his final decree. But this is a final decree throughout, in form and substance. Omitting the words that "the plaintiff hath liberty to resort to the Court, as occasion may require," &c. it would be allowed on all hands to be final. Nor do those words change its final character, either as to Mayo or Purcell. Not as to Mayo; because they keep open the door expressly as to Purcell only. Nor as to Purcell; for what are those words? They mean one of two things: either, 1. That Purcell should be at liberty to apply to the Court for process to force Mayo to do what the decree commanded: that is, to make the mortgage, or pay the money; (in which case they mean nothing; because Purcell would have had liberty to resort to the Court, for that purpose, without those words; and, upon Mayo's complying with the decree, it would certainly have been final.) or, 2. They mean that he is to be at liberty to resort to the Court for the accruing interest, *toties quoties*.

255 Such decrees are common on running contracts, where instalments are yet to be due, and are always regarded as final. The cause is off the docket; both parties out of Court: it is never to be redocketed; but when the plaintiff comes in, it is by a new bill.

But, if this decree is to be considered as interlocutory because there are instalments of interest yet to come, for which the plaintiff has leave to apply; every decree for the future instalments will be equally interlocutory; until the whole shall be paid; because the same leave will be reserved in every decree; so that the decree for making the title need not come until after the twenty years; after the payment of four or five thousand pounds of interest! Both in practice and principle, it is a final decree.

Hay, for the appellee. I admit, that where a decree is for the payment of purchase money, it ought to direct a title to be made; and that here it has not been expressly directed in terms; but it is impliedly. The decree says, that the contract ought to be specifically executed on both sides. So, in the contract itself, there is no express stipulation that a title shall be made: yet this was understood to be implied, of course.

No particular form of words is necessary in a decree. The Chancellor's opinion, being expressed, is equivalent to an order. The Clerk, therefore, under this decree, would not issue an execution against Mayo until Purcell had complied with the agreement on his part, by tendering a deed.

But suppose it not a fair inference from the decree that a deed is to be made; yet this Court, approving the decree as far as it goes, may add the direction which the Court below ought to have added. According to a fair exposition of the 19th section of

(a) Wyatt's Prac. Reg. 154.

the Act of Assembly concerning the Court of Appeals, (a) which says, that such decree or judgment may be given, "if it be not affirmed or reversed in the whole, as the Court whose error is sought to be corrected ought to have given,"

256 *there can be no question but this may be done. And it has been the practice, in affirming a decree, to make any necessary addition. (b) Indeed, the Court has even gone further, and added a restrictive explanation to the judgment of a Court of law. (c)

Wickham, in reply. Is this decree legal, or not? I have a right to say, on behalf of Mayo, that he appealed, because it directed him to pay the money absolutely, when it should have been conditionally; that is, with a proviso, that a title should be previously made him by Purcell. In *Pollard v. Rogers*, decided June 11th, 1791, the very point now in question was decided: and in *Grantland v. Wight*, 2 Munf. 179, a similar decision took place; the Court determined the claim of Grantland to be one of the most unfounded that ever was; yet, for the oversight of the Chancellor, in omitting to direct a title to be made, the decree was reversed.

The expression of an opinion by the Chancellor, that the agreement ought to be specifically executed on both sides, contains an implication that Purcell had executed it on his side, and that Mayo ought to execute it on his side; not that Purcell ought now to make a deed. If it was to be understood as an opinion that Purcell ought to do it; nevertheless, it was not directed to be done. The clerk of the Court of Chancery was bound to issue the execution. Mayo could not get the error rectified without appealing to this Court, or by a bill of review.

Curia advisari vult.

Thursday, November 19th, 1812, the following opinion of the Court was delivered by JUDGE ROANE.

The decree of the Court of Chancery being, inter alia, that the agreement should be specifically performed by both the parties, and that the appellant should execute a mortgage on the lands in the proceedings mentioned; which presupposes that a
249 title should first be made to *him, therefor, by the appellee; this Court (thus understanding that decree,) is of opinion, that the same is correct upon the merits; and the same is consequently affirmed.

Thatcher and Herndon v. Taylor and Cochrane, Trustees, &c. of Miller.

Thursday, March 26th, 1812.

1. Bond Payable in Installments.—Action of Debt.—Plea of Payment.—Effect of.*—In debt on a bond, if the defendant, after craving oyer, plead "payment," and it appear, from the condition of the bond that only a part of the debt had become due at the time of institution of the suit; the plea extends to that part only, and not to sums which might become due thereafter.

(a) Revised Code, 1st vol. p. 63.

(b) *Alexander v. Morris*, 3 Call, 106; *Argenbright v. Campbell*, 5 H. & M. 199.

(c) *Preston v. Harvey*, 2 H. & M. 68.†

*See monographic note on "Debt. The Action of" appended to *Davis v. Mead*, 13 Gratt. 118.

†Note. See also *Hefner v. Miller*, 3 Munf. 43.

2. Same.—Judgment on Form.—A judgment on a bond, for payment of a debt by installments, should be, for the debt in the declaration mentioned, to be discharged by the sum due at the time of institution of the suit; reserving liberty to the plaintiff to resort to a scire facias to recover such other damages as might thereafter arise under the condition of the bond.*†

An action of debt on a bond was brought by William Taylor and Thomas Cochrane trustees and executors of Thomas Miller, deceased, against Eliasha Thatcher, Godlove Heiskell, and William Herndon, in the County Court of Sportsylvania. The declaration was in the usual form, demanding a debt of 2,000 dollars, and saying nothing about a condition to the bond. The defendants praying oyer, the writ and bond were spread on the record. The writ bore date the 1st of April, 1806, and was returned executed. The bond was dated November 7th, 1803, in the penal sum of 2,000 dollars, conditioned to be discharged by the payment of the legal interest on 3,660 dollars, annually, during the life of John Miller, brother of the said Thomas Miller; (the first payment to be made the first day of September, 1804, and, then, every first day of September thereafter;) also, by the payment of 1,830 dollars, in one year after the death of the said John Miller, and the further sum of 1,830 dollars, in one year thereafter.

The defendants then pleaded "payment;" and in November, 1806, a verdict was found for "the debt in the declaration mentioned, to be discharged by the
250 payment *of 439 dollars 20 cents; it being the amount of interest up to the first day of September, 1805:" and judgment was entered accordingly.

To this judgment the plaintiffs obtained a writ of supersedeas, assigning errors; 1st, That no assignment of breaches was made; and, 2dly, That the judgment was not in conformity with the law in such cases, which requires that it should be for the debt in the declaration mentioned, to be discharged by the payment of the sum actually due at the time of rendering such judgment, and such other sum, or sums, as shall thereafter be made appear to be due.

The Superior Court of law reversed the judgment, ordered the proceedings to be set aside to the plea, and remanded the cause for further proceedings; whereupon the defendants appealed to this Court.

Stanard, for the appellants.

Williams, for the appellees.

Wednesday, November 11th, the president pronounced the following opinion of the Court.

"The Court is of opinion, that the condition of the bond in this case being made a part of the declaration by oyer, and that condition only showing that a part of the money, thereby secured and provided for, had become due at the time of the institution of the suit, the plea of payment, put in by the defendant, only extended to such sum or sums, and not to those which might become due in future; and that issue being joined upon that plea, so understood, the judgment of the County Court was correct so far as it went; but that the same was erroneous in not reserving liberty to the

†Note. See *Bibb v. Cauthorne*, 1 Wash. 91.

plaintiffs to resort to the said judgment by *scire facias* to recover such other damages as might thereafter arise under the condition of the bond; and that the judgment of the Superior Court of law is also erroneous for this last omission."

251 *Both judgments reversed, and judgment entered, that the appellee recover against the appellants 2,000 dollars, the debt in the declaration mentioned, and his costs, &c.; but this judgment may be discharged by the payment of 439 dollars 20 cents, and the said costs; "liberty being reserved to the appellee to resort to the said judgment by *scire facias*, to recover such other damages, as may have arisen since the institution of this suit, or may hereafter arise under the condition of the said bond."

Gray and Scott v. Campbell.

Thursday, April 24, 1812.

1. **Injunction Bond*—Defective Plea.**—It is no plea to an action upon an injunction bond, "that the injunction was not dissolved unconditionally; but upon terms, that the plaintiff at law should execute a bond for securing the title to a tract of land;" without averring in the plea that such bond had not been given.
2. **Same—Same.**—Such defective plea ought not to be received by the Court, to set aside an office judgment.
3. **Injunction*—Dissolution on Condition.**—Where an injunction is dissolved upon a condition; and that condition has been complied with by the defendant in equity, the surety in the injunction bond is not exonerated.

Upon an appeal from a judgment of the Superior Court of Campbell County, in an action of debt on an injunction bond, dated November 12th, 1802, in the penalty of two thousand dollars.

The declaration stated, that the injunction was dissolved; whereby the action accrued, &c.

The cause standing for trial on a writ of inquiry, the defendants tendered two pleas; one of them "covenants performed," on which issue was taken; the other a special plea, prayingoyer, and stating that the injunction was obtained on account of a defect of title in the lands sold, by the assignor of the plaintiff at law, to the plaintiff in equity; and that it was not dissolved unconditionally, but upon terms that the plaintiff at law should execute a bond for securing the title to the land in question, without averring that such bond had not been given. This plea the Court refused to receive; whereupon the defendants excepted.

The parties went to trial upon the 252 first plea; and at the trial the defendants moved the Court to instruct the jury, that if it should appear in evidence that the injunction was dissolved on condition that the title should be secured, and not otherwise, a compliance with the condition of the said order, by securing the title to the land, would not warrant an action against Scott, the surety in the injunction bond: but the Court refused to give the instruction; whereupon the defendants again excepted.

A verdict and judgment were rendered in favour of the plaintiff, for the debt in the

declaration mentioned, to be discharged by the payment of 288l. 12s. 9d. with interest thereon from the 25th of December, 1800, and costs.

Wickham, for the appellants. Whether the matter of the plea, which was rejected by the Court, constituted a good defence, or not, it ought to have been received. If there was any informality in it, the defendant might have moved to amend it.

2. The plea rejected was a good defence on the merits. The surety in the injunction bond is responsible only in the event of an absolute dissolution of the injunction.

Such appears to be the meaning of the Act of Assembly on the subject.(a) It says nothing about a conditional, or incomplete dissolution, and speaks of awarding costs.

3. The Court erred in refusing to give the instruction required by the defendants at the trial.

The Attorney General, contra. The Court acted properly in rejecting the plea. Whenever a plea is tendered to the Court, it must contain such matter as is good ground of defence at law; or the Court should reject it.(b) A frivolous plea ought not to be received, because such a practice would be productive of great delays and inconvenience. On setting aside an office judgment, an issuable plea is necessary. In *Downman v. Downman's executor*, 1 Wash. 26, "tender and refusal," as there pleaded, was considered a bad plea, and therefore rejected. *That case shows, that a plea to set aside an office judgment, must be a plea to the merits; and that, in such case, the Court will not put the plaintiff to his demurrer.

The plea in this case was not a good defence. The injunction was dissolved; and its being a conditional dissolution did not prevent it from being a dissolution. The breach of the condition of the bond is sufficiently assigned, without saying that the defendant in equity had performed the order of the Court of Chancery, by giving bond to secure the title to the land. A breach assigned in the terms of the condition, is sufficiently special.(c) A conditional dissolution of the injunction satisfies the terms of the injunction bond. If the title bond was not given, it was incumbent on the other party to aver it: but in the second bill of exceptions, it is admitted, that such bond was actually given.

It may be said to be a hard case, that the surety in an injunction bond should be bound, when his principal had a ground for going into equity. But it often happens that a party going into equity for an injunction, though obtaining it, has been guilty of great default. In this case, the Chancery record shows, that the plaintiff in equity was altogether in the wrong. He had received a good title: the injunction was dissolved at his costs: but the Court (out of abundant caution) directed a bond to be given him for securing the title.

Wickham, in reply. A good plea is not

* monographic note on "Injunctions" appended to *York v. Anthony*, 15 Gratt. 518.

(a) Rev. Code, vol. 1, c. 64, sect. 56, p. 68.

(b) 1 Chitty, 459; 5 Bac. 570.

(c) Winslow v. The Commonwealth, 2 H. & M. 52

necessary to set aside an office judgment; but only an issuable plea: that is to say, a plea in bar, not a dilatory plea, or plea in abatement. In *Stone v. Patterson*, (a) and *Waller's executors v. Ellis*, (b) it was settled, that a party may file as many pleas as he thinks proper, without leave of the Court. *Downman v. Downman's executor* was decided on special reasons, applying only to the plea of "tender and refusal." The money was not brought into Court; without which, it was no plea at all.

254 *The doctrine of Mr. Nicholas goes to this extent; that no plea to which the plaintiff may demur can be received on setting aside an office judgment. But a plea to which the plaintiff may demur, is an issuable plea; for issue in law may be taken upon it.

Here the attorney general explained. He did not mean to say that formal objections to a plea shall exclude it: but if the fact alleged, (admitting it to be true,) is no ground of the defence, plea ought not to be received.

Wickham, on the merits. It is evident the plaintiff in the injunction had reason for going into equity. Otherwise a bond of indemnity would not have been required in his favour. This is a clear case of relief granted upon the injunction. The question then is, whether in such a case, the surety in the injunction bond ought to be charged? The injunction was not dissolved by the Court, but by the act of the defendant in Chancery, (who was plaintiff at law;) that is, upon his executing the bond of indemnity.

In *Nelson v. Anderson*, 2 Call, 286, it was determined, that the surety in an appeal bond is exonerated, upon the abatement of the appeal by the death of the appellant.

The attorney general. That case went off upon the ground that the surety ought not to be injured by the act of God, and that the appeal should have been revived by *scire facias*.

Curia advisari vult.

January 9th, 1813. The President delivered the Court's opinion, that the judgment be affirmed.

255 **Laughlin v. Flood, Executor of Washington*.

Argued, Dec. 19th, 1811.

Covenant—Declaration—Defects Cured by Verdict.*—

On a covenant in which the plaintiff engaged to serve the defendant as his overseer, for one year; and the defendant, to pay to the plaintiff a certain part of all grain "made on the plantation, (after deducting the seed,) oats excepted: a declaration charging that the defendant did not, at the close of the year, pay to the plaintiff such part of the grain "made on the plantation," (without setting forth what crop was made,) is good after verdict,

This case was argued by *Botts* for the appellant, and for the appellee; but is so fully considered and discussed by the

(a) M. S. May 6th, 1806.

(b) 2 Munn. 88.

***Pleading and Practice—Declarations—Defects—Statute of Jeofails—Effect.**—If the declaration states a defective title or cause of action though it states it well, or if it states no title or cause of action at all, neither common law nor the statute of Jeofails helps the judgment. If it states a defective title, it shows that there is no right to recover. If it states no title, the presumption is irresistible that the

judges in their opinions, that any further statement is unnecessary.

March 8th, 1814. The judges delivered their opinion seriatim; the Court consisting of *ROANE, CABELL* and *COALTER*.

JUDGE COALTER. The only question in this case is, whether after verdict for the plaintiff, there appears a sufficient cause of action in his declaration to enable the Court to pronounce judgment for him.

The declaration is drawn on a covenant between the plaintiff, now appellant, and the testator of the appellee, in which the former engaged to attend carefully, as an overseer, on the plantation of the latter, for a year, and was to have the management of twenty-six working hands: for these services the testator of the appellee, was to pay him at the close of the year, one twelfth part of all grain made on the plantation; (after deducting the seed;) oats excepted.

The plaintiff avers in his declaration, that, "in pursuance of said agreement, he entered into the service of said Washington, and well and truly performed all the covenants and agreements in the said deed on his part to be performed, &c.; nevertheless, the said Washington did not, at the close of the year, pay to the plaintiff one twelfth part of the grain made on the plantation; nor did he pay any part thereof, as, according to the terms and effect of the covenant aforesaid, he ought to have done," &c.

256 *The defendant takes over of the covenant, (whereby the whole of it is made part of the declaration,) and then pleads, "that his testator hath performed all the conditions expressed in the covenant mentioned on his part to be performed, &c.; to which the plaintiff replied generally. The jury first found a verdict for upwards of 400 dollars, which was set aside, and a new trial granted; and the second jury found for the plaintiff 385 dollars 50 cents damages; on which the defendant's attorney filed errors in arrest of judgment. The cause assigned is, that it does not appear, from the declaration or pleadings, that any grain was made upon the plantation the year the plaintiff was overseer.

The judgment of the District Court was for the defendant; and the question is, whether that judgment is correct?

My opinion is that it is erroneous, and must be reversed, and judgment entered for the appellant on the verdict of the jury.

By the common law, if the issue joined be such as necessarily to require, on trial, proof of the facts, defectively, or imper-

plaintiff could not have made out a case by proof on the trial. But if it states a good title but states it defectively, it is fair to say that the plaintiff on the trial proves a good cause else the jury would not have found for him, and the statute cures the defective statement. *Long v. Campbell*, 37 W. Va. 671, 17 S. E. Rep. 199, citing the principal case. To the point that the statute of Jeofails will not validate a declaration which does not state any cause of action at all; but it cures the error in a declaration which defectively states a good cause of action, the principal case is also cited in *Com. v. Peas*, 2 Gratt. 640: *Roanoke Land and Improvement Co. v. Karn*, 80 Va. 595. See also, *foot-note* to *Winston v. Francisco*, 2 Wash. 187; *foot-note* to *Chichester v. Vass*, 1 Call 88; *monographic note* on "Amendments" appended to *Snead v. Coleman*, 7 Gratt. 300.

fectly stated, or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict. (a)

This common law rule is, in very definite and explicit terms, adopted by our statute, which enacts and declares, "that no judgment, after verdict, shall be stayed, or arrested, for omitting the averment of any matter, without proving which, the jury ought not to have given such verdict." (b)

These cases of defects or omissions are frequently helped too by the plea. In *Buster's executors v. Wallace*, (c) the plea of "covenants not broken," was held to admit, that a breach was laid. In the case in 4 Bac. 21, taken from Rol. Rep. 382, the plaintiff declares that, "in consideration the plaintiff would deliver all the corn in "a certain barn, the defendant did assume," &c.; and avers that he did deliver all the corn in the barn; but does not show that there was corn there. It was agreed by the Court, that had this been on demurrer, the declaration would not have been good; but, being after verdict, upon non assumpsit pleaded, (by which issue it is admitted there was corn there,) it was adjudged for the plaintiff.

So, also, in 5 Bac. 197, in trespass for taking goods, the plaintiff neither averred property, nor possession of the goods; (which would have been bad on demurrer, and indeed after verdict on "not guilty;") but the plea justified the taking the goods from the possession of the plaintiff; and so it cured the want of averment.

The fact, which is not averred, is admitted by the plea; and the defendant takes the affirmative on himself. (d)

In the present case, the plaintiff avers his performance of all the covenants on his part; that he tilled the earth, &c.; but does not aver that God gave the increase, from which he was to be paid for his labour; or what those crops were, further than what is alleged in the assignment of the breach; to wit, that the testator did not pay him one twelfth of the grain "made," &c. This is the only breach assigned, and for which damages are claimed. The defendant does not plead that no crops were made; but to a declaration, charging the faithful management and labour of twenty-six hands for the year, and claiming a twelfth part of the grain made, according to contract, the defendant pleads that his testator performed the covenants; that is, paid the grain, &c.; thereby taking the affirmative on himself. Suppose, in the case of the corn in the barn, the parties to be reversed, and that the suit had been brought by the purchaser of all the corn in the barn, on an averment that he had paid, or was ready to pay, the price, &c.; and that, instead of case, it had been covenant; and a breach laid for the non-delivery of the corn in the barn; and to which the person "selling had pleaded covenants performed; in

other words, a delivery of the corn; would judgment on a verdict for the plaintiff, in such a case, be arrested?

But when we add to this the informal averment in the breach, that grain was made; (indeed, the averment that he laboured twenty-six hands on the farm for a year, may, perhaps, be considered an informal averment that grain was made;) when the plaintiff claims nothing, except for the non-delivery of the twelfth of the grain made, it seems to me impossible that the verdict in question, on the issue in this case, could have been found, without evidence of the quantity of grain made; and if so, it comes within the common law doctrine on this subject, as well as within the act of assembly aforesaid.

Neither the principles for which I contend, nor their application to this case, I hope, will be found to conflict with any of the decisions of this Court. It is certainly not intended by me that they should: on the contrary, I think the case of *Smith v. Walker's executors*, 1 Wash. 135, confirms the doctrines I am now contending for. In that case, the plaintiff set out a promise by the testator, if he would marry his granddaughter, to give him as much of his estate, &c., as he would give to any of his own children; and averred that the testator did not give him as much as he gave to some of his children; without averring how much he gave to either of his own children; yet, the Court say, "this might have been aided by verdict, if that had been rendered on the trial of a proper issue;" but one of the issues was immaterial, and so the verdict was set aside; and the declaration standing unaided by a verdict, it was not a sufficient foundation whereon to award a repleader. In other words, it would have been bad, on general demurrer.

In *Chichester v. Vass*, it was not averred that he failed, and refused to give him as much as he give other children; for if that had been so laid, and also that it was convenient to make a like advancement to the plaintiff, *I presume the objections in these points, to that case, would not have availed.

The Court will strive to support a verdict, where it appears that what was necessary to sustain the action must have been proved to the jury; in other words, that the trial must have been on the merits, notwithstanding the imperfections or omissions in the pleadings, as will appear from a variety of cases; and, amongst others, in addition to those above, I will refer to the case in 1 Salk. 120, to *Avery v. Hoole*, Cowp. 825, and to *Frederick v. Lookup*, 4 Burr. 2018.*

I think the trial, in this case, could not have been otherwise than on the merits; that all the valuable purposes of pleading have been answered; that the defendant could not have been surprised; on the contrary, that he knew that a portion of the

(a) 1 Chitty, 401; 1 Saund. 228, and 2 Burr. 900.

(b) Rev. Code, 1st vol. p. 112, and 2 Wash. 210.

(c) H. & M. 82.

(d) See also *Winslow v. The Commonwealth*, 2 H. & M. 459.

*Note. See also *Lev. 78*; and *Keble*, 371; *Conyers v. Smith*, cited 5 Bac. 389; *Winslow v. The Commonwealth*, 2 H. & M. 459; also *Roll's Rep. 383*, cited 5 Bac. 344; *Rushton v. Aspinall*, 2 Doug. 683; *Fulgham v. Lightfoot*, 1 Call. 257; and *Holladay and wife v. Littlepage*, 2 Munf. 539; all which authorities were referred to by *Botts*, in argument.—Note in Original Edition.

grain made, was claimed according to the covenant; and that he came prepared, especially on the second trial, to prove payment, as far as it had been made; that the plaintiff could not have recovered, except for the non-delivery of grain that was made during that year; and, finally, that the judgment in this case, if for the plaintiff, will be a bar to any future action he may bring for the non-delivery of a twelfth part of the grain made, &c. during that year.

I am, therefore, for affirming the judgment.

JUDGE CABELL. Concurring entirely in the opinion just delivered, I have nothing to add but an explicit declaration, that I do not conceive it to be in opposition to the former decisions of this Court. This is not like the case of *Chichester v. Vass*, where a fact, essential to the plaintiff's right of action, was totally omitted. In this case, I think, all necessary facts

260 are set forth; and, *although some of them are so defectively stated that the declaration would have been bad on demurrer, yet, after verdict, that defective statement, (especially when aided by the admission in the plea,*) is, in my opinion, cured by the common law rule, engrafted into our statute of jeofails, that no judgment shall be stayed, or reversed, "for omitting the averment of any matter; without proving which, the jury ought not to have given such verdict."

JUDGE ROANE. This is an action of covenant, brought by the appellant against the appellee, as executor of Thacher Washington, deceased. The declaration states, that a covenant was made between the appellant and the said testator, whereby, in consideration of certain specified services to be rendered by the former for the latter, in the year 1795, in the character of an overseer, it was, among other things, covenanted and agreed, on the part of the said Washington, to put twenty-six working hands under him, to give him a certain specified allowance of provisions for the support of his family, "and to pay him, at the close of the year, one twelfth part of the grain made on the plantation, after deducting the seed wheat, oats excepted."

The declaration states a further covenant, on the part of the said Washington, in the case of his failing to comply with his agreement to the appellant; that is, (as I understand it,) in the event of his not allowing the appellant to become his overseer.

The declaration then avers, that the plaintiff had well and truly performed all the covenants on his part to be performed, and charges a breach in this, "that the said Washington did not, at the close of the year aforesaid, pay to the appellant one twelfth part of the grain made on the plantation, or any part thereof, as, according to the form and effect of the covenant aforesaid, he ought to have done." On oyer, the agreement was set out: it became thereby a part of the declaration; 261 and, while it precisely *corresponds with the statement in the declaration,

as to the part of the grain, (the seed wheat and oats excepted,) to which the appellant should become entitled, it contains, also, still other covenants on the part of the said Washington; such as, to give him one third of the fowls raised by him, and the privilege of keeping three of his own negroes on the plantation.

To the declaration, thus amplified by the agreement as set out on oyer, and which shows, (as, indeed, the original declaration itself does,) that there were other covenants to be performed on the part of the said Washington, over and above that stated in the breach aforesaid to have been violated, the defendant pleaded, that his testator had performed all the conditions expressed in the covenant in the declaration mentioned. To this plea the appellant replied generally; and, thereupon, issue was joined. The jury find, in general terms, "for the plaintiff," and assess his damages to 285 dollars 25 cents.

Admitting, from the breach assigned in this cause, that the plaintiff went for damages, on the ground only of that covenant being broken, which stipulated for one twelfth part of the grain made on the plantation, and not on that of the breach of any other of the covenants; the first question is, whether there is not a material defect in the declaration, in not averring that any grain, other than oats, was made thereupon, in the year in question; and more than was necessary for seed; and what was the quantity and quality thereof. These are facts resting within the knowledge of the plaintiff, and which, therefore, while they are material to the defence of the appellee, there is no hardship on the plaintiff in requiring him to discover. This (it appears to me) forms the very gist of the action. The covenant in itself gave no cause of action, but only laid the foundation of one, which, in the event of grain being made and withheld from the plaintiff, gave him a right to recover. In this respect, this case is precisely similar to that of *Chichester v. Vass*, in which it

was adjudged, that the gist of the 262 action was the *giving to his other daughters more than the testator gave the wife of the plaintiff: the promise to do that was not, alone, held to be that gist. It was also held, in that case, to be absolutely necessary that that fact should be averred in the declaration; our act of jeofails not extending to cure the defect of the averment of the gist of the action. There is no difference between that case and the case before us. In that the plaintiff omitted to aver that the defendant had given to other daughters what he did not give to the wife of the plaintiff: in this there is no averment that any grain was made; without which, on this ground of complaint, the appellant was not entitled to recover.

I understand that it is not denied by the other judges, but that the averment of this fact is wanting in the case before us: but they consider the defect as cured by the breach, the pleadings, or the verdict. I will briefly examine the effect of each of these, in its order: And, first, of the breach.

This term, "averment," as applied to a

*Note. In the argument, Botts observed, that the plea of "covenants performed," admitted that a crop was made.—Note in Original Edition.

declaration, is a technical term. It means a direct and positive allegation of a fact, made in a manner capable of being traversed. It excludes the idea of an affirmation to be made out by inference and induction only. When the parties go to issue, as to a point of fact, before a jury, and especially, one which makes the very gist of the action, it is necessary that there should be a positive affirmation on one hand, and negation on the other. Nothing less than this will suffice, under the decisions of this Court, as applied to the gist of the action. Among others, the cases of *Winston's executor v. Francisco*, (a) and *Chichester v. Vass*, are decisive to this effect. In neither of these cases was the averment, deducible from the breach, held to supply the defect of a positive averment of the cause of action. In the last case, it is true, the breach was merely general; but as there was only one ground of action set out, the allegation, that that had not been complied with, is the same thing as if that ground had

263 been specifically *stated to have been broken. That case is, in that view, a full authority in the case before us. All the judges concurred, in that case, that the breach did not supply the defect of the averment of the cause of action.

But if a breach should be held to have such effect, it should be a breach within the covenant; for, where the covenant, under the breach as assigned, may not have been broken, the declaration is clearly defective. It is defective if the cause of action has been previously averred in a proper manner; and, a fortiori, where there is a defect of that averment. As to this point, I refer to 1 *Esp.* 363, and the cases there cited. To apply this position to the case before us, it will be seen that the complaint made by the breach, is, that the testator did not give the appellant one twelfth part of the grain made on the plantation; whereas, by the covenant, as stated in the declaration, he was only bound to give one twelfth part, after the seed wheat and oats were deducted. According to the breach, the appellee is subjected to the action, although he may have only made oats, (which is a species of grain,) or less wheat than was necessary for seed; whereas, under the covenant, as declared on, he may have refused to comply with the requisitions in the breach, and yet not have broken his covenant. He has not broken it, if he did not refuse to give him a twelfth part of what remained after the seed wheat and oats were deducted. So this word, "made," contained in the breach, (admitting that it amounted to an averment,) may be satisfied by any quantity, however small; it may be satisfied by a quantity less than the seed of the wheat; or by the oats; neither of which are demandable: the breach, therefore, does not necessarily import a case, in which the covenant declared on has been broken. That covenant has not been broken, although some grain was made; unless more than the seed wheat and oats was made, and the twelfth of the surplus was refused to be given to the appellant.

264 *If, therefore, a breach should be held, in general, to supply a defective averment of the cause of action, it is not such a breach as would be inadequate to warrant a recovery, if that averment had in fact been made. It is not such a breach as, if true, does not necessarily show a cause of action. That is precisely the character of the breach before us.

As for the pleadings in this case; none of the authorities show that a plea, like the one before us, is competent to cure the omission of that which is the very gist of the action: If there be such cases, however, in the old books, they are in conflict with the decisions of this Court. To omit others, I will refer to the case of *Faulcon v. Harris*, 2 H. & M. 550. That was an action of debt on a bond given in 1782, in the penalty of 50,000*l.* (paper money,) conditioned for the payment of 1000*l.* specie, or such farther sum as should be equal to the said 1000*l.* in 1774: that is to say, to purchase as much land and negroes as that sum might have purchased at that time, to be settled by agreement of the parties, or their referees, in default of such agreement. The breach assigned was, that the defendant had not paid the said 1000*l.* specie, or such further sum as was equal thereto, in 1774; but there was no averment in the declaration of the amount of any further sum to which the plaintiff was entitled, as arising either from the agreement of the parties, or as ascertained by their referees. Pleas, "conditions performed," and "the statute of usury." Verdict and judgment for the plaintiff. On appeal to this Court, it was decided that, notwithstanding the breach, and plea of covenants performed, as aforesaid, the plaintiff was confined in his recovery to the 1000*l.* and could not go for an ulterior sum, for want of an averment in the declaration as to the amount of such sum, to which he was, in event, to be entitled. If neither the breach, nor the plea of "covenants performed," could, in that case, enlarge the ground of the plaintiff's action beyond the averment in the declaration; 273 tion; *neither can they create that ground altogether, in the case before us. In principle, that case is a direct authority as to the present; it applies as well to the breach as to the plea of "conditions performed," and shows that neither of them is competent to supply the want of an averment of the cause of action.

In that case it was also decided, that it was erroneous, on that declaration, to allow evidence to be exhibited tending to show the amount of such ulterior sum. It is, therefore, a direct authority, in the third place, as to the effect of the verdict in the case before us. A verdict operates, under the act of *jeofails*, only where the case is defectively stated in the declaration; and not where no case or title is made. It cures on the ground that proof is presumed to have been given at the trial, without which the jury could not have found the verdict in question; but it does not cure in cases in which no such presumption can be made. The Court presumes proof to have been given as to facts imperfectly laid, but not as to facts not laid: it only presumes such

(a) 3 Wash. 187.

proof to have been given as is called for by the averments in the declaration. This doctrine is explicitly stated by all the judges, in the case of *Chichester v. Vass*; and was admitted by the Court, in rejecting, as improper, the testimony as to the ulterior amount, in the case of *Faulcon v. Harris*. The Court, in the case of a general verdict, will not presume proof to have been given, which, so far from being called for by the declaration, ought to have been rejected, if offered: it will not, on such a ground, extend the power of the verdict.

This doctrine applying, emphatically, to all cases in which an averment of the cause of action is omitted, (and as to which no proof can therefore be presumed to have been given, on that point, to the jury,) applies in an especial manner to the case before us. In this case, the appellee, not content to meet the appellant on the ground of the particular condition, the breach of

which is supposed to be the ground of the present action, avers *in his plea, that his testator performed all the conditions in the covenant in the declaration expressed. To this the appellant replied generally; and issue was taken thereupon. On that issue, the verdict of the jury will be justified, if, as to any of the conditions in the covenant, the plea of the appellee has been falsified. It would be as well justified if it were proved to the jury that the intestate failed in any of the other conditions contained in the covenant, as in that respecting the non-delivery of the grain. In addition, therefore, to the general doctrine, negating the presumption of proof as to a point not stated in the declaration, the appellant has further estopped himself, in this instance, by meeting the appellee on the extended ground taken by his plea, and which leaves it entirely uncertain whether the verdict was found on proof applying to this, or another ground of action.

On these grounds, I am of opinion that the declaration in question is radically defective; that it is not helped by the breach, pleadings, or verdict in the case; and that the judgment of the Court below, in favour of the appellee, is correct, and ought to be affirmed. The other judges, however, are of a different opinion; and that judgment must be reversed, and a judgment upon the verdict entered for the appellant.

275 *Foreman v. Newkirk and Others.

October, 1811.

1. *Sale of Land—Bond for Purchase Money—Equitable Relief against Assignee of Bond.*—Where the purchaser of land gives bonds for the purchase money, payable at different times: and the agreement is, that if the title to any part of the land prove defective, a deduction from the purchase money shall be made, in proportion to the value of the bonds lost: a Court of equity will not protect the purchaser, against an assignee of one of the bonds, on the ground of a defect in the title to part of the land: if it appear that the bonds not assigned, and remaining unsatisfied, are sufficient to indemnify him against such loss.

From the bill, answers, and exhibits in this case, it appeared that Foreman (the plaintiff in equity) purchased of Andrew Bowman three tracts of land adjoining each other, comprehended in several patents;

one for 100 acres, another for 129 acres, and a third for 16 acres; also a sawmill, with a lot of land, whereon it stood, containing more than two acres; the whole including 248 acres, more or less, for the sum of 1,875l. Pennsylvania currency, payable partly in property, at a certain valuation, and partly in money, by instalments, particularly stipulated in articles of agreement, dated December 15th, 1800; and that, in case the title to any part of the land should prove defective, a deduction from the purchase money was to be made, in proportion to the value of the land which should be lost. Sundry bonds were executed by Foreman for the money instalments; one of which (being for 300l.) was assigned by Bowman to George Newkirk, for a valuable consideration. The other six, for 100l. each, remained unsatisfied in the hands of Amos Nichols, administrator of said Bowman. A suit having been brought, and judgment obtained by Newkirk, on the bond assigned to him, the bill was filed by Foreman in the Superior Court of Chancery for the Staunton district, for an injunction to that judgment, on the ground that the title of the said Andrew Bowman to two of the tracts of land, (viz. that of 129 acres, and that of 16 acres,) was defective. Newkirk, in his answer, admitted that he had heard of some dispute as to the title, without knowing the merits of the claims; but contended, that if the plaintiff should lose the lands in dispute, yet the amount of the respondent's judgment ought not to be withheld from him, "because those lands are not worth more than twenty shillings per acre; indeed,

lands of the same quality adjoining thereto, could now *be purchased at that price;" the most valuable part of the lands purchased by the plaintiff as aforesaid being not in dispute, and that therefore the bonds of the plaintiff, remaining in the hands of the administrator, were sufficient to indemnify him. This allegation in the answer was, in substance, supported by testimony.

The following opinion and decree were pronounced by Chancellor Brown, the 16th of April, 1808. "The plaintiff in this cause, having failed to set out in his bill the nature and extent of the deficiency complained of, so as to enable the defendant, who is an assignee, to rebut his equity; and having failed also to require a survey, account, or issue, by which the real damage might be ascertained, and a deduction made agreeably to the contract between the plaintiff and Andrew Bowman, a suspicion would naturally arise, that he was seeking to retain more of the purchase money in his hands than he was equitably entitled to; and it appearing to the Court, from the exhibits, that, independent of the money enjoined, there is a sufficiency in the hands of the plaintiff completely to indemnify him agreeably to his contract aforesaid; (and, indeed, his bill does not state the reverse;) and the said plaintiff having neglected to make the heirs of the said Bowman (in whom the legal title is) defendants, so as to enable the Court to decree against them, and therefore ought not to complain on that ground, or seek to de-

lay the plaintiff at law for that cause: it is therefore adjudged, ordered, and decreed that the injunction be dissolved."

At the next term, the complainant showing no cause to the contrary, the bill was dismissed; whereupon the plaintiff appealed to this Court.

Monday, January 11th, 1813, the following opinion of this Court was delivered by JUDGE ROANE.

"The Court, concurring with the Chancellor in opinion, that it appears from the exhibits in the cause, that, independently of the sum enjoined in this case, there is a 'sufficiency of money in the hands of the appellant to indemnify him, agreeably to the tenor of his contract, against any loss he may sustain in the land, in the proceedings mentioned, is of opinion, that there is no error in the said decree; therefore, it is decreed and ordered that the same be affirmed.'"

Williams v. Howard.

Thursday, Nov. 12th, 1812.

1. **Replevy Bond—Judgment—Excessive Interest—Deduction Thereof.**—Judgment ought not to be rendered, on a 3 months' replevy bond, for interest from a day anterior to the date of the bond; but it may for interest from that date, on the rent and costs of the distress added together. And if the bond be taken, including interest from a day anterior to its date, such erroneous interest may be deducted, and judgment entered for the right sum.
2. **Distress—Lease of Land with Slaves.**—It seems, that on a lease of a tract of land, with sundry slaves and other personal property, reserving, by way of rent, a gross sum, payable annually, the remedy by distress may be resorted to, without any express stipulation.
3. **Same—Rent Payable in Advance.**—Rent may be payable in advance, by contract; and such rent may be distrained for, if not paid when due.

A three months' replevy bond was executed, March 23d, 1808, by Powell Williams, Arthur Horner, and James P. Cocke, to Jane Howard, in the penal sum of 340l. 17s. 2d., with a condition that "whereas two negroes, (naming them,) one yoke of oxen, six head of cattle, and five horses, have been distrained by Thomas Watkins, deputy Sheriff for Horatio Turpin, Sheriff of Powhatan county, to satisfy the sum of 162l. 0s. 6d., with interest from the first day of January last, due to the said Jane Howard for arrears of rent, the cost of which distress amounts to 6l. 0s. 5d., which said property has been restored to the said Powell Williams on his entering into bond, with Arthur Horner and James B. Cocke, to pay the said rent and cost of distress, amounting to 170l. 8s. 7d., at the end of three months; now, if the above bound Powell Williams, Arthur Horner, and James P. Cocke, their heirs, &c., shall, at the end of three months, pay to the said Jane Howard, her executors and administrators, or assigns, the sum of 170l. 8s. 7d., with interest from the date hereof, then the above obligation to be void, or else to remain in full force and virtue."

*On this bond, judgment was obtained by motion in a summary way. The defendants objected thereto, and prayed the Court to overrule such motion; "as it appeared that the debt due in this case was

on a contract executed for the rent of land, and the hire of ten slaves; and which contract specified that the sum for said rent and hire was to be paid on the first day of January last, for the use of said land and slaves during the present year;" but the Court overruled such objections, and granted the judgment and award of execution on the said bond; to which proceeding the defendants excepted, and appealed to this Court.

Wirt, for the appellants, submitted the case.

Call, for the appellee, observed, that the only question was, whether a distress could be made on a contract for the rent of land and hire of slaves blended together?†

The following was delivered as the opinion of this Court.

"The Court is of opinion that the judgment of the county Court is erroneous, in this, that the same is entered for the amount of the rent distrained for, with interest thereon from a day anterior to that of the distress made and bond taken, and which interest is added to the rent, and, together with the costs, makes a gross sum to bear interest from the date of the bond until paid; which interest, the Court is of opinion, the appellee was not entitled to by law, and ought therefore to have been deducted before entering the judgment; and that the judgment of the district Court, affirming the same, is also erroneous. It is therefore considered, that both judgments be reversed, &c.; and this Court proceeding, &c., it is further considered, that the appellee recover against the appellants the debt in the bond mentioned, &c., to be discharged *by the payment of 168l. 1s. 1d., with interest thereon from the 23d day of March, 1808, till paid, and the costs."

Ball's Devises v. Ball's Executors and Widow.

Tuesday, Nov. 10th, 1812.

1. **Marriage Settlement—As Bar to Marital Rights.**—A marriage settlement of land and slaves, for the wife's jointure. "In full satisfaction of her dower, or thirds, in any lands, tenements, and hereditaments, whereof the husband should, at any time during his life, be seised of any estate of inheritance," was not a bar to her right of dower in the slaves; tho' made before the act of 1792, declaring slaves to be personal estate.
2. **Chancery Practice—Suit for Settlement of Administration Account.**—A suit in Chancery being brought by legatees against the executors and widow of the testator, for a settlement of the administration account, and distribution of the personal estate among the plaintiffs: if it appear that the widow has not fully received her share, the Court should not dismiss the bill as to her, but decree in her favour the sum to which she appears entitled.

A marriage being about to be solemnized between William Ball and Drusilla Singleton, two deeds were signed and sealed by them, both bearing date the 12th of July, 1790; by the first of which, certain slaves, therein mentioned, (whereof she was then possessed as her own property,) and their increase, were conveyed to Samuel P.

†Note. See Brady on Distresses, p. 26, 102, and Newton v. Wilson, 1 H. & M. 476.

†The principal case is cited in Alexander v. Coleman, 6 Munf. 333, 340, 341, 343, 348; Pate v. McClure, 4 Rand. 176.

*See monographic note on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

Minzies, in trust, for the use of said Drusilla until the said marriage, afterwards to the use of the said William Ball during his life, and after his decease to the use of the said Drusilla and of her heirs and assigns forever; and by the other, one moiety of a tract of land in Frederick county, supposed to contain about 400 acres, (being the same land upon which the said William Ball then lived, the said moiety to be laid off according to quantity and quality, and to contain therein the dwelling house, kitchen, and all the out-houses appertaining to the said dwelling house,) was conveyed to the same trustee, to the use of the said William Ball during his life, without impeachment of waste, and after his death to the said Drusilla during her life; and afterwards to the use of the heirs, &c., of William Ball, forever; it being declared, by the last mentioned deed, that the provision made for her, by it, and by the other deed aforesaid, was "intended for her jointure, and in full satisfaction of her dower or

280 *thirds, which she might claim to have in any lands, tenements, and hereditaments whereof, or wherein, the said William Ball should at any time during his life be seised of any estate of inheritance."

The marriage accordingly took place; and, by his last will, (dated May 14th, 1796, and admitted to probate the 6th of September following,) William Ball devised to William P. Ball and Thomas K. Ball, (two of his children by a former wife,) after the death of his widow, that part of his plantation settled upon her by way of jointure; and when his son Thomas should arrive to the age of 21 years, the other part thereof to be equally divided between them; giving the rents, in the mean time, to be equally divided between his said sons, and his three daughters, by the former wife, namely, Judith Throckmorton, Betsy Henry, and Nancy; to which five children he also bequeathed the residue of his estate, consisting of sundry slaves and other personal property; concluding the disposing clauses of his will with the following sentence: "Should it be supposed that I have not obeyed the dictates of natural duty to my two younger children, by my present wife, by premitting them in the disposition of my estate, I give a reason; that is, their mother is amply provided for: I have no doubt that they will be in a situation more eligible than some of my children before spoken of: and it is further my wish, that it may not be imputed to a want of affection for them."

A suit in Chancery was instituted in the county Court of Frederick, by the widow against the executors, who were also appointed by the will guardians to the five devisees, for the purpose of having the moiety of the land, mentioned in the marriage contract, laid off and allotted, and of recovering a third part of the personal estate of the deceased, her right to which, as she contended, was not barred by the jointure. A cross bill was also filed by the executors against her, to obtain a settlement of their account of sundry articles of

281 property *which she had received of them. The county Court, on the

9th of June, 1797, appointed commissioners, (with the assistance of the county surveyor,) to lay off the moiety of the land, by metes and bounds, to the plaintiff; and "further ordered, decreed, and adjudged, that the plaintiff is entitled to one third part of the personal estate, according to law, of which her said husband died seised, after the payment of his just debts, &c., and after a deduction from the said third of whatsoever shall be found due from the plaintiff on a cross bill now depending between the parties; and that the part of the decree relative to the third part of the personal estate as aforesaid be suspended, until the final decision of the cause depending on the cross bill before mentioned; each party paying their own costs."

The commissioners appointed by that decree made a report on the 2d of January, 1798, setting forth an allotment to the widow of one third of the slaves belonging to the estate, and a distribution of the other slaves among the five devisees; but saying nothing about the residue of the personal property; which report was admitted to record the 4th of April, 1798.

In April, 1803, a bill was filed in the Superior Court of Chancery for the Staunton district, in behalf of the five children, devisees and legatees as aforesaid, against the executors and the widow, for an account and distribution among the plaintiffs of the personal estate of the testator, including negroes; the plaintiffs, contending that, by the jointure, all right of the widow, to any part of his slaves or other personal estate, was altogether barred.

Mrs. Ball, by her answer, insisted, that the real intention, as well as obvious import of the deeds of trust, was to give her a jointure, in lieu of dower in the lands only, without affecting her right to one third of the slaves, and other personal estate. In order to show more clearly the intention of her husband, she averred that, when he first made his overtures for

282 a matrimonial *connexion, he proposed to settle his whole estate upon her, during her life, and to secure, to her sole use, the whole of her own property, slaves as well as money, amounting to between five and six hundred pounds; but this proposition was declined by her, because she thought it unreasonably liberal; the truth of which allegation in her answer was in substance, proved by the deposition of Charles Webb. She admitted that a third part of the slaves had been allotted to her under the decree of the county Court of Frederick but declared that, "with respect to the other personal estate, she had not yet received her proportion from the executors."

In their answer, the executors said they had paid off almost the whole of Mrs. Ball's claim upon the personal estate of their testator, pursuant to the terms of said decree; and expressed their willingness to render a fair account; averring, also, that, in fact, they had given up to the legatees almost the whole of the personal estate. The Court of Chancery made an order of account: and a statement of the administration was reported by a commissioner, showing sundry

payments to Mrs. Ball and the plaintiffs, and a balance in the hands of the executors, amounting to 225l. 3s. The cause came on to be heard the 26th of November, 1807; "and it appearing to the Court sufficiently, that it was conceded by the plaintiffs that the allotment of the slaves made to the defendant by the commissioners, under the decree of the county Court of Frederick, did not exceed her share, if she was entitled to claim a share in the slaves of her deceased husband; it was therefore decreed, ordered, and adjudged, that the bill of the plaintiffs, as to the defendant, Drusilla, be dismissed, with costs;" from which decree the plaintiffs appealed.

Wickham, for the appellants. The marriage settlement being made expressly in bar of the dower "in lands, tenements, and hereditaments;" the last word comprehended slaves as effectually as if they 283 had been specially *named; since, before the act of 1792, slaves were real estate of inheritance; and also real estate quoad to the right of dower; for the heir was not compelled to account for the appraised value of such slaves as were included in the widow's dower.

2. The decree is also erroneous, in having dismissed the bill as to the prayer for a division of the personal estate. The cause being ripe for hearing in all its parts, the Court should have decided on them all.

Williams, contra. The parties, in using the words "hereditaments," and "estate of inheritance," showed, by the deed itself, that they meant to exclude the idea of personal property. Wallace v. Taliaferro, 2 Call, 447, is an authority showing that slaves were not to be considered as real estate in a case like this. The act of 1785, ch. 61, sect. 24, (a) plainly evinces that the legislature considered them as personal estate, relatively to dower. In that section, slaves are spoken of as included in goods and chattels. This is a clear legislative exposition of the meaning of the deed now in question. The word "thirds" did not properly point to the widow's share of the slaves; because, as the law then stood, (b) she was entitled to "one half" of the slaves during her life, in the event of her husband's leaving no child.

Wickham, in reply. Wallace v. Taliaferro is a strong authority in my favour; for slaves are there said to be "personal estate, in almost every instance that could be named, but descents, entails, and dower." (c)

The agreement should have a reasonable construction, according to what both parties intended, which intention appears from the circumstance that, by another deed, bearing even date with that for the land, a separate provision was made for Mrs. Ball, in relation to slaves. Her husband secured her own slaves to her and her heirs forever, and furnished his land for them to work during her life.

284 *The word "thirds" ought to be understood in the common or popular sense. By that word the parties un-

doubtedly meant all the wife's interest, by way of dower, in the property.

Monday, February 22d, 1813, the President delivered the Court's opinion, "that there is no error in the said decree, except in the dismissal of the bill, as to the appellee, before an account of distribution of the personal estate of William Ball, deceased, other than the slaves, one third of which had been allotted to the appellee, in a manner satisfactory to all parties, pursuant to the decree of the county Court of Frederick. Therefore, it was decreed and ordered, that so much of the said decree as is mentioned above to be erroneous, be reversed, &c., that the residue thereof be affirmed, and that the appellants pay to the appellee, being the party substantially prevailing, her costs, by her, about her defence in this behalf, expended. And it is ordered, that the cause be remanded to the said Court of Chancery, for an account of distribution to be made of the residue of the personal estate amongst all parties interested therein."*

285 *Davis and Wife v. Martin.

Wednesday, Nov. 11th, 1812.

1. Wills—Devise of Land of Which Testator Disseised.—A testator who died before the 1st of January, 1787, (when the act of 1785, ch. 61, took effect,) could not devise a tract of land, of which he was actually disseised, when he made his will, and at the time of his death.

See Hyer v. Shobe, 2 Munf. 300-304, and Taylor. ex dem. Atkyns. v. Horde et al., 1 Burr. 110, 111, 112, 113, as to the distinction between an actual disseisin and a disseisin at the election of the person injured.

2. Real Estate—Disseisin—What Constitutes—Case at Bar.—If A. be tenant of the freehold, and B. tortiously enter upon, and turn the subtenant of A. out of possession, claiming the land as his absolute property; and he, or those claiming under him, continue to hold the same, by actual adverse possession, until the death of A., this is an actual disseisin of A.; so that (in such a case, before the 1st of January, 1787) he could not, for the purpose of being enabled to devise the land, elect to consider himself as not disseised. See 1 Burr. 112.

This appeal was from a judgment of the district Court of Charlottesville, according to a verdict, in favour of John Martin, the tenant, at the suit of Staige Davis, and Elizabeth his wife, demandants in a writ of right.

On the trial of the cause, and before the rendition of the verdict, it was agreed by the parties, that James Gardner, claiming title to the land in the court and plea mentioned, (by a conveyance from Parmenus Booker, bearing date the first day of December, 1740; Booker claiming the same by a patent issued to him the 20th day of June, 1733, on a survey made for his father, Ralph Booker, the 28th of August, 1718,) entered upon, and took possession of the said land, prior to the year 1752, and remained possessed thereof, by actual cultivation and occupancy, until about the year 1767, when he removed his overseer and hands from said land, and rented the same, for that and several succeeding years, to one Faulkner and others; that the said James Gardner, being then aged, and confined to his house, which was upwards of ninety miles from the land, trusted the same to the possession of his tenants aforesaid; that, about the year 1769, one Lewis Craig

(a) Revised Code, 1st vol. p. 163, ch. 92, sect. 25.
(b) Acts of 1785, ch. 61, sect. 26: Revised Code, 1st vol. p. 164, ch. 92, sect. 27.
(c) JUDGE FLEMING'S opinion, 2 Call, 473.

entered upon and took possession of said land, claiming the same as his by a conveyance from Hugh Sanders, by deed of bargain and sale, dated the 14th day of November, 1766; and contending that the survey made for Hugh Sanders, the 27th of February, 1727, and the patent which issued to him on the 28th day of September, 1728, comprehended this land; that the said Lewis Craig remained in the actual adverse possession of said land, claiming the same as his, from the year 1769, until the 6th day of August, 1779, when he, by 286 deed of bargain and sale, *conveyed to the tenant, John Martin, that part of said land now held by him, and put him in possession thereof; and that he has ever since held possession thereof, claiming the same as his; that, about the year 1721, Ralph Booker took possession of, and settled some servants and an overseer on the lands in controversy; and that the aforesaid Parmenus Booker obtained a patent on the survey of said Ralph, claiming as his heir at law; that James Gardner, aforesaid, made and published his last will and testament on the 8th day of March, 1784, which was set forth in hæc verba; that he departed this life in the year 1785; that Anthony Gardner, named in the said will, (as residuary devisee, was then alive, and capable of taking the estate devised; that the land in controversy is a part of the residue of the estate of the said testator; that John Gardner was the eldest son, and heir at law, of said James, and departed this life in the year 1784, leaving the female demandant, his only child, and heir at law, who intermarried with the other demandant before bringing this suit.

On this agreement of facts, the tenant, by his counsel, alleged, that, whatever might be the result of the inquiry by the jury, as to the identity of the lands, covered either by the patent of Parmenus Booker, or by that of Hugh Sanders, it was immaterial as to this cause, and contended, 1st, That if the testator, James Gardner, had held this land by title superior to that under which the tenant holds, and had even been disseised thereof, that he could devise the same, and did devise the same, by the said last will, to Anthony Gardner; 2dly, That, from the facts admitted, the said James Gardner was not disseised of said lands, and therefore could devise the same; and that, he having done so, the demandants ought not to recover the said land, the right thereto being now out of them; and moved the Court to instruct the jury to that effect.

The Court was of opinion, and did instruct the jury, "that if the testator, when he made his will, and at 287 *the time of his death, was actually disseised of the lands in controversy, he could not devise the same; but that the aforesaid conveyance by deed of bargain and sale, made by the said Hugh Sanders to the said Lewis Craig, and the said Lewis Craig's entry and possession under the same, and the said several other conveyances, entries, and possessions so made, taken, and held, as aforesaid, by and under the said Craig, were not suffi-

cient, in law, to work an actual disseisin of the true owner of lands, in spite of such true owner; and that, therefore, if it should appear to the jury, on further testimony, that the said James Gardner was, at the time of executing the said will, the true owner of the said lands, and duly seised thereof, and that, from that time, and at his death, he remained the true owner, his devise of the said land was good and effectual to pass the same." To which opinion of the Court the demandants excepted.

Wickham, for the appellants.

Botts, for the appellee.

Tuesday, March 16th, 1813, the president delivered the opinion of this Court, "that the testator, James Gardner, in the case agreed mentioned, having died prior to the commencement of the act of assembly concerning wills, the distribution of intestates' estates, and the duty of executors and administrators, and not being seised of the premises in question, at the date of his will, or at the time of his death, there is no error in the opinion of the district Court in the first member of the bill of exceptions contained; but that the instruction given to the jury, as contained in the second member thereof, was improper, in this, that the facts agreed in the case amounted to a disseisin of the premises at the said periods respectively; and that the said judgment is erroneous."

Judgment reversed, the verdict set 288 aside, and the *cause sent to the Superior Court of law, directed to be held in Albemarle County, for a new trial to be had therein, on which the said last-mentioned instruction is not to be given.

M'Call v. Peachy's Administrator.

Monday, Jan. 26th, 1812.

1. **Executors.—Sale of Perishable Property.—Discretion.**—In determining which of the goods and chattels of a testator, or intestate, shall be sold, "as liable to perish, consume, or be the worse for using or keeping," some latitude of discretion must be allowed to the executor or administrator; and his conduct appearing to be fair, and, probably, proceeding from a good intention, ought to be sanctioned by a Court of equity.
2. **Administrator c. t. a.—Powers of.**—An administrator, with the will annexed, has, in general, the same powers which, under the will, the executors would have had, if they had qualified.
3. **Executors.—Power to Lease Lands.**—Where a testator directs the moneys arising from certain sources (among which are the rents of his lands) to be placed out at interest, his executor is impliedly authorized to make leases of such lands, not already occupied by tenants, as are not necessary to be reserved for cultivation by the testator's own slaves.
4. **Same.—Investments.—Loan-Office Securities.**—A testator, by directing certain moneys to be placed out at interest, upon good and sufficient securities, in Virginia or Maryland, as his executors should think proper, authorized them to invest the same in loan-office certificates, or other public securities.
5. **Same.—Changing Bonds.—Liability.**—If an executor be authorized, by the will, to put certain moneys out at interest, his changing the bonds, shifting the debts, or applying moneys to his own use, or that of his friends, without any fraudulent design, is no reason for charging him to the amount, in specie, for so much paper money received.
6. **Same.—Same.—Same.**—In such case, it being important that the moneys should be always kept at interest, which could, perhaps, be better effected

*Executors.—See monographic note on "Executors and Administrators" appended to *Ross v. Deprist*, 5 Gratt. 6. See principal case cited in *Harman v. M'Mullin*, 86 Va. 190, 7 S. E. Rep. 349.

by changing the bonds, than by receiving the money from one man, and seeking for another to whom to lend it; the executor should not be liable in case of insolvencies, unless the change was made injudiciously, or from fraudulent motives; and, as to any moneys actually converted by him to his own use, or lent to his friends, without security, he should be chargeable with the value thereof, at the times, respectively, when it was so converted or lent; provided, that in all such cases of loans without security, if the borrower, and also the executor himself, (who, in that case, stands in the place of a security,) were sufficiently adequate and responsible, at the time, for the sums so lent as aforesaid, (of which competency the subsequent repayment of the money should be deemed conclusive evidence,) the foregoing rule ought not to apply; but, in such cases, they should be considered as on a common footing with other borrowers, and the account be taken accordingly.

7. **Same—Assumption of Debts of Others Due Estate—Effect.**—In all cases in which an executor or administrator has debited himself with, or assumed, the debts of others to the estate of his testator or intestate, the same ought to be considered as a payment by them to him, and carried to the account of paper money, or specie, as the case may be; and if, in any case, such debts were not due at the time the same were debited or assumed as aforesaid, the said executor or administrator should be charged only as at the time when the same became payable.

8. **Same—Inventory—Omission of Credits—Effect.**—An executor or administrator omitting to insert in the inventory certain credits belonging to the estate of the testator or intestate, is not to be charged, on that account, with more than shall be proved to have been received by him, or to have been lost by his negligence.

9. **Same—Credits—Deductions from Accounts of Testator.**—An executor or administrator may, with propriety, be credited for deductions made by him from accounts left by his testator or intestate for collection; if it appear that the charges in those accounts were unusually extravagant, and it be not proved that, in making such deductions, he acted fraudulently or disadvantageously for the estate.

10. **Same—Same—Paper Money.**—In general, an executor or administrator should not be debited or credited with the value of paper money at the times when received or paid away by him; unless it be proved that he received it unnecessarily, or improperly delayed paying it away to those entitled to it.

See 1 Wash. 248; and 2 Call, 190. But the account of debts and credits should be stated in paper money, and the balance scaled at the time of the last payment; which balance, turned into specie, should be carried to the subsequent account in specie.

See also Walker's executors v. Walker, 2 Wash. 195, 200; Sallee v. Yates and wife, 1 Wash. 226, 227.

11. **Same—Charges—Tobacco Received by Executor.**—An executor, or administrator, is not chargeable, specifically, with tobacco received by him, and not disbursed on account of his testator's estate; but only with the price actually received for such tobacco, where that can be ascertained; and, where not, with the then current value thereof.

12. **Same—Ex Parte Settlement—Bill to Surcharge—Presumption as to Vouchers.**—Where an ex parte settlement of an administration account has taken place before commissioners appointed by the Court, in which the executor, or administrator, qualified; if the legatees, afterwards, bring a suit in Chancery for a new examination and settlement of such account, the vouchers in support thereof, if they be not ostensible, should be presumed to have existed, and the onus probandi thrown on the adverse party.

13. **Same—Same—Same—Production of Vouchers.**—But, it seems, the executor, or administrator, may be required to produce the vouchers, unless he declare on oath, or otherwise prove, that they were deposited with the clerk of such Court, at,

or after examination of the account by the commissioners, and have not come to his possession since.

14. **Same—Same—Same—Articles Allowed without Vouchers.**—In such case, if the vouchers, or official copies of them, be produced, the plaintiffs may, nevertheless, controvert the articles intended to be justified by them. An article ought to be allowed, on the oath of the defendant, if it be of such a nature that the expense, probably, must have been incurred, or that, perhaps, a voucher for it could not have been procured; for example, mourning for the widow, midwife's fees, services performed by a negro carpenter, and the like.

15. **Same—Wearing Apparel of Testator—Liability for.**—The executor ought not to be charged, at the suit of a general residuary legatee, with the wearing apparel of the testator, if the same be not proved to have been converted to his use, and a sale of it was not necessary for payment of debts or legacies.

16. **Same—When Chargeable with Interest.**—An executor, or administrator, is chargeable with interest, in all cases where he has received it; and, also, where paper money or specie, remained in his hands more than a reasonable time, (which, in this case, was said to be six months,) without being applied to the purposes of the estate.

See Cavendish v. Fleming, 3 Munf. p. 198.

17. **Same—Compensation—Commission—Ten Per Cent.**—In this case, under circumstances of extraordinary trouble attendant on the administration, the administrator was allowed a commission of ten per centum on all specie received by him, in full satisfaction for receiving, putting out, and paying away the same; as, also, for his trouble and services in the administration and management of the estate; such commission to be allowed only once, on receiving the same sum of money; and, as to the paper money, a commission was allowed of five per centum on the value thereof when received, and the same on the value thereof when paid away, according to the legal scale of depreciation.

See Fitzgerald, executor of Jones, v. Jones, 1 Munf. 150; and Cavendish v. Fleming, 3 Munf. 198.

Catharine Flood M'Call, as one of the legatees and devisees, sister and heir
289 at law of the other devisee *and legatee, and now sole heiress at law of Doctor Nicholas Flood, deceased, filed her bill in the late high Court of Chancery against William Peachy, Le Roy Peachy, and Elizabeth Flood, administrators, with the will annexed, of the said decedent; for an account of their administration;
290 *complaining of ex parte settlements, before the Court of Richmond county, (which granted the letters of administration,) by William Peachy, the principal acting administrator, of various errors, omissions, &c., in such settlements, and improper conduct in the administration and management of the estate; calling for accounts, discovery, and general relief.

The defendants severally filed their answers. William Peachy relied upon his settlements made before commissioners, under orders of the county Court; contending that they exhibited a true account of his administration of the estate, and of every thing which came to his hands, except what he had delivered to the plaintiff, or her father, who was her agent; admitting that, when he returned his inventory of the personal estate, he failed to state therein the credits due the testator at the time of his death, because the same were not then ascertained;

***Same—Ex Parte Settlement—Bill to Surcharge—Presumption as to Vouchers.**—On a bill to surcharge and falsify, if an order be made for a new settlement, and the vouchers cannot be produced, they will be presumed to have existed especially after a great lapse of time, and the onus probandi is thrown upon the contracting party. Backhouse v. Jett, 2 Fed. Cas. 823, citing the principal case. To the same effect, the principal case was cited in Campbell v. White, 14 W. Va. 148; *foot-note* to Tabb v. Boyd, 4 Call 458, containing an extract from Campbell v. White, 14 W. Va. 148.

+**Same—Compensation—Commissions.**—See principal case cited on this subject in Gregory v. Parker, 87 Va. 466, 13 S. E. Rep. 801; Estill v. McClinton, 11 W. Va. 412; *foot-note* to Fitzgerald v. Jones, 1 Munf. 150; Wallis v. Neale, 48 W. Va. 538, 37 S. E. Rep. 231.

Decrees—Finality.—See the principal case cited on the subject of the finality of decrees in Harvey v. Branson, 1 Leigh 124.

but averring that all such credits have been, in different ways, accounted for in his administration accounts, or delivered to the complainant through her father; that the said accounts show all the money he ever received from those credits, or on any other account, for the estate; and that he is ready to produce a book containing the account of sales, if required by the Court. This defendant averred, also, that he had delivered to the plaintiff the books and papers belonging to the estate; that his trouble and expense in performing the duties of administrator had been uncommonly great, &c. Le Roy Peachy states, that he settled his account with William, having acted very little, except in collecting credits put into his hands by William, and declares his firm belief in the truth and correctness of William's answer. Elizabeth Flood refers, in general, to William Peachy's answer, and supports it by sundry circumstances within her knowledge.

To these answers the plaintiff replied generally, and a number of depositions were taken.

The cause came on to be heard the 15th of March, 1792, on the bill, the answers, the last will and testament *of
291 Nicholas Flood,* and other exhibits, and the examination of witnesses;
292 when the late Chancellor Wythe *pronounced the following opinion and decree: "The goods and chattels of a testator, or intestate, which his executor or administrator is required by act of general assembly to sell, being therein described by terms so indefinite, namely, 'such as are or may be liable to perish, consume, or be the worse for using or keeping:' to dis-

tinguish those which he ought not to sell, from the others, seemeth difficult. The sale of the testator's goods and chattels, in this case, having been fairly made, and probably made in order to prevent damage and spoil, (the danger whereof seemeth to have been apprehended not without cause,) and made before probat of the testament, which forbid the sale of some of them, and before the defendants knew that the testament could be admitted to be proved; and the probat appearing to the Court to have been deferred for the reasons explained by the answer of the defendant, William Peachy, and the exhibits to which he referreth for that purpose, and not for the reasons suspected by the plaintiff; the Court is of opinion that the defendants, in these circumstances, are accountable for the goods and chattels of the testator, not comprehended in the afore-mentioned description, sold by them, (if such were sold,) not farther, nor otherwise, than if they had been so comprehended; certain slaves hereafter mentioned to have been unwarrantably sold, and the goods retained by the defendants, William Peachy and Le Roy

Peachy, being, however, understood
293 to be excepted. The *Court is also of opinion, that the part of the said Nicholas Flood's testament, which declared his will and desire to be that the moneys arising from several enumerated sources, (among which is rents of his lands,) should be placed out at interest, would impliedly have authorized his executors, if they had been nominated, and had undertaken the office, to make leases of such lands, not before occupied by tenants, as were not necessary to be reserved for cultivation by his own slaves; and that the defendants, his

*Note. The will of Doctor Flood, which was dated in 1774, (among other clauses,) contained the following:

"I likewise give and bequeath to my said wife, so long as she shall continue to be my widow, (but no longer,) the use of all my household and kitchen furniture, except such parts thereof as may be superfluous, and which my executors may choose to sell, and the use of all my plate of every kind. And it is my will and desire, that my executors, hereafter to be named, do provide, and lay in for her, yearly, (so long as she shall continue to be my widow, but no longer,) a sufficient quantity of indian corn, wheat, beef, mutton, lamb, cider, and such other provisions for housekeeping, as can be raised on my estate, for the support of herself and her family: (she not taking in any boarders;) and that she have the benefit of all the milch cows, yearly, on my plantations, except such as my executors may think proper to keep for the use of overseers, &c. And I desire, that all the wool which may be yearly produced from my sheep, may be delivered to her, and that she will have the same spun up by her house servants, or with the occasional assistance of one of the negro women who may work out; and that it be wove and appropriated to the clothing of the slaves which are set apart for her use, as well as for clothing my other slaves; and that she have corn, fodder, hay, and pasturage for her horses; and that a sufficient quantity of firewood be carted for her use every winter. As this will is intended to be made exactly agreeable with, and conformable to, my wife's desire, I hope she will acquiesce therein, and abide by it, and not be persuaded to the contrary by selfish and designing persons, who may endeavour to make a property of her; and I firmly trust, that she will give my executors as little trouble as possible; and as my executors will readily perceive, that it is my sincere will and desire that my wife should be enabled to live as easy and as happy as possible. I therefore request that they will punctually comply with every part of this, my last will and testament, that is, or shall be made in her favour, as well in laying in proper provisions for her in due time, as in collect-

ing and paying to her the moneys which I shall direct to be paid to her, yearly, and in every year, during her widowhood, for her further and better support and maintenance. Item, I give and bequeath to my said wife, my new riding chair with the bellows top, and harness for two horses; and I likewise give unto her the two horses which are employed in drawing the same. I likewise give and bequeath to her, her watch, rings, &c. Item, I give to my said wife, one third part of my wine and rum, that I may have by me at my death, and likewise all the new goods which may have been laid in for her own clothing, and a proportionable part of the clothing that is laid in for the slaves; and that she divide them according to the good behaviour of all my said slaves; those which are to be allotted to her part, coming in share, and [blank] the others. Item, it is my will and desire, that an inventory, or particular, be taken by my executors, of all my estate, soon after my death, and that another inventory, or particular, be taken of the same immediately after the death of my wife."

The testator (after directing certain lands, slaves, and stocks of cattle, to be sold by his executors) proceeded thus: "and all the moneys arising from the sale of the said lands, slaves, and stocks, together with all such moneys as I shall leave behind me, either in specie, or in debts due to me, either by bonds, or by accounts, or in any other manner whatever, and likewise all such moneys as may arise by the sale of any of my slaves, that may turn out too roguish, runaways, obstinate, or irreclaimable, to be made to do their duty. (which sort of slaves I hereby empower my said executors, in their discretion, to make sale of,) and all the moneys arising from the yearly rents of my lands, the hire of my slaves, and the labour of my slaves, shall be placed out at interest upon good and sufficient securities, either in this Colony, or in Maryland, as my executors shall think proper, during the term of the natural life of my said wife: during all which said term, I give and bequeath unto my said wife, one moiety, or half part, of the interest arising from such moneys so placed out at interest, to be paid to my said wife, yearly, and in every year."—Note in Original Edition.

administrators, with that testament annexed, had the same authority to make those leases. The Court is also of opinion, that the sale of the testator's slaves, Adam, Will, Sam, Adam, and Robin, was either warrantable, because the defendants had the power to sell, declared by the testament to be given to the executors of it, (and in that was implied a power, as is supposed, to distinguish those slaves whom the testator, by particular characters, had destined to sale,) or because, if the administrators had not those powers, a Court of equity, upon application, would have directed a sale of such slaves, and, probably, by the administrators: and the Court ought to sanction an act after it is done, if it be done fairly, (the contrary whereof is not proved, nor presumable, in this case,) which act the same Court would previously have authorized; especially as the circumstances of the country, at the time of this transaction, were such, that no precedent authority could have been obtained. But the Court is of opinion, that the sale of the slaves, James, Winny, and Mimah, with Beck and Betty, the children of the two latter, was unwarrantable, and ought not to be ratified, because to neither of them is any character by which the saleable slaves were designated applicable, nor was the sale of slaves necessary for payment of debts; so that the defendants neither had, nor could have obtained, authority to sell those slaves; and he, by whose act, without authority, another suffereth loss, although a benefit may have been designed by the agent, is strictly bound to make reparation; and, therefore, whatever may have
 294 been the defendants' motives for "selling those slaves, they are accountable for the value of them, in the same manner as if they had remained unsold; their value to be ascertained by the appraisement, if it cannot be more truly done otherwise. The Court is also of opinion, that the defendant, William Peachy, remaineth chargeable with the money due from him to the testator on the medical account; and that the defendants, William Peachy, and Le Roy Peachy, are accountable for the goods of the testator retained by them, not as goods sold, but as goods converted to their own use, to be estimated in the same manner as the slaves sold without authority; but that the defendants, although they omitted the credits which the law required them to insert in the inventory, are not chargeable with more on that account than those which shall be proved to have been received by them, or to have been lost by their negligence. And the Court is also of opinion, that the defendants are not bound to make reparation for any loss which the plaintiff may have sustained by their buying loan-office certificates, and other public securities, with the ready money left by the testator, and with the money collected and received for his outstanding debts, for the rents of his lands, and for those sales of his estate which are before mentioned to be not wrongful; because the executors, (as is conceived,) by the declaration of the testator's will and desire, 'that such moneys should be placed out at interest, upon good and sufficient securities, in Virginia or

Maryland, as his executors should think proper,' would have been empowered to place out the money in such certificates and public securities; and that power is supposed to have devolved on the administrators, who do not appear, in exercising it, to have practised or meditated any fraud. And the Court doth direct accounts between the parties, according to the foregoing opinion, to be made up before James Campbell, Luke Wheeler, William Barksdale, James Freeland, and Alexander Horsburgh, gentlemen, to be by them, or any three of them, examined, stated, and reported to the Court; allowing to the defendant, William Peachy, a compensation
 295 sation *for his services in the administration and management of the testator's estate; and stating, specially, matters thought proper by themselves, or required by the parties: and the said commissioners are empowered to examine the parties in solemn manner relative to the subject matters of reference."

Three of the commissioners appointed, reported the accounts; to which both parties filed exceptions; and, on the 17th of March, 1794, the cause (having abated as to Le Roy Peachy and Elizabeth Flood, by their deaths) came on to be reheard; when the Chancellor retained his opinion delivered at the former hearing, and, setting aside the report, referred the matters, before referred, to Master Commissioner Dunscomb, with an instruction to perform the order according to the directions thereof, and according to the following additional opinion and directions; viz. "that the defendant, William Peachy, be required to produce the book mentioned in his answer, containing accounts of sales of the estate of Nicholas Flood, if the plaintiffs demand it; by which, compared with the inventory, may be discovered whether the administrators had fully accounted for the estate, or not. The vouchers for articles in the defendant's, William Peachy, accounts of administration, shall be presumed to have existed, if they be now not ostensible; but let him be required to produce them, unless he shall declare upon oath, or otherwise prove, that they were deposited with the clerk of the County Court, at, or after examination of the accounts by the Commissioners appointed for that purpose, and have not come to his possession since: if the vouchers, or official copies of them, be produced, the plaintiff may nevertheless controvert the articles intended to be justified by them: an article ought to be allowed on the oath of the defendant, William Peachy, if it be of such a nature that the expense, probably, must have been incurred, or that a voucher for it, perhaps, could not have been procured: for example, mourning of Elizabeth Flood, midwife's fees, services performed by William *Peachy's
 296 carpenter, and the like. The Court is of opinion, he is not entitled to commission for receiving and putting out the same capital money more than once. The defendant, William Peachy, ought not to have credit against the estate of Nicholas Flood, for the levies, taxes, and clergyman's salary, paid on account of that part

of the estate which was devised and bequeathed to Elizabeth Flood. Let an account of tobacco articles be stated, in that commodity, without extending the price of them in money."

From this decree, as well as that of March 15th, 1792, both parties appealed; consenting and desiring that the cause, in the present state of it, should be sent up to the Court of Appeals, for the sake of despatch, and to prevent unnecessary expense. In October, 1797, the Court of Appeals decided, that the decrees being interlocutory, this Court had no jurisdiction, notwithstanding the consent of parties; (a) and, therefore, the appeal was premature. The cause was sent back to the Court of Chancery, to be there proceeded in to a final decree; but, in pursuance of a provision in the 2d section of the Act of Assembly, "enlarging the right of appeal in certain cases," (passed the 23d of January, 1798, (b) it was not retained for trial in that Court; a certificate whereof from the clerk of said Court being produced, on Monday, the 30th of April, 1798, the appeal was ordered to be placed again on the docket of this Court. And, on the 21st of May, 1798, the Court of Appeals pronounced the following opinion: "It appears by the will of Dr. Nicholas Flood, filed among the exhibits in this cause, that it was his desire his widow should live in ease and quiet, and, as he expressed it, "as happy as possible;" and that his executors should have as little trouble as possible in the management of his estate; and that his knowing (as it may be reasonably supposed) the turbulent and vicious dispositions of his slaves, was the reason of his empowering his executors to dispose of such of them as were, or should

297 prove, roguish, runaways, obstinate, or irreclaimable, least, contrary to his intent and meaning, they should disturb the peace and happiness of his widow, or give trouble to his executors; confiding in his executors, and trusting to their discretion alone in that respect; and it appearing, from the testimony of witnesses, as well as from the answer of the widow, Elizabeth Flood, that all the slaves sold by the appellee, William Peachy, as administrator, were of that description, except two young children, who could not, with humanity, (and ought not, on that account, to) have been separated from their mothers; and that the said slaves were sold, not only with the consent, but at the express desire and request of the said widow; and no fraud appearing in the conduct of the appellee, William Peachy, this Court is of opinion that the said appellee should not account for, or be chargeable with, more than the real amount of the sales, and what he actually received for the slaves so sold from the purchasers, unless any part of the purchase money hath been lost by his negligence. That the appellee, William Peachy, as well on account of the great and unusual trouble he had in settling the accounts, collecting the debts, superintending the estate, and managing the affairs of

the testator, as for the extraordinary expense it appears he was put to in employing clerks and agents to assist him, and entertaining them and others while transacting the said business, ought to be allowed a commission of ten per cent., and no more, on the money received by him for the use of the estate, including debts, sales, and profits, in full satisfaction for receiving, putting out, and paying away the said money, and for his services in the administration and management of the testator's estate; but he is not to be allowed a commission for receiving and putting out the same capital money more than once; and only five per cent. on paper money, at the value thereof when received, and five per cent. on the value thereof, according to the scale, when put out or paid away. That an account of the tobacco

298 should be stated in that commodity, as directed by *the decree of the 17th day of March, 1794; but that another account of the tobacco should also be stated, and extended in money, at the prices current at the dates of the items, for the information of the Court of Chancery. That the said decrees, so far as the same differ from the foregoing opinion of this Court, are erroneous; and that there is no error in the other parts of the said decrees. Therefore, it is decreed and ordered, that such parts of the said decrees as are herein before stated to be erroneous, be reversed and annulled, and that the residue be affirmed; and it is ordered that the cause be remanded to the said High Court of Chancery, to be proceeded in according to the principles of this decree."

The Court of Chancery, accordingly, referred the accounts to master Commissioner Dunscomb, who made a report, to which the plaintiff filed twenty-one exceptions; whereupon, the Chancellor, understanding the opinion and decree of the Court of Appeals differently from the Commissioner, transmitted the said report to master Commissioner Hay, with instructions to report the accounts, and to attend to certain animadversions on the plaintiff's exceptions; the most important of which laid down, in substance, the following rules for the Commissioner.

1. That the administrator is understood to be responsible for the value of the money, when received by him, if, when he placed it out, he took no security, or if he did not place it out within a reasonable time after the receipt; and to be responsible for any of the testator's debts, where he appears to have exacted or collected them for his own use.

2. The defendant is to have credit for money laid out in purchasing loan-office certificates, according to its value at the time when it was laid out.

3. The accounts should not be so ordered as to make the depreciation of moneys collected by the administrator from those in whose hands the same were placed by

Doctor Flood, in his lifetime, and not 299 laid out by the administrator, *either agreeably to the will, or as the law directs in such cases, fall on the plaintiff, instead of falling on the defendant.

4. The Commissioner ought not to debit

(a) See 1 Call. 55. 63.

(b) See Rev. Code, vol. 1, p. 875.

the estate with purchases of provisions for the use of persons who boarded with the widow.

5. Certain articles charged to the estate of the deceased, but appearing to have been purchased for the use of Mrs. Flood, and her family, ought to be apportioned between the widow and the plaintiff.

6. William Peachy should be charged with the debts assumed by him for others, in like manner as he is directed to be charged with his own, and for the goods taken by him for his own use.

7. If, by changing debts, loss has arisen, William Peachy, and not the plaintiff, must sustain the loss.

8. The defendant must be debited with the wearing apparel of the testator, appraised at 66l. 11s., if the plaintiff insists upon it.

9. Elizabeth Flood being herself an administratrix, and entitled, under the will, to one half of the interest on the testator's outstanding credits, the Commissioner ought not to allow William Peachy a commission on that half of said interest, and charge it against the estate of the testator.

10. The Commissioner may allow the defendant travelling expenses, when on business for the estate, beside his commissions.

A report was made by master Commissioner Hay, to which voluminous exceptions were taken by both parties: after which, the cause having been sent to Williamsburgh, in July, 1802, under the Act of Assembly, concerning the High Court of Chancery; (a) having abated as to William Peachy, by his death, and then revived against John Nicholson, his administrator, at July term, 1804, the following opinion and decree were pronounced by Chancellor Tyler.

"This Court, understanding the

300 opinion and decree of *the Court of Appeals differently from master Commissioner Hay, doth set aside his report, and direct, that examination, statement, and settlement of all accounts between the parties be made by master Commissioner Coleman, upon the principles settled by the opinion and decree of the Court of Appeals, as herein after explained.

"The Commissioner was expressly directed by that decree to state an account of tobacco in that commodity; and that another account of the tobacco should be stated, and extended in money, at the prices current at the dates of the items, for the information of the Court of Chancery. In the execution of the latter part of this clause, the Commissioner wholly failed; the performance of which is indispensable.

"The clauses in the will of Doctor Nicholas Flood, providing for his widow, are differently understood by Commissioner Hay from this Court. Upon this subject, this Court is of opinion his will should receive a liberal interpretation; that the pork, or other necessaries for housekeeping, provided or laid in by the administrator, William Peachy, in due time, (as they ought to have been,) for the widow, were proper charges against the estate of the testator; that if pork, or other neces-

saries for housekeeping, were not raised in plenty, from the cultivation of the lands, for the use of Mrs. Flood, and her family, and in due time, it was the duty of William Peachy to have provided them. If her interest money was to be applied to the purchase of pork, or other necessaries, this fund could not exclusively go to her "further and better support." This Court is also of opinion, that the new goods left by the testator, as far as they were proper, and as long as they lasted, were to furnish Mrs. Flood with her clothing, and that of her servants; and that if (as has been proved) the widow has not received her reasonable proportion, she is entitled to an adequate allowance for the same; which would, to its amount, be a good charge against the estate, if the administrator, William *Peachy, is made accountable for the whole amount of the sales of these goods. This Court would also reject any charge against the widow, or either of the administrators, for the wearing apparel of the testator; the same not having been proved to have been converted to their use, or to the use of either; and a sale of it being unnecessary for the payment of debts or legacies; and because the decree of the Court of Appeals doth not say that William Peachy shall be so chargeable, as that Court might have done, and, it is presumed, would have done, as well in this case as in the cases of the medical account, and the new goods converted to their use.

"This Court is also of opinion, that no charge should be raised against the administrator, William Peachy, for any deductions he has made in the settlement of the medical accounts of the testator; as in the cases of Muse, and Burgess Ball; because, in some instances, the testator so acted himself; (his accounts were unusually extravagant, because of the general conduct of juries toward such accounts, when put in suit;) and because the administrator is not proved to have acted fraudulently, or even disadvantageously, in these instances, towards the estate.

"This Court is also of opinion, that master Commissioner Hay hath not permitted that clause in the decree of the High Court or Chancery, affirmed in this respect by the Court of Appeals, to have its due operation; namely, that vouchers for the articles in the said William Peachy's accounts of administration, shall be presumed to have existed, if they be not now ostensible," &c. For example; in the Commissioner's settlement of Cyrus Griffin's bill of exchange, he hath added fifteen per cent. to the rate of exchange, as stated by the administrator; and in other charges which he has made in the administration account, as settled by the Commissioners appointed by the County Court of Richmond; and, in further violation of this principle, by antedating many of the entries of debts against the administrator, without the *fact of the dates of these entries being controverted by the plaintiff, and differently established by proof.

"The principle adopted by the commissioner, of making the administrator, Wil-

liam Peachy, answerable for the value of all moneys, when received, by the scale of depreciation, and crediting him by the value when paid away, or invested in loan-office certificates by the scale, is disapproved by this Court, as being in violation of the decree of the High Court of Chancery, in this respect, affirmed by the decree of the Court of Appeals. The decree affirmed by the Court of Appeals states, that the administrators are not bound to make reparation for any loss the plaintiff may have sustained by the administrators buying loan-office certificates with the money left by the testator, or money arising to the estate from other enumerated sources. This Court is of opinion that, under this clause in that decree, the administrators are entitled to credit for the nominal amount of the loan-office certificates. The operation of the Act of Assembly, believed to be applicable to this subject, and the cases of Granberry's executor v. Granberry, (a) and Taliaferro v. Minor, (b) appear to warrant the principle established by this interpretation. The decree of the Court of Appeals, if the facts appear that the administrators changed the bonds, or shifted the debts of the estate, or applied moneys to their own use, or to that of their friends, for commercial or other purposes, doth not seem to warrant charging them to the amount in specie during the existence of paper money. The exceptions of the medical account, and of the new goods converted to their own use, serve to establish the present construction of that decree. The account, from the first day of January, 1777, to the period of the latest investment of paper money in loan-office certificates, should be stated in paper money; and the balance against William Peachy should be scaled at that period; which balance, turned into specie, will be carried to the subsequent account, in specie.

303 ***The administrator, William Peachy, will be charged with interest in all cases where he has received it, and where paper money or specie remained in his hands more than a reasonable time, (stated to be six months,) without being applied to the purposes of the estate. The settlement of the tobacco account will conform, as nearly as may be, to the principles laid down for the settlement of the account in money.

Master Commissioner Coleman is directed to report any matter, specially, thought pertinent by himself, or required by the parties, and to make all his explanatory notes at the feet of those pages which contain those items thus requiring explanation, and not in separate pages of the report: and he is requested to make his report as short, plain, and simple as possible; so that the parties, as well as the Court, may easily understand it."

From this decree an appeal was granted the plaintiff to the Court of Appeals.

Williams and Warden, for the appellant. Wickham and Wirt, for the appellee.

The cause was argued here, at great

length, during the 25th, 27th, 28th, 29th, 30th, and 31st days of January, 1812.

December 10th, 1812, the following opinion of this Court was delivered by JUDGE ROANE.

"The Court is of opinion, that the general merits of this cause having been decided by the two former decrees of the Court of Chancery, affirmed, in general, by this Court, it becomes unnecessary, if not improper, to enter, at this time, upon many topics minutely discussed at the bar, as it were de novo; and which course was only rendered excusable by the difficulty of discriminating the points so decided 304 from those now proper for the *consideration and decision of the Court; a difficulty arising from the unusual size of the record, and the obscurity and perplexity resulting from the multifarious reports and dissertations with which the cause abounds. Disclaiming, therefore, to disturb or unsettle any point or principle established by those decrees; but, on the contrary, adopting them as the basis of the decree now to be rendered, the Court proceeds to declare its opinion touching such points and principles as may be necessary finally to settle this controversy, in pursuance of the decrees aforesaid.

"The animadversions of Chancellor Wythe, of the 9th of June, 1800, being most of them erroneous, and in conflict with the decrees aforesaid, are set aside by the Court; and the report of commissioner Hay founded thereupon, being liable to the same, and greater objections, was rightly set aside by the decree now appealed from; and a new report was properly directed to be made in lieu thereof.

"On considering the instructions of Chancellor Tyler to the commissioner, to aid him in taking the new account, and which are contained in the decree now appealed from, the Court approves and adopts the same, with the following alterations, additions, and exceptions.

"1st. The Court approves of so much of those instructions as requires the tobacco account to be also extended in money, pursuant to the decree of the Court of Appeals, and adds, that the administrator, William Peachy, is to be chargeable only for the price actually received for the tobacco not disbursed by him, where that can be ascertained, and where not, for the then current value thereof. 2dly. The Court approves of so much of the said Chancellor's instructions as relate to the construction of Doctor Flood's will, respecting the supplies to be furnished to his widow; and sees no cause, from any facts appearing in the record, to make any deduction on account of boarders. 3dly. The Court approves the instruction relative to the charge against the

305 *estate for Mrs. Flood's proportion of the new goods; and to the claim for the wearing apparel of the testator, under all the circumstances of the case. 4thly. The Court also approves of the instruction relative to the reductions in the medical accounts, as in the cases of B. Ball and H. Muse, for the reasons assigned by the Chancellor, and particularly the last; and because that course, while it may, probably, have produced benefit to the estate,

(a) 1 Wash. 246.

(b) 3 Call. 190.

is one in which we do not perceive that the administrator could have had any interest. 5thly. The Court approves the instruction of the Chancellor relative to the principle laid down by the decree of 1794, affirmed by this Court, as to the presuming of vouchers; and without adverting to the particular examples put in the instruction in question, the Court is of opinion, that, where the vouchers are not ostensible, the onus probandi is thrown on the adverse party, and that no change should be made in the account founded thereon, but in cases justified by satisfactory evidence; especially, considering the great lapse of time which has occurred in the present instance. 6thly. The Court approves of the instruction of the Chancellor respecting the purchase of the loan-office certificates, the receipt and payment of the paper money, and the manner of stating the accounts during the paper-money era; the same being in pursuance of the former decree of this Court, and warranted by the uniform current of decisions upon the subject. 7thly. The Court also concurs with the Chancellor as to his construction of the decree of this Court in relation to the changing of bonds, and applying the moneys of the estate, by the administrator, to his own use, or that of his friends; and that the same ought not to be charged in specie; with this addition, that, as it was important that the moneys of the testator should be always kept at interest, which could, perhaps, be better effected by changing the bonds than by receiving the money from one man and seeking for another to whom to lend it, the administrator should not be

liable, in case of insolvencies of
306 *this description, unless the change was made injudiciously, or from fraudulent motives; and that, as to any moneys actually converted by the administrator to his own use or purposes, or lent by him to his friends, or others, without security, the said administrator should be chargeable with the value thereof, at the times respectively at which it was so converted or loaned; provided that, in all such cases of loans without security, as aforesaid, if the borrower, and also the administrator himself, (who, in that case, stands in the place of a security,) were sufficiently adequate and responsible, at the time, for the sums so loaned as aforesaid, (of which competency the subsequent repayment of the money shall be deemed conclusive evidence,) the foregoing rule shall not apply; but, in such cases, they shall be considered as on a common footing with other borrowers, and the account to be taken accordingly. 8thly. The Chancellor's instruction as to interest is also approved."

"In addition to the foregoing instructions of the Chancellor, modified and approved as aforesaid, the Court, for greater perspicuity and certainty, deems it proper to add the following:

"1. That in all cases in which the administrator shall have debited himself with, or assumed, the debts of others, the same ought to be considered as a payment by them to him, and carried to the account of paper money, or specie, as the case may be; and if, in any case, such debts were

not due at the time the same were debited or assumed as aforesaid, the said administrator shall be only chargeable as at the time when the same shall have become payable. 2dly. With respect to commissions; (a subject so elaborately discussed at the bar;) the Court cannot say any thing more explicit, than by referring to the former decree of this Court, by which the administrator is allowed a commission of ten per centum, and no more, on all moneys received by him, in full satisfaction for receiving, putting out, and paying away the same; as, also, for his trouble
307 and services in the *administration and management of the testator's estate; provided, that a commission shall only be allowed on receiving the same capital money once; and that, as to the paper money, the commission shall be five per centum on the value of the money when received, and the same on the value thereof when paid away, according to the legal scale of depreciation. 3dly. With respect to the medical account of the administrator, William Peachy, this Court understands the decree of the Court of Chancery, affirmed by this Court, as only overruling a claim of the said William Peachy to be absolved therefrom altogether, and not as fixing any particular sum to be due by him; which, therefore, will depend upon the proofs, as in other cases: this construction is the more clear, because that decree of the Court of Chancery was rendered anterior to the exhibition of any of the accounts, in this cause, to a commissioner, and could not, therefore, have had reference to any.

"The Court has thus endeavoured to settle the great principles of this cause, and has, perhaps, repeated some which are contained in, or are evidently deducible from, the decrees formerly rendered. In doing this, they have been actuated by a desire to put an end to the present controversy; which they hope and believe may be ultimately accomplished, by means of a clear and simple report by a commissioner, and a reasonable degree of candour and acquiescence in the parties. With the same view, the Court has no hesitation in expressing its opinion to be, that, upon the whole circumstances of the case, the conduct of the acting administrator was just and unexceptionable, and that the losses incurred by the plaintiff are to be ascribed to the unexampled character of the times.

"With respect to the other objections and exceptions made in this cause, as they depended upon, and were pointed against the principles contained in Mr. Hay's report, which has been set aside as aforesaid, and as many of them may not be taken

308 up, or repeated, by a *future commissioner, on that ground, (exclusive of the objection of going too much into detail,) the Court deems it unnecessary to give minute and specific answers to them all: but it is proper to add, that the principles of that report are neither approved nor condemned further than is deducible from the foregoing premises; the Court only deeming it a better course to set aside the report altogether, than to attempt to reform it.

"Upon the whole, the Court affirms the

decree now appealed from, with costs, with the explanations and modifications herein before mentioned and prescribed, and remands the cause to the Superior Court of Chancery, to be finally proceeded in pursuant to the principles now adopted and declared."

Dix v. Evans.

Friday, Nov. 20th, 1812.

1. *Forthcoming Bond—Reversal of Judgment on—Defects in Sheriff's Return.*—The sheriff's failing to mention, in his return of an execution, one of the negroes on whom it was levied, is no ground for reversing a judgment on a forfeited forthcoming bond, in which that negro is mentioned as one of those on whom such execution was levied. See *Jones and others v. Hull*, 1 H. & M. 212.*

Capias ad Satisfaciendum—Receiving Property in Discharge of Body.—It seems, that where a *capias ad satisfaciendum* is executed at any time before the return-day thereof, the sheriff may receive property tendered by the debtor. In discharge of his body out of custody, and appoint a day of sale posterior to the return day; and that a bond for the forthcoming of such property is good in law, though dated after such return-day.

Upon a writ of supersedeas to a judgment by default on a forthcoming bond, which was taken for the delivery, at the time and place of sale, of certain slaves and other property, tendered by the defendant 309 to the sheriff, in discharge *of his body, on a writ of *capias ad satisfaciendum*. (a) The errors assigned were, 1st. That a material variance existed between the property described in the condition of the bond, and that mentioned in the sheriff's return of the execution; and, 2dly. That the bond was illegally taken, the date thereof being posterior to the return-day of the execution. The *ca. sa.* and return were spread on the record; (as in *Glascok's administratrix v. Dawson*, 1 Munf. 609;) from which, when compared with the bond, it appeared that a negro man, by the name of Joe, mentioned in the condition of the bond as one of the slaves tendered by the defendant, and received by the sheriff, was omitted in the sheriff's return; that the *ca. sa.* (being returnable the 1st of January, 1809) was executed December 29th, 1808; that the property, in discharge of the defendant's body, was tendered and received "at the time of levying the said writ;" that the time appointed for the sale was March 31st, 1809; and that the forthcoming bond was dated March 4th, 1809.

Wickham, for the plaintiff in error.

No counsel appeared on the other side.

February 2d, 1813, the Court affirmed the judgment.

*See *Jones v. Hull*, 1 Hen. & M. 212, and *foot-note*; *Harwood v. Creel*, 8 W. Va. 581, 582, citing the principal case.

†Note. *Eckhols v. Graham*, 1 Call, 492, may seem, on a superficial view, to be in conflict with this decision; but the point decided there was, only, "that the names of the slaves ought to have been endorsed, in order to prevent purchasers from being deceived;" that is, that such was the duty of the sheriff, for failing to comply with which, he was liable to a penalty; see *Rev. Code*, vol. 1, p. 209, sect. 18, and p. 325, sect. 9; but not that, in the event of the sheriff's neglecting to perform this duty, a sale of the slaves, lawfully made by him in other respects, or a bond taken for their forthcoming at the time and place of sale, would be void.—Note in Original Edition.

(a) See *Rev. Code*, vol. 1, p. 301.

310

*Williams v. Moore.

Monday, Nov. 23d, 1812.

1. *Slaves—Sale Subject to Approval of Purchaser—Right to Return for Disabilities Not Existing at Time of Sale.*—If a slave be sold, upon condition that the buyer, not liking, may return him in a given time; and, while in the buyer's possession, but not thro' his neglect, he be disabled by cold, so as to be of little value; the buyer may refuse to keep him, and is not responsible for the loss, unless he expressly agreed to be so liable. But the buyer is responsible, without such agreement, for ordinary neglect; that is, if he failed to take such care of the slave as any man of common prudence and capable of governing a family, takes of his own concerns.

This was an action on the case, by the appellant against the appellee, in the Superior Court of law for Harrison County. The declaration contained two counts. The first was "that, whereas, upon the 6th day of February, 1807, at the aforesaid county, the defendant entered into a verbal agreement with the plaintiff for the purchase, by the defendant of the plaintiff, of a negro woman slave, named Peg, at the price of 300 dollars, on condition that, if the defendant did not like the said slave, he was to return her to the plaintiff in the space of two or three weeks; and, thereupon, the said defendant, on the day, year, and place aforesaid, received of the plaintiff the said slave, Peg, under the agreement aforesaid; and while the said slave was in possession of the defendant, to wit, upon the 6th day of February, 1807, by being exposed to the severity of the weather, her hands were so frozen that she lost several of her fingers, and is otherwise disabled, so that she is of little value; and thereupon the defendant refused to keep the said negro, or to compensate the plaintiff for her in any manner whatever, although so to do the defendant, afterwards, to wit, the 1st day of April, 1807, and often since, in the year last aforesaid, by the plaintiff, hath been requested; by which the plaintiff, during the whole time aforesaid, lost, not only the service of the said negro slave, and the future use and value of her so long as she may live, but also hath been at great expense and trouble in the maintenance and cure of the said negro slave." The second count resembled the first, except that it contained averments that the slave was "sound and in good health" when delivered to the defendant, and that the injury she sustained was by "his negligence." The defendant pleaded "not guilty." And on

the trial of the cause, the counsel for 311 the plaintiff moved the *Court to instruct the jury, "that if they were of opinion that the negro mentioned in the declaration was purchased by the defendant, of the plaintiff, on condition that if, after keeping her two or three weeks, he did not like her, he was to be at liberty to return her, that, in such event, the defendant, to entitle him to the benefit of the contract, was bound to return her in the same condition he received her; even although the injury she sustained was not imputable to the neglect of the defendant." But the Court refused to give the jury such instruction, and instructed them, "that no bailee is responsible for accident, unless it be expressly agreed between the parties to the contract that he shall be so liable; that,

when the bailee alone is benefited by his contract, he is bound for slight neglect; and that slight neglect is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels." To which opinion of the Court, "refusing the instruction asked," the plaintiff filed a bill of exceptions.

Verdict and judgment for the defendant. The plaintiff appealed.

The Attorney General, for the appellant, insisted, in the first place, that the appellee was not released from his bargain. The clear intention of the parties was, that the negro was to belong to him from the time of the sale, unless he made his election to return her in two or three weeks; during which time he took her upon trial. An accident happening in that time could not defeat the bargain. Nothing could have this effect, but his returning her within the time, and saying he did not like her qualities.

2. The Court's instruction to the jury, that no bailee is responsible for accident, without an express agreement to that effect, was plainly erroneous; for the law is otherwise in relation to common carriers; (a) and to innkeepers. (b)

312. *It may be said that this was not the point in controversy; that the instruction given was a mere opinion upon an abstract question; but, however irrelevant in itself, it might have had the effect of improperly influencing the minds of the jury. No evidence of illegal character ought to be confided to the jury; (c) and the principle equally applies to instructions from the Court.

Wickham, contra. There is no question that a bailee is not liable for accidental injury to a negro, unless it appear to have been occasioned by his own fault. According to the bargain, the defendant had a right to return the negro, if he disliked her for any cause. His liking was to continue during the whole time allowed him to make his election; and her becoming frost-bitten was a sufficient reason for his disliking her. At any rate, it could not deprive him of his right of election: that right was absolute in him; so that he was not bound to assign his reason for dislike.

2. A bill of exceptions is to receive a reasonable construction, and to be taken, by intendment, to support the judge's opinion, unless the contrary appear. When the Court says, in general terms, "no bailee," it ought to be taken with reference to the subject matter, as intending "no such bailee as that described in the declaration." The word "bailee" may be understood in a general or restricted sense: in its general sense it does not apply to carriers and innkeepers, who are responsible by custom of the realm: taken in a general sense, a bailee is not liable without negligence.

The Attorney General, in reply. The purchaser's liking the slave, must be understood with reference to her qualities at

the time of the contract; not to any change, by accident, afterwards.

Where it does not appear that a point is relevant, the judge is not compelled to give the instruction; or, if he gives a correct instruction upon such point, it is not error. *But the present question is, whether an erroneous instruction upon an abstract question be not sufficient error to set aside the verdict. This instruction was clearly erroneous. The broad proposition, "no bailee," &c., cannot be understood as pointing to any particular bailee; but must comprehend bailees of every description.

Saturday, December 12th, the President pronounced the Court's opinion, that the judgment be reversed, the verdict set aside, and the cause remanded to the Superior Court of law, with directions to that Court to instruct the jury that, "if the injury to the slave complained of was not imputable to the neglect of the appellee, he would not be responsible therefor, unless he expressly agreed to be so liable; and that, as no such agreement is charged to have been made, he is only bound (according to the present declaration) for ordinary care of the slave in question; that is, such care as any man of common prudence, and capable of governing a family, takes of his own concerns; and that he is therefore answerable for ordinary neglect only."

314 *Wilkinson's Administrators v. Bennett.

Tuesday, Nov. 5th, 1812.

Pleading and Practice—No Issue Joined—Effect.—If a jury be empaneled "to try the issue joined," when, in reality, no issue is joined, the judgment must be reversed, and the verdict set aside, notwithstanding it was against the party who failed to meet, by a negative on his side, the affirmative matter pleaded on the other side. See *Taylor v. Huston*, 2 H. & M. 161-164; *Stevens v. Tallafarro*, 1 Wash. 155, and *Kerr v. Dixon*, 2 Call, 379.

In debt on a bond, in behalf of Thomas Bennett against William Nelson, and

***Pleading and Practice—No Issue Joined—Effect.**—In *State v. Douglass*, 20 W. Va. 777, it is said: "It is well settled that if a verdict has been rendered without any issue being joined, it is a mere nullity, and no judgment can properly be rendered upon it, whether it be a civil or a criminal action. See *Stearns v. Tallafarro*, 1 Wash. 155; *Grymes v. Pendleton*, 4 Call 180; *Taylor v. Huston*, 2 Hen. & M. 161; *Keer v. Dixon*, 2 Call 319; *Wilkinson v. Bennett*, 3 Munf. 316; *Sydnor v. Burke*, 4 Rand. 161; *McMillon v. Dobbins*, 9 Leigh 422; *Rowans v. Givens*, 10 Gratt. 250; *Baltimore & Ohio Railroad Company v. Gettle*, 8 W. Va. 376; *Baltimore & Ohio Railroad Company v. Faulkner*, 4 W. Va. 180; *Gallatin v. Haywood*, 4 W. Va. 1; *Baltimore & Ohio Railroad Company v. Christie*, 5 W. Va. 325; *State v. Conkle*, alias *Swank*, 16 W. Va. 735." To the same effect, the principal case is cited in *Reynier v. Hill*, 21 W. Va. 159; *Brown v. Cunningham*, 23 W. Va. 111; *Hickman v. B. & O. R. Co.*, 30 W. Va. 315, 7 S. E. Rep. 660. See further, on this subject, *foot-note* to *Stevens v. Tallafarro*, 1 Wash. 155, containing a quotation from *Henry v. Ohio R. R. Co.*, 40 W. Va. 294, 31 S. E. Rep. 865, in which the principal case is cited; *foot-note* to *Southside R. R. Co. v. Daniel*, 30 Gratt. 344, containing an extract from *Simmons v. Trumbo*, 9 W. Va. 368, in which the principal case is referred to; *foot-note* to *Rowans v. Givens*, 10 Gratt. 250; monographic note on "Judgments," appended to *Smith v. Charlton*, 7 Gratt. 425. The principal case is also cited in discussing this point on *Southside R. R. Co. v. Daniel*, 30 Gratt. 360.

*Note. A diversity in this respect, between a case where no issue is joined, and the case of an immaterial issue: concerning which, see *Baird & Co. v. Mattox*, 1 Call. 357-379, *Webster v. Banister*, Dougl. 395, and *Kirtley v. Deck*, 3 H. & M. 393, 394. The reason of this distinction seems to be, that, where

(a) Jones on Bailments, 119, 104; 1 Bac. 379, and 5 Term Rep. 389. *Hyde & Co. v. The Navigation Company from the Trent to the Mersey*.

(b) 3 Bac. 664.

(c) 2 Wash 281, *Lee v. Tapscott*.

Martha, his wife, late Martha Wilkinson, administratrix of Willis Wilkinson, deceased, the defendants pleaded, "that all and singular the goods and chattels of the said Willis Wilkinson, which have come to their hands to be administered, have been by them duly and actually administered, to the amount of 1,724l. 5s., in the following manner, to wit: in discharge of a judgment in favour of Matthew Maben, of 90l. 1s. 10d.; in payment of taxes to Zachariah M'Clenny, to the amount of 9l. 13s. 6d.; in payment of taxes and Clerks' Tickets to Stephen Wright, to the amount of 30l.; in payment of a debt to Louisa Everett of 300l. due from the intestate on a guardian's account; in payment of taxes to Stephen Wright, to the amount of 15l. 6s. 6d.; and to 1,279l. 3s. 2d. retained on a bond due from Willis Wilkinson to Thomas Everett, of whom Martha Nelson, wife of said William Nelson, is administratrix: and the said William Nelson, and Martha, his wife, administratrix as aforesaid of Willis Wilkinson, have no goods or chattels, which belonged to the said Willis Wilkinson, at the time of his death, in their hands, to be administered; nor had, on the day of suing out of the writ aforesaid, nor ever after, except the goods and chattels so as aforesaid by them actually administered; and this they are ready to verify."

To this plea the plaintiff replied, "that, by any thing alleged above by the said William Nelson, and Martha, his wife, his wife in pleading, he ought not to be barred from having his action against them: because, he says, *that the bond set out in the plea, as having been executed by the defendants' intestate to Thomas Everett, and of which the defendants claim, by right of retainer, the sum of 1,279l. 3s. 2d., was not a fair and bona fide bond for legal consideration, but was without consideration; and fraudulent; and this he is ready to verify: wherefore he prays judgment, and that his said debt, together with his damages, by reason of detaining the same, may be adjudged to him," &c.

No rejoinder was filed by the defendant; but a jury was empaneled, who "being elected, tried, and sworn, the truth to speak upon the issue joined," brought in a verdict in these words: "We, of the jury, find for the plaintiff the debt in the declaration mentioned, and one penny damages. We also find there are assets in the hands of the defendants."

Judgment was rented accordingly, for 11,462 dollars, the debt aforesaid, &c. to be discharged by the payment of 5,731 dollars, with interest from the 3d of August, 1802, &c. "And the plaintiff may have execution on the judgment aforesaid, for the sum of 1,279l. 3s. 2d., the sum retained in

no issue is joined, both parties are equally in fault: because the party who pleads the affirmative matter, ought to rule the other party to reply: (and so on until issue be joined, or judgment be entered by default: instead of having a jury empaneled to try an issue, when, in fact, there is none. But where an issue is actually joined, but that issue immaterial, the party who tendered it is most to blame, because his conduct had the tendency of misleading his adversary and the Court, by countenancing such a practice, might encourage tricks in pleading." 1 Call, 301.—Note in Original Edition.

the hands of the defendants to discharge the bond said to be due a certain Thomas Everett, and for the payment of which the said sum was retained by the defendants: and further, execution may issue, when assets shall come to the hands of the defendants to be administered, for the balance of the debt and costs."

From this judgment the defendants appealed to this Court.

Call, for the appellants, made two points:

1. That no issue was joined in the cause.

2. That the verdict was defective; not finding the amount of the assets. (a)

George K. Taylor, contra. I admit there ought always to be enough in the verdict to settle the point in controversy: but this

has been virtually and effectually done. *The dispute does not appear

to have been about the quantum of assets; but whether the administratrix had a right to retain to satisfy a bond which the plaintiff replies was fraudulent. The authority in 2 Wash. does not touch the point. In this verdict, the jury, in finding "assets," must be understood as finding "assets to the amount of 1,279l. 3s. 2d." that being the only sum in controversy between the parties.

The Court had the right to mould the verdict into proper form according to the right of the case; a practice arising from the circumstance that verdicts were originally ore tenus.

Call, in reply. The replication contains no negative to the plea, but introduces new matter altogether: the jury were sworn "to try an issue, though none had ever been joined."

JUDGE COALTER. Is not the neglecting to join issue a default of your client? and can he take advantage of it?

Call. There must be some issue joined; either material or immaterial. According to the case of Baird & Co. v. Mattox, 1 Call, 257, the defendant could not take advantage of an immaterial issue tendered by himself. But he may, if there be no issue.

In the case of Booth v. Armstrong, the intendment that the assets were more than sufficient to satisfy the plaintiff's claim, was stronger than in this case; indeed, almost a necessary intendment: but the Court said it was not to be supplied by intendment.* The verdict here is not precise enough. If the Court had a right to mould it; they have not done so; and, having had it recorded in its defective state, cannot now alter it: as this Court decided in Vaughan v. Freeland, 2 H. & M. 477.

317 *Friday, November 27th, JUDGE

ROANE pronounced the Court's opinion, that the judgment be reversed; "it not appearing, in this case, that the affirmative matter, set out in the replication, was met by a negative on the part of the said William and Martha; and there being no issue joined thereupon in the cause."

Verdict, and all proceeding subsequent to the replication, set aside, and the cause remanded for further proceedings.

(a) Booth v. Armstrong, 2 Wash. 301.

*Note. See also the case of Rogers's administratrix v. Chandler's administratrix, ante, p. 65.

Beverley v. Lawson's Heirs, &c.

Thursday, March 5th, 1812.

1. **Sale of Land—Specific Performance—Reference of Title to Commissioners.**—Where a bill in equity is exhibited by the vendor of land, against the purchaser for specific performance; if the purchaser object to the title, and it appear doubtful whether the plaintiff can make such a title as would authorize a decree for specific performance, or other relief, on giving bond to guard against remote or improbable contingencies, the title ought, of course, to be referred to a commissioner, to be examined and reported upon.
2. **Same—Metes and Bounds—Liability of Vendor.**—If lands be sold according to certain metes and bounds: and, by a covenant under seal, the vendor agree to warrant the title against all persons whatsoever; he is bound to include, in a conveyance with general warranty, and in case of eviction, to make compensation for all the lands within those bounds, which he held and claimed as his own at the time of the sale, and showed to the purchaser as part of the lands sold; notwithstanding his title thereto may be defective. But he is not bound to convey lands which were not held and claimed by him at the time of the sale, nor shown as part of the lands sold; although his title papers may comprehend them.
3. **Same—Specific Performance—Decree.**—If land be sold on a credit, a day being appointed when the purchaser is to give bond and security for the money, and the vendor to convey the land; and on the day appointed, the purchaser is ready with the bond and security, but the vendor not ready to convey; on a bill afterwards brought by the vendor against the purchaser for specific performance, it is too rigorous to decree an absolute sale of the land, on a short notice, to raise the purchase money; but if it appear, on examination of the title, that the contract can, according to the principles of equity, be enforced on both sides, the decree should be, that the land be held bound for the purchase money. If bond and security for payment thereof be not given, within a reasonable time after the title shall have been made, and approved of by the judge, and after the plaintiff shall have performed such other acts as the Court may enjoin upon him; and that, thereupon, the land be sold, after allowing such further reasonable time to redeem the same, by payment of the debt and interest, as is customary in the case of mortgages.
4. **Appellate Practice—Removal of Decree against Purchase of Land.**—When a decree, in favour of the vendor, against the purchaser of lands, of sundry personal property, is reversed, and the cause remanded for a reference of the title, and a survey to be made before commissioners, the Court of Appeals will direct, that the appellant have liberty to show, and prove to them, if he can, what parts of the personal property stipulated for were not delivered under the contract, and the value thereof; although the Court would not have remanded the case for that purpose alone.

An agreement, under seal, was entered into, the 26th of August, 1801, between Gavin Lawson and Carter Beverley, "witnessing, that the said Lawson had 318 on that *day bargained and sold, and did thereby bargain and sell, unto the said Beverley, all his tract of land lying and being in the county of Culpepper, together with the buildings of every kind, stock of cattle, horses, hogs, plantation implements, and every other thing thereto appertaining; together with his adjoining

***Sale of Land—Specific Performance—Reference of Title to Commissioners.**—Where a suit is brought for the specific execution of a contract for the sale of land against the purchaser, if the title to such land is doubtful and obscure or depending upon matters *in pais*, the court may refer the cause to a commissioner to ascertain the state of the title. To this effect the principal case was cited in *Jackson v. Henderson*, 8 Leigh 190; *Goddin v. Vaughn*, 14 Gratt. 128; *Hudson v. Max Meadows, L. & I. Co.*, 97 Va. 347, 33 S. E. Rep. 586; *Middleton v. Selby*, 19 W. Va. 174; *foot-note to Griffin v. Cunningham*, 19 Gratt. 572. See further, monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 3 Gratt. 243.

***Same—Metes and Bounds—Liability of Vendor.**—See, citing principal case, *Crislip v. Cain*, 19 W. Va. 460; *Butcher v. Peterson*, 20 W. Va. 452.

tract of land in Fauquier County, purchased of Routt and others, with the two mills thereon erected, and the stocks; the whole containing fifteen hundred acres certainly, (if more, the surplus to be given in,) for and in consideration of the sum of seven thousand five hundred pounds, Virginia money, to be paid to the said Lawson, in four annual payments, on the first day of December in every year, commencing from the date of said agreement. Should the several tracts of land fall short of the fifteen hundred acres, then the said Lawson is to make a deduction of two pounds twelve shillings and six pence for every acre deficient. The said Lawson will forever warrant and defend the said tracts in quiet possession of the said Beverley, his heirs, executors, administrators, and assigns, and from every other person or persons whatsoever. Possession to be given to the said Beverley on the first day of December next ensuing the date hereof, when a regular conveyance of the said property, agreeably to this instrument of writing, is then to be made, by the said Lawson, his heirs, executors, administrators, and assigns, to the said Beverley, his heirs, executors, administrators, and assigns, and the said Beverley is then, in consideration of the purchase hereby entered into on his part, to give his bonds, with approved security, to the said Lawson, his heirs, executors, administrators, and assigns, for the regular fulfilment of the annual payments. The said Beverley is to be allowed to sow both the corn and tobacco land with wheat, when he thinks proper, to be under the care and management of the said Lawson's overseer; the seed wheat to be found by the said Beverley. The said Lawson is to keep possession of the store house and lumber house, with the 319 garden and paddock, until *the 1st day of December, 1802, for and in consideration of fifty pounds current money. Should, however, the said Beverley wish to occupy the said store, &c. himself in the autumn of 1802, then the said Lawson is to give it up; firewood to be allowed the said Lawson for his store purposes."

On the 12th of May, 1803, Lawson filed his bill against Beverley, in the Superior Court of Chancery for the Richmond district; setting forth, that, in pursuance of the said contract, Beverley and himself met on the first day of December, 1801, and executed the contract, "as far as was then practicable;" that is, possession was given by him to Beverley of the said lands, and of all houses thereon (except the store and mill,) together with the stocks of horses, cattle, and hogs, and the plantation implements: the mill, with its appurtenances, was retained for five or six days by the complainant, with Beverley's consent, who paid, on his part, one fourth of the purchase money, and produced bonds, executed by himself and two securities, for the other annual payments: but the said bonds were retained by the said Beverley, because the complainant could not fully execute his part of the contract by making conveyance of the land, for want of knowing the precise quantity thereof." The complainant and the said Beverley had previously agreed

on a certain Thomas Spillman to be the surveyor, who should ascertain the quantity, and he had commenced the survey, and would have completed it by the said first day of December, but was prevented by a fall from his horse. The further execution of the contract was deferred, by consent, till the survey was completed. The defendant, Beverley, had enjoyed full and entire possession of the lands, houses, mills, and other property aforesaid, from the delivery thereof; and on the first day of December, 1802, he received possession of the store and its appurtenances, and continued in possession ever since. The complainant had called on him to proceed to the complete execution of the contract, the survey having, at the time of such request, been completed more than twelve months, and having ascertained the quantity of land to be fifteen hundred and twenty-three acres; and the said Beverley having had full notice thereof for a like space of time before the said request; with which he refused to comply. The bill, therefore, prayed for such relief as the plaintiff's case might require.

The defendant, by his answer, admitted, that he was put in possession of the greater proportion of the said tract of land at different periods of time, but denied his having been possessed of the whole thereof agreeably to the contract. He acknowledged, "that Thomas Spillman was appointed to survey the said lands, which he accomplished some considerable time after the date of said contract; and further he alleged, that as soon as he was furnished by the said Spillman with the courses of the different lines of the said two tracts, he, by his agent, at the mutual agreement of the complainant and himself, waited on the complainant with deeds (drawn conformably to the surveys,) and presented them to the complainant for his signature, February 2d, 1802; that the complainant evaded giving deeds, and deferred the fulfilment of his engagements under the said contract to the time of his visit, intended in the spring following, to Culpepper, where and when (as he said) he would most certainly conclude every thing requisite; but he let the spring pass without noticing his promises aforesaid; that the respondent by the delay and reluctance shown by the complainant, was induced to examine into his title to the said lands, and discovered sundry defects therein; viz. "that the complainant purchased the tract in Fauquier of several persons; to wit, a portion thereof of a certain John Routt and others, for which he had only a deed from John Routt, and his bond for the others who could make a conveyance; that the part so bought of John Routt, &c., was further the subject of litigation; the same being claimed by the descendants of James Routt, on the ground of a division having been made of the said land in the minority of the said James Routt, without the authority necessary to make such divisions binding; and that the said James Routt's heirs had notified the respondent of their claim; that another part of the tract, purchased by the complainant of the said John Routt, &c., is claimed and possessed

by the representatives or heirs of a certain Edward Nugent; that Turbervill's heirs claimed, and are in possession of another part thereof; that the complainant had diminished the number of acres in the said Fauquier tract by the sale of a considerable part of the tract he purchased of James Withers to James Routt, whose heirs are in possession thereof; that the complainant has a defective conveyance to another portion of the said Fauquier tract, which he purchased of Margaret Reynolds, who had a title thereto, but his deed for which was from Catharine Reynolds, who had no title; that the complainant cannot make a legal title to the greater part of the tract in Culpepper, which he purchased of a certain James Slaughter; the same being open to the claim of the heirs of the original patentee, and in part controverted by the claim of a certain John Matthews, who is in possession of the part so claimed by him.

The respondent further stated, that, "as soon as he found the complainant's title so imperfect, he thought it advisable to communicate to him full information relative thereto: he accordingly did so, and demanded of him a view of his title papers; the demand was not complied with; and this respondent refused to accept deeds from the complainant with the solitary and naked security of his general warranty; especially, as, since the date of the contract, the complainant had nearly sold off all his real estate, and invested the proceeds thereof in lands in the state of New-York, in the names of his sons-in-law, John Nicholas, and Robert Rose; having himself removed from Virginia to Genessee, in the state of New-York, there to reside, and taken with him, or parted with, the property he was possessed of at the time of his contract aforesaid.

322 *The respondent did not receive possession of the store house, and lumber house, until the first day of December, 1802; the same having been occupied by the complainant, agreeably to the contract, at the rent of fifty pounds per annum; which sum the complainant is chargeable with." He denied that he received all the stock and plantation utensils; some of which were kept back, (as he had been informed,) and were actually removed and used by the complainant. Several other discounts or set-offs were also claimed in the answer; for repairs to the mill, which (as the respondent alleged) the complainant verbally agreed to pay for, &c. He stated, also, that the complainant had instituted actions of ejectment against him, in the District Courts of Dumfries and Fredericksburg, to turn him out of possession. In March, 1804, an order was therefore made by the chancellor, that the plaintiff, on the third day of the next term, being served with a copy of such order, show cause, if any he could, why he should not be compelled to make his election, either to dismiss his said suit at common law, and proceed in the court of Chancery, or to dismiss his suit there, and proceed at common law. The complainant replied generally, and commissions to take depositions were awarded.

The first of June, 1805, the suit having

abated by the plaintiff's death, was revived, by consent, in the names of John Nicholas, and Anne, his wife; Robert S. Rose, and Jane, his wife, (which Anne and Jane are heirs of Gavin Lawson,) and the said John Nicholas, administrator, and Susannah Lawson, widow of the said decedent; they having agreed to dismiss the actions at common law in the proceedings mentioned.

The cause coming on to be heard, the 22d of September, 1808, Chancellor Taylor decreed, "that, within thirty days after, the plaintiffs shall file in the office of this court, a bond executed by the plaintiffs, John and Robert, with sufficient security, residing in the state of Virginia, payable to the defendant, in the penalty of six thousand pounds, with condition to

abide by and perform any future
323 *order, or orders, of this court, to be made for compensating the said defendant for the loss of any part of the land sold by Gavin Lawson to the said defendant, by the agreement, made an exhibit in this cause, from which he may be evicted, according to the measure of compensation, which the true and proper construction of the said agreement shall warrant, and after the said plaintiff's offer to the said defendant, and if he shall refuse them, deposit in the office of this court, for his use, good and sufficient deeds of conveyance in fee simple, with general warranty, and the legal certificates of the privy examinations and relinquishments of the plaintiffs, Anne Nichols and Jane Rose, of dower in the land before mentioned, the said defendant do pay to the plaintiffs 1,825l., the second instalment stipulated for, in the said agreement, after deducting therefrom, the rent of 50l., mentioned in the answer, with interest, at the rate of six per centum per annum, on the balance thereof from the first day of December, 1802, until paid; also the sum of 1,875l., with like interest thereon, from the first day of December, 1803, until paid; and the sum of 1,875l. with like interest thereon, from the first day of December, 1804, until paid, and the costs of this suit. And that, in case of the failure of the said defendant, to pay the said several sums of money, with interest, as aforesaid, within thirty days from the time of depositing the said bond and deeds, aforesaid, that then William C. Williams, John Minor, and Benjamin Botts, who are hereby appointed commissioners for the purpose, or any two of them, do, after advertising the time and place of sale in a newspaper, published in Fredericksburg, for three weeks successively, expose to public auction, for ready money, the said tracts of land, and out of the proceeds, after discharging the costs and charges of sale, pay the several sums aforesaid, with the interest and costs, to the plaintiffs, and the balance, if any, pay over to the defendant; and it is further ordered, that the commissioners, in that event, do report their proceedings to the court, in order to a final decree."

In pursuance to this decree, a bond
324 and deed from the *plaintiffs were delivered to the defendant; copies whereof were also deposited in the clerk's

office;* and the defendant having failed to pay the money, the commissioners proceeded to sell the lands, and made a report, to which the defendant excepted; 1st. Because they had charged him with the sum of eight dollars paid the printer for their first advertisement, when they did not proceed to sell the lands, the sale being postponed either by themselves, or by direction of the plaintiffs; 2dly. Because they had charged 926 dollars (being five per cent. on the amount of sales) as a compensation for selling the said lands, which were sold in Fredericksburg, at the place of their own residence; and, 3dly. Because, instead of selling the lands in separate tracts, they sold them all together, thereby excluding competition in purchasers.

The Chancellor, June 12th, 1809, pronounced his opinion; "that, as the postponement of the sale, in the first instance, though by the commissioners, with the consent of the creditors, was done for the benefit of the defendant, he should pay the costs to the printer of the first advertisement; and as he was consulted, whether his lands should be sold in separate tracts, or altogether, and approved of the latter mode, he should not be allowed now to object to the sale on that account; and that a commission of one per cent. is sufficient, in this case, to the commissioners of sale for their services, cryer, and bell: and, therefore, allowing so much of the second exception as will exclude four per cent. of the commission charged to the defendant, and disallowing the other exceptions, he decreed that the said report, so reformed, be confirmed; and that the commissioners do execute a deed of conveyance to Samuel Gordon, (the purchaser,)" "at his costs, for the lands sold by them to him, as stated in the said report, with warranty against
325 themselves, and all persons *claiming under them; and that the defendant pay the costs of this suit." From which decree the defendant appealed.

Williams, for the appellant, made the following points:

1. Lawson has not performed the contract on his part; and therefore specific performance ought not to be decreed, until his heirs shall do so.

2. The title conveyed from him and his heirs is defective. According to the exhibits, the plaintiffs appear to rely on five patents; but their title is not deduced regularly from those patents. It is obvious, that when this suit was brought, Lawson had no title to that part of the land for which Richard Young Wigginton has since made a deed to the female appellees.

The deed from Henry Hitt, and wife, to James Spillman, dated October 18th, 1764, is defective. The land conveyed by it is stated therein to have been entailed on Mrs. Hitt, by her father, and a writ of ad quod damnum, docking the entail, is recited, but does not appear.† The certificate of her

*Note. Deeds also from Lawson and Wife to Beverley, with relinquishments of her dower, dated February 28d, 1808. (before the suit was brought,) were also deposited in the clerk's office, and copied in the transcript of the record.—Note in Original Edition.

†Note. The deed contained a covenant for further

examination, being merely that she was "examined," (without saying privily and apart from her husband,) "and acknowledged her right of dower," was not according to law. (a) The deed from Peter Lucas, dated the 18th of February, 1799, is executed by himself alone; not being signed or sealed by his wife, though her name is mentioned in it. The certificate of her privy examination does not state that the deed was ever shown to her. It was, therefore, not effectual in law to pass her title. (b)

The title, deduced from Richard Young to John Wigginton, from Wigginton to Lear, and from Lear to Lawson, is also defective. The deed from Young to Wigginton, was a deed poll, in consideration of natural love and affection for an

"adopted" son, who does not appear 326 to "have been related by blood to the donor." The consideration is therefore insufficient to pass a title. A deed poll, too, was not the proper instrument, under the laws then in force. The conveyance should have been by indenture.

The deed from John Matthews and Elisha Matthews, to James Dobie, dated the 15th of June, 1793, appears not to have been fully proved and admitted to record until the 16th of June, 1794. The creditors of Matthews might therefore come upon the land, if they thought proper. The title conveyed from Dobie to Lawson, is also incomplete; the dower right of Mrs. Dobie having never been relinquished.

The deed expressed to be from Margaret Reynolds, is signed by "Catharine ^{her} Reynolds." This may be a mistake; but, clearly, it makes the title defective; so that, in ejectment, it would be insufficient.

The conveyance from James Routt and others, is executed by guardians of infants, and no confirmation by the infants appears. †

assurance. JUDGE ROANE therefore referred Mr. Williams to the case of Nelson v. Harwood, 8 Call, 304, as removing the difficulty on this point.—Note in Original Edition.

(a) Virginia Laws, (Ed. of 1769,) p. 148.

(b) Revised Code, 1st vol. p. 187, ch. 90, sect. 6.

*Note. It was stated in the deposition of Thomas Spillman, that John Wigginton was the reputed son of Richard Young.—Note in Original Edition.

†Note. According to the exhibits, the title of Lawson, derived from the Routts, appears to have been as follows:

The patent was granted to Peter Routt, sen. in the year 1726, for 714 acres. On the 15th and 16th days of February, 1764, he and his wife conveyed, by deeds of lease and release, fifty acres, part thereof, to James Withers, who, by like deeds, dated the 24th and 25th of June, 1771, conveyed the same to Lawson. September 11th, 1776, John Routt conveyed to Lawson, by deed of bargain and sale, 365 acres, to which the said John Routt was entitled, by virtue of an amicable division between himself and his brothers, Peter and James, who were devisees of Peter Routt, sen. Another deed, to the same purport, was made by John Routt, the 6th of August, 1793. (It seems because the former had not been recorded;) and this deed was recorded the 23d of December, 1793; but Mary, his wife, was not privately examined, and did not, in the manner required by law, relinquish her right of dower; although both the deeds were signed by her. On the 5th of December, 1793, bonds were executed between James Routt and Lawson, for exchanging the 50 acres held by Lawson, as aforesaid, for other 51 acres belonging to James Routt, according to certain metes and bounds; but deeds not having been interchangeably executed. James Routt and others, (some of whom were infants,) coheirs of the said James Routt, deceased, of the one part, and the said Gavin Lawson, of the other part, by a friendly bill and answer in Chancery, obtained a

The right of a feme covert is also conveyed by that deed, without any privy examination.

327 *The commissioners left out a part of the land which they understood that referees had adjudged against Lawson: but it does not appear that the referees did so decide it. Beverley was therefore entitled, under his contract with Lawson, to that land also. †

3. The Chancellor (instead of decreeing specific performance upon the appellee's giving security for the title) should have directed a survey, and referred the title to a commissioner, to be reported upon.

Beverley contracted for land; not for bond and security. Personal security may be good to-day, and bad to-morrow. This is the first time that a Court of Chancery ever substituted personal security for land. This decree violates every principle of law, and every rule of equity. Until a Chancellor shall be a legislator, such power cannot be assumed. He should have investigated the title, and if Lawson's representatives could not make a good one, refused to decree a specific performance.

4. The plats and surveys made by Spillman, being ex parte, should not have been received as evidence. We could not except

328 ing *the objection on the paper, and that was done. A letter from Beverley to Lawson, in November, 1801, (exhibited by the appellees themselves,) expressed a wish to be notified, that he might be present at the survey. Yet it was made without giving him any notice. ‡

decree of the Court of Fauquier County, dated May 23d, 1803, directing the plaintiffs to execute a deed of release and confirmation to the defendant, and vice versa, which was accordingly done in June, 1803, by an indenture signed by Gavin Lawson, of the one part, and James Routt, William Routt, Peggy Routt, Edward Ballenger, (whose wife, Hannah, should also have signed, but did not,) and Peter Routt, guardian of Thomas Routt, Gabriel Routt, Elizabeth Routt, and Syntha Routt; which deed was recorded September 26th, 1803.—Note in Original Edition.

§Note. An award, made the 28th of June, 1787, by James Wright and James Routt, arbitrators, mutually chosen by Gavin Lawson and Edward Nugent, to settle a dispute between them, relative to their lands adjoining, was, "allowing the said Nugent's to be the oldest patent, that, when the courses of the said Nugent's land, reversed from the beginning, will intersect the first-mentioned line of the same, the same shall be the established corner now in dispute; but provided the patent of the said Lawson's land should hereafter be found to be the oldest, then that to have its courses notwithstanding." Which of those patents was the oldest, does not appear in the transcript of the record.—Note in Original Edition.

§Note. The deposition of Thomas Spillman (the surveyor) stated, (among other things,) that he was appointed by Gavin Lawson and Carter Beverley, to survey the lands bargained for between them, in the counties of Culpepper and Fauquier; that the plat of the land in Culpepper, returned by him to the parties, and subscribed with his name, contained, as he believed, a true account of the lands which the said Lawson held under the deeds of John Lear, James Slaughter, James Dobie, and Zachary Delany, which the deponent had carefully examined; that he surveyed the land in Fauquier, which was conveyed by John Routt, and by Robert Hopper, to the said Lawson, according to the courses of their conveyances, except so far as he understood the lines of Routt's land interfered with Edward Nugent's land; as to which he was informed there had been an arbitration between the said Gavin Lawson and the said Nugent, which ended in favour of the said Nugent; and that he conformed his survey to the said decision, as he was informed of it; that the mill lot of fifty-one acres was surveyed agreeably to the bonds between James Routt and

5. The discounts claimed in the answer should have been allowed, or, at any rate, referred to a commissioner to state them.

On this point the answer, being responsive to the bill, was evidence. The plaintiff should therefore have proved actual delivery of all the articles before he could claim specific performance.

Call, for the appellees. Mr. Williams has introduced a frivolous train of objections to the title; possible claims of dead ladies to dower, and of creditors of 30 or 40 years standing. As to the title under

Dobie, no objection was taken in the 329 Court below; and as to the *title generally, no application was made for referring it to a commissioner. It is now, therefore, too late to raise these objections. The cases of *Jenkins v. Hiles*, (a) *Hartwell v. Townsend*, (b) and *Perkins v. Saunders and Wade*, (c) are authorities, showing, that many objections, not made in the Court below, should be considered as waived, and not permitted in the Court above.

The reference of a title to a commissioner, for examination, should be made, not of course, but on the motion, of the purchaser: (d) and where the title is clear, no reference is necessary. (e) It is enough, too, if this be the case *prima facie*; for the seller of land is bound to do no more than to show a title *prima facie* good: when that is done, the *onus probandi* lies on the purchaser to show it bad. Nor shall the purchaser be allowed to object to the title, on the ground of mere probabilities. (f) In the case of *Lyle v. Ronald*, (g) Chancellor Wythe decided, on a bill exhibited by a vendor against a purchaser, that the objection, that a right of dower had not been relinquished, was not sufficient to render the title so defective as to prevent a decree for specific performance possible; and dormant claims are inadmissible. Mr. Williams should have proved the resurrection of these dead women, and that their rights and claims are actually subsisting.

As to the objection to the consideration of the deed from Young to Wigginton, on the ground that the adopted son was not a blood relation; had it been made in the Court below, we might have proved that, in fact, he was a near relation. The case of *Eppes v. Randolph* (h) shows that evidence may be adduced in support of the

the said Gavin Lawson; and that the deponent was directed by the said Lawson to leave out all disputed lands, and in consequence thereof, did not compute a piece of land which was claimed by John Matthews, containing about nine acres: that the deponent, when he surveyed the land in Culpepper, found the part sold by Zachary Delany to Gavin Lawson, did not hold out as much as the deed called for; and (as well as the deponent recollected) it did not exceed forty-four acres.*

The lands were sold by the Commissioners, according to the surveys made by Spillman, containing in all fifteen hundred and twenty-four acres.—Note in Original Edition.

*The quantity mentioned in that deed is "forty-seven acres, more or less."—Note in Original Edition.

(a) 6 Ves. jr. 653.
(b) 2 Bro. Parl. Cas. 112.

(c) 2 H. & M. 420.

(d) Sugden, 155: 6 Ves. jr. 653.

(e) *Omerod v. Hardman*, 5 Ves. jr. 722, and *Rose v. Calland*, id. 188.

(f) Sugden, 214.

(g) Not reported.

(h) 2 Call, 183.

consideration. It is questionable, also, whether a party could object the want of consideration to invalidate his own deed.

It does not appear that the survey was *ex parte*. The implication from the answer is quite the reverse. Beverley declares himself satisfied with the survey; for, he says, that he drew the deed for Lawson's signature, according to the lines laid down

330 in it. But, even if it *were *ex parte*, it was supported by the deposition of the surveyor, and, if not conclusive against Beverley, was legal evidence, (considered as part of that deposition,) to avail as far as it could properly avail. *Johnson v. Brown*, 3 Call, 259, is an apposite case on this point. Beverley, if dissatisfied with the survey, (which was a mere private one, by consent of parties, when no suit was pending,) should have moved the court for an order of survey.

An account of the personal property, delivered by Lawson, together with the lands, was not asked for by the defendant. He took possession of all the cows, of all the horses, of all the hogs, &c. &c. An account is not a matter of right, except in the case of an executor or administrator. There should be proof that an account is necessary. A schedule should have been shown of what Beverley actually received; and this should have been exhibited on his part.

The Attorney General, on the same side. The answer, as to the articles alleged by Beverley to have been not delivered, is not evidence. Was it ever supposed, where a man admits a general compliance with a contract, with certain exceptions, that he is not bound to prove the exceptions? Beverley, here, has adduced no evidence, although the subject was easily susceptible of proof.

He has equally failed in establishing his objections to the title. This is a bill brought to subject lands, in possession of a purchaser, to be sold for payment of the purchase money. The purchaser objects to the title; he is therefore bound to prove his objections. But Beverley shows no evidence of any real grievance; no proof of disturbance of title, of any claim set up against him. He has always been in possession. The difficulties raised are merely speculative; drawn from hunting up old musty records. Lawson (it is true) filed his title papers: but he was not bound to do so: he might have withheld them; for

the *onus probandi* lay on Beverley 331 *alone. A deed having been made him, with general warranty, Lawson had a right to call upon him to show some substantial defect, some real objection.

The Court of Chancery, after lapse of time, will presume every thing in favour of a title. Outstanding titles, being mere possibilities, or remote contingencies, are not to be regarded. (i)

If the objections taken by Mr. Williams, in this Court, had been suggested in the Court below, they might have been repelled by evidence: and, as to those made in the answer, not one of them is supported by the facts in the cause. There is no proof

(i) *Lyddal v. Weston*, 2 Atk. 19, and *Harvey v. Phillips*, id. 541.

that James Routt's heirs set up any claim to the land. Nugent's dispute with Lawson was in the year 1787, long before the contract with Beverley. It was referred to arbitrators, and they awarded in favor of Nugent: but it does not appear that the contract between Beverley and Lawson interfered with the line between Lawson and Nugent, established by that award. There is no proof of Turbervill's claim. The transaction with James Routt was only an exchange for the benefit of Lawson, long before his bargain with Beverley. The deed from Margaret Reynolds was signed

(by mistake) "Catharine ~~her~~ Reynolds," be-
mark

cause she could not write, and the person who wrote for her made the mistake. The deposition of William Gibson (p. 26 of the record) clears this up completely. That of Thomas Spillman, (the surveyor,) proves the uninterrupted possession of James Slaughter (whom he always understood to be the son of Robert Slaughter, the original patentee, by patent bearing date the 3d of October, 1734) ever since before the year 1769. The title of Lawson, under the deed from James Slaughter, must therefore be good: for the claim of John Matthews would be barred by length of time.

I have now gone through all the objections made in the answer. In all these he has failed, except his claim of a credit for

501., which appears in the contract
332 itself, *and never was controverted.

He should now be confined to those objections; for we had no notice of any other. One circumstance will strike the Court in their retirement: Lawson, and those under whom he claims, have, in every instance, been in possession between thirty, forty, and fifty years.

The bill charges that the survey was made with Beverley's consent and approbation. The answer does not deny this, but admits it. Mr. Beverley himself proposed Spillman as the person to make the survey. After this, he ought not to be permitted to entrap, ensnare, and commit injustice against the plaintiffs, by going into the Chancery office, and endorsing on the paper an objection, of which the plaintiffs knew nothing till it might be too late to have another survey made. This objection was plainly an after thought.

Lawson directed Spillman to omit, in the survey, every piece of land to which there was any dispute. This showed his disposition to fairness.

The reference of a title to a commissioner is not a matter of course; but a motion to that effect should be made, and a case made out requiring such reference. In this case, the title papers being before the Court, the Court could judge upon them as well as a master could.

As to the bond for securing the title, though irregularly demanded of the plaintiffs, (since, in fact, there was no reason for apprehending any defect in the title,) they gave it; and they (who alone had a right to complain) having submitted to the order, it cannot now be disturbed.

Williams, in reply. It was not necessary

to make a motion in the Court below for a reference of the title to a master. It is true that in *Omerod v. Hardman*, 5 Vesey, jr. 722, where it was clearly shown that the vendor (who sued for specific performance) could not make a title for a long time, and that a suit in Chancery to obtain it was necessary, the Court dismissed the 333 bill without such reference; *but, in that case, (a) costs were refused, "on the ground that it is very much the common course of the Court to consider that there must be a reference to the master." In *Rose v. Calland*, (b) the Chancellor, not upon a motion, but upon the hearing, said that all he could do at present was to send that case to a master. He afterwards dismissed the bill, because the exchequer had decided against such a title as the plaintiff proposed to make, although he differed in opinion from that Court; saying, he would not make the purchaser take a lawsuit.

In *Cooper v. Denne*, 1 Vesey, jr. 565, (c) it was decided, that "the decreeing specific performance of an agreement for a purchase is in the discretion of the Court; therefore a purchaser will not be compelled to make a doubtful title."

It is laid down in Sugden, 155, that, in all cases where a bill is filed by a vendor for a specific performance, the defendant, the purchaser, may, if he please, have a reference as to the title: and even "though an abstract is in the hands of the party who says he cannot object to it, yet he may insist upon a reference: (d) because, by the production of papers, which can be enforced, and by the examinations and inquiries which can be made, by virtue of the decree, the title may be examined in a manner it never could upon a mere abstract." It is not there stated that the defendant must move a reference. It is enough that he objects to the title; and if there be a cloud upon it, that cloud must be cleared up, or the Court will not decree a specific performance. According to the case of *Jenkins v. Hiles*, (e) the purchaser is entitled to a reference, unless it appear distinctly that he waived it; and he is not limited to rely on the objections taken in his answer.

But it is said that the purchaser must not only object, but must prove the title bad. Such, indeed, is the rule where the purchaser brings an action at law for recovery of his deposit on account of a 334 defect in the title, and for *damages for loss of his bargain. (f) But the case is otherwise where the vendor brings his bill for specific performance. He is asking equity, and therefore must do equity, by making a clear and indisputable title, before the Court will give him a decree.

The authorities cited (g) show that the Court of Chancery, in the regular course of proceeding, should direct a reference to a master, unless it be expressly waived by the purchaser; or the title be clearly bad;

(a) *Omerod v. Hardman*, 5 Vesey, jr. 727.

(b) *Ibid.* 186.

(c) *S. C.* 4 Bro. Ch. Cases, 80.

(d) Sugden, 155.

(e) 6 Vesey, jr. 658.

(f) Sugden, 157.

(g) See also *Abel v. Heathcote*, 2 Ves. jr. 98.

in which case the Court will dismiss the bill without a reference.

But it is said that my objections should have been made in the Court below, to have given the plaintiff the opportunity of rebutting them by proof. The plaintiff, since he was asking the aid of the Court, was bound to exhibit his title, free from doubt. The onus probandi therefore lay on him. Such an argument would apply in all cases where the plaintiff's proof is insufficient; he might say, that if the objection had been made in the Court below, he could have supplied the defect. Our objections are not mere probabilities, but it is very possible, and probable, that our title may be disturbed by some of the women who have rights of dower, by some creditor of Matthews, whose deed was not duly recorded, or by the heirs of James Routt, whose guardians undertook to make a deed for them when they were infants. It should have been proved, on the other side, that none of these dangers exist, or may reasonably be apprehended.

The next argument is, that the surveys do not appear to have been made *ex parte*. To this, I answer, that notice to Beverley should have been proved on the part of the plaintiffs. He made this objection in the Court below, by endorsing it on the plats and certificates of survey. In *Johnson v. Brown*, 3 Call, 259, no exception to the survey was taken in the Court below: it was therefore read in the Court of Appeals: but here the formal objection was made.

335 *An account, too, it is contended, ought not now to be demanded, because it was not asked for by a motion appearing on the face of the record. But, according to the Chancellor's own decisions, a motion for an account would have been improper. (a) The true rule is, that the appellant may avail himself of whatever objections appear on the face of the record; and if the bill and proceedings show it was a proper case for an account, it is error that the Chancellor failed to make such order.

Mr. Nicholas says, that this is a bill brought to subject lands, in possession of a purchaser, to be sold for payment of the purchase money. But such is not the case. The bill is for a specific performance. Is the Court competent then to decree a sale of the land? Where is the instance of a Court of equity decreeing a sale, on a bill like the present?

It seems to me, that the plaintiffs cannot be entitled to a decree for a sale, but for specific performance only. First. Because the agreement was, not that the purchase money should be a lien on the land, but that bond and security for payment should be given. Secondly. Because, if this mode of proceeding be sanctioned, the plaintiff will be benefited by not having been able to perform his agreement at the time appointed. He shows himself, that part of his title was not complete until June, 1803, and another part in 1805; even if now complete. The bill was filed in May, 1803, and admits that, in 1801, Beverley offered his bonds, duly executed, but the plaintiff was not ready to perform his part

of the agreement. The suit was instituted immediately after the first annual instalment became due. The question between the parties was as to the sufficiency of the title. Yet the Chancellor, although he admitted there was such a cloud over the title as required security to guaranty it, has decreed a sale of the land, in thirty days, for the whole amount in ready money. Surely, if this Court shall be of opinion, that a decree for a sale could be made, at least six months should have been given.

336 *The deeds from Lawson and wife, bearing date the 23d of February, 1803, were never delivered to Beverley, but filed in the clerk's office, for the first time, by the commissioners who made the sale.

Thursday, November 26th, 1812, the president delivered the following opinion of this Court:

"The Court is of opinion, that Gavin Lawson, by covenant, was bound to make a title to the appellant, for all the lands specified in his contract, bearing date the 26th of August, 1801; and that it was not competent for him to throw off any portions thereof, (as being in dispute,) because, out of the residue, he could make up the quantity of fifteen hundred acres; the appellant being entitled, by the agreement, to the residue, if comprehended within the boundaries shown him, (and which Lawson then claimed to hold,) and to compensation therefor, in case of eviction. By this it is not intended, that Lawson was bound to convey the lands which he had heretofore agreed to give in exchange to Routt; although the legal title may have remained in him, and the title not acquired for the land got in exchange, the latter being the land which he contracted to convey; nor was he bound to convey lands which had heretofore been established, by arbitration or compromise, not to belong to him, if any such there be; although his title papers may comprehend the same, unless such lands were held and claimed by him at the time of the sale, and shown as part of the land sold.*

"This Court is also of opinion, that if Lawson's title, in all other respects, had been complete, he was to blame in not making a conveyance, according to contract, on the first day of December, 1801, when the appellant was *ready to give bond and security; a knowledge of the number of acres being unnecessary to a completion of the title, and only necessary at a future day, in order to ascertain whether any, and what, deduction should be made from the purchase money.

"Whether the title was then complete in Lawson, or whether he, or those claiming under him, ever have been able to make an indefeasible conveyance of the lands sold, or such a title thereto, as, agreeably to the principles of equity, would authorize a resort to that Court for a specific performance, or other relief, on giving bond to

*Note. Beverley, in his answer, states, that, before he made the contract, he "examined the lines and boundaries of the lands, accompanied by two persons who were in the employment of Lawson. In order to have the lines accurately shown him." But what lines were shown him are not set forth in the answer.—Note in Original Edition.

(a) *Hampton's ex'ors v. Pollard*, 4 H. & M. 451.

guard against remote and improbable contingencies, this Court cannot undertake to decide; the title being under such a cloud as to have made a reference and report necessary, in order to a correct judgment thereon; and, particularly, as the party came here for relief.

"The Court is further of opinion, that, as the appellant was ready, on the first day of December, 1801, to give bond and security, when it appears that Lawson considered himself not ready to convey; and, more especially, if he was unprepared to make a title, even at the institution of this suit, (as is suggested,) it was too rigorous to decree an absolute sale of the land on short notice; the appellant having been kept out of his title, and, consequently, deprived of the power to make sale of the property, so as to meet the growing instalments; that such decree would still be more oppressive, if it is true, (as is suggested,) that parts of the land actually sold, were thrown out of the survey, and the title only offered for the residue; should it, therefore, hereafter appear, on a reference of the title papers, and survey, to be made as herein after directed, that this contract can, according to the principles of equity, be enforced on both sides; yet, from the facts, as now disclosed, the Court is of opinion, that the decree ought to be for a specific performance; (the party having only stipulated for a personal security for his debt;) and only in the event that such bond and security is not given within a

338 *reasonable time after the title is made and deposited in Court, and approved of by the judge, and after the appellees shall have performed such other acts as the Court may enjoin upon them, to hold the land bound for the purchase money, and to direct a sale thereof, after allowing such reasonable time, as is customary in cases of mortgages, to redeem the same by the payment of the debt and interest.

"Therefore, it is decreed and ordered, that the said decree be reversed, &c.; and that the cause be remanded to the said Court of Chancery, with directions to the Chancellor to order a survey of the lands, to be made by the parties, in the presence of commissioners, according to the directions of each party; and also in such way as the commissioners may direct; in order to ascertain, as well the quantity of the land sold, as whether any part, or parts thereof, and what parts have been thrown off by the surveyor, Spillman, in making the survey in the proceedings mentioned; and that they report all matters specially. Also, that the title to the lands in controversy be referred to some proper commissioner, who is to examine and make report thereon to the Court; and although the Court would not have remanded the cause for that purpose alone, yet, as commissioners are appointed for the above purposes, the appellant is to have liberty to show, and prove to them, if he can, what parts of the personal property stipulated for, have not been delivered under the contract, and the value thereof; which they are to state and report, in order to a final decree."

339

*Green v. Garrett.

Friday, Nov. 6th, 1812.

Prison Bounds—Failure to Charge Debtor in Execution in Writing—Effect.—A debtor, being surrendered to the sheriff by his special bail, (after judgment against him in a county Court,) cannot legally be detained in jail, or within the prison bounds, on a bond given for that purpose, more than twenty days from the time of such surrender, if the creditor, his attorney, or agent, do not, within that time, charge him in execution in writing.

In an action of debt on a prison bounds bond, in behalf of Alexander Garrett, assignee of Joseph Blackwell, Sheriff of Fauquier county, against Moses Green, surety for William Blackwell, the following facts were disclosed by a special verdict; viz. that the plaintiff, on the 29th of April, 1800, brought suit, in the county Court of Fauquier, against William Blackwell, on a bond for one thousand dollars; that on the 29th of November, 1800, Thomas Chilton, Elias Edmonds, jun., and Turner Morehead, became special bail for the defendant in the said suit; that judgment was rendered for the plaintiff the 27th of March, 1801; that a fieri facias issued September 1st, 1801, which was returned October 26th, nulla bona; that no other execution was ever issued upon the said judgment; that, on the said 26th day of October, 1801, the special bail in the said suit did deliver up the body of the said William Blackwell to the Sheriff of the said county of Fauquier, in discharge of their recognisance; that the said William Blackwell was thereupon committed to the jail of Fauquier county, where he remained in close confinement until the 30th day of October, 1801, when he was admitted to the rules of the prison of said county, upon the execution of the bond whereon this action was founded; that, at a Court held for Fauquier, on the 26th day of April, 1802, the said Court made an order in the words following, to wit: "In the case of Garrett against Blackwell, who was delivered up by his special bail, and the plaintiff failing to charge him in execution, and more than twenty days having elapsed since his confinement, and the plaintiff refusing to pay prison fees, it is the opinion of the Court that the jailer would be justifiable in discharging the defendant from prison, which he is accordingly directed to do;" that, in pursuance of this order of Court, the said Sheriff

340 *of Fauquier, on the 27th day of April, 1802, in writing, reciting the surrender and commitment, as above stated, and that the plaintiff had failed to pay the prison fees of the said Blackwell, or to charge him in custody, and also reciting the order of Court above set forth, did release and discharge from his jail and custody, the body of the said William Blackwell, who, in consequence of the said discharge, did, on the 28th day of April, 1802, go without the said prison rules, in which, until then, he had constantly remained; that the jail fees were regularly paid by the plaintiff, after the said Blackwell was surrendered in custody, until he removed his family within the bounds,

*See Turner v. Harris, 1 Rob. 476, 478.

and kept house, when the payment was discontinued; that on the 27th day of October, 1801, after the return day of the said fieri facias, notice was verbally given by the plaintiff to the sheriff, who had not made return of the said execution, to consider the writ of fieri facias in his hands, as charging him in execution, to which the sheriff assented; that the attorney for the plaintiff in the said action in Fauquier county Court, had verbal notice, on the 27th day of October, 1801, that the said Blackwell was in custody of the Sheriff of Fauquier county, under the aforesaid surrender by his bail; and that the said plaintiff did not, during the imprisonment of the said Blackwell, to wit, from the 26th day of October, 1801, to the 28th day of April, 1802, in any way charge the said Blackwell in execution, except by the verbal instruction of the plaintiff to the sheriff as above set forth.

Upon this special verdict, the district Court rendered judgment for the plaintiff, from which the defendant appealed.

Williams, for the appellant. In Meredith's administratrix v. Duval, (a) all the judges were of opinion, that a man in the prison bounds is a true prisoner, as completely as if confined in the jail. He 341 cannot be compelled to "remain in the bounds, any more than in the jail, after the sheriff has told him he is discharged.

But in this case the appellant never was a legal prisoner; for a verbal charge in execution is not good; it must be in writing. The sheriff's assenting to the illegal act of the creditor, in charging him verbally, could not give it effect so as to bind the debtor. If we look to the common law, there is not a dictum but shows the charge must be in writing, or entered of record. (b) Such is the rule upon reason, as well as authority; since, if a verbal direction to the sheriff was sufficient, it would put the defendant at the mercy of the sheriff and creditor, and deprive him of the benefit of the insolvent law. Our act of 1764, ch. 6, sect. 6, (c) speaks, indeed, of a "charge in execution," in general terms, without saying whether it shall be in writing, or not; but it must be construed as intending that mode of charge which is known to the law; where not explicit, every statute must be so construed as will render it most conformable to the rules of the common law. The act of 1792, concerning district Courts, (d) expressly provides, that the charge shall be "in writing;" and the county Court law (e) requires the practice of the county Courts to conform to that of the district Courts.

It follows, therefore, that Blackwell, in contemplation of law, never was in execution; and therefore his surety for keeping the bounds was never responsible.

But even if in this I am mistaken, the order of the county Court was a sufficient

discharge; being by a Court of competent jurisdiction.

Wirt, for the appellee. The first question is, whether the charge in execution must be in writing? For whose benefit is the writing required? For whose benefit was it, according to the common law, that the committitur was to be in writing? In the cases cited by Mr. Williams, the question uniformly was, whether the marshal was

liable or not; and the decisions were 342 founded on a "rule of the common law, that the charge must be made a matter of record, to give the marshal notice. There is not a word in our Acts of Assembly requiring the charge to be by matter of record; and where a written charge is required, it is intended for the sheriff's direction only; to give him information of the fact that the defendant is in execution. The common law rule has no application to a case like this; of a bond for keeping the prison bounds; there being no such institution at common law. The act of 1764 cannot then be understood as referring to the common law mode of proceeding. The district Court law of 1792, requiring the charge to be in writing, must have been intended to make a new provision on the subject, in relation to the district Courts; but there is no such clause in the county Court law. The section requiring the county Court practice to conform to that of the district Courts, cannot apply to proceedings in pais, such as this, or a surrender out of Court.

The act which contains the words "in writing," does not require the sheriff to give a copy of the writing to the surety in the prison bounds bond. Being intended for the sheriff's benefit only, the sheriff has a right to waive it, and accept a charge, though not in writing. Where the reason of the law does not apply, the law itself ceases.

Whether the charge was in writing or not, the condition of the debtor, or his surety, is not affected. The only question in which they are interested is, whether the discharge was lawful or not. In Meredith's administratrix v. Duval, Philip Duval was not guilty of any immoral act in trusting to the sheriff's discharge, as authorizing his departure from the bounds; the only inquiry made by this Court was, whether the discharge was lawful. So here, Blackwell's supposing that he was lawfully discharged, or the innocence of his intention, makes no difference.

343 *The county Court had no right to discharge the prisoner. He was not in custody of the Court. Their power over the case had ceased. The sheriff alone was responsible; and over him the Court had no control. Suppose the sheriff had taken the defendant by ca. sa., could the Court have discharged him? The sheriff is bound to look to the regularity of the proceedings. If he execute a man condemned, irregularly, to death, he may be indicted for murder.

Wickham, in reply. In all cases whatever, there must be a writing, to authorize the enforcing a judgment against lands, goods, or body. In the case of special bail, there must be a bail-piece to authorize

(a) 1 Munf. 76.

(b) Watson v. Sutton, 12 Mod. 588, S. C. 1 Salk. 272, and 10 Vin. 570; Wightman v. Mullens, 2 Str. 1236, Tidd's Pr. 150.

(c) Edit. of 1769, p. 448.

(d) Revised Code, vol. 1, p. 79, sect. 31.

(e) Ibid. p. 92, sect. 60.

the bail to take the principal. The writing is intended for the protection of the debtor. If he be in actual custody, and there be no writing, he may sue the sheriff in trespass. The debtor cannot have the benefit of the insolvent act, unless there be a writing. The sheriff may be ruled to produce it. The defendant is entitled to a writ of habeas corpus, if there be no written warrant justifying his detention. The act of 1764 does not say the charge may be without writing. It uses the technical terms, "charge in custody," which must be understood as a charge, according to the course of the common law.

Putting the common law out of view, the old general Court, and district Court laws, require a writing. The county Court law says, "the proceedings of the said Courts, in common law cases, shall, as nearly as may be, conform to the practice in the district Courts." That word, "proceedings," is a large expression, and covers not only proceedings in Court, but of the officers of the Court under its authority. The district Court quashes a forthcoming bond, if improperly taken, though it be a proceeding in pais; and will not the county Courts follow the same practice?

344 "The question is, whether the charge was lawful? not whether the discharge was so? The debtor's considering himself in custody, does not make him so, according to law. The condition of the bond must be understood as referring to a case existing, and corresponding with the recital. It must truly recite the state of things at the date of the bond. If no such case existed, the bond is void. In the case of a surrender by bail, the sheriff's authority to hold the debtor in custody, is for twenty days only, if the creditor do not charge him in execution.

The county Court had jurisdiction over the subject. It was one of their own judgments, and an act of their own officer. The Court is not *functus officio*, upon giving judgment; execution is the life of the law. How often has this Court acted upon cases of orders quashing forthcoming bonds?

Whether the Court acted right or not, the sheriff was bound to obey. The judgment of a Court of competent jurisdiction, though irregular and illegal, can be corrected only by appeal, writ of error, or *superaedeas*. Its officers are bound by such judgment, though erroneous. The sheriff might have been attached for contempt, if he had disobeyed the order of the Court, which, I contend, had full power to direct and control the acts of its officers.

Monday, March 1st, 1813, the president pronounced the opinion of the Court; "that the judgment was erroneous in this, that William Blackwell, in the proceedings mentioned, after having been delivered to the sheriff, by his special bail, was not by the creditor, his attorney, or agent, charged in execution, in writing, as the law requires."

Judgment reversed, and entered, that the appellee take nothing, &c.

345 *Geddy and Knox v. Butler and Wife.

Friday, Nov. 27th, 1812.

1. *Wills—Construction—Power of Executor to Convey Realty—Statute.*—Where a testator, who empowered his executors to sell and convey certain real estate, died before the 1st of January, 1787, the construction of the will, as to the power of the executors to convey, is to be governed by the statute of 21st Hen. VIII. c. 4, and not by the act of 1786, c. 81; notwithstanding the conveyance was executed after the 1st of January, 1787.

2. *Executors—Conveyance of Realty—Refusal of Part of Executors to Qualify.*—Under the statute of 21 Hen. VIII. c. 4, a conveyance by part of the executors named in a will, (by which the executors therein mentioned are empowered to convey,) is justified where the others refuse to qualify. And such refusal may be found on proof of declarations in pais, or presumed, from circumstances, without any renunciation of record. But a special verdict, in ejectment, finding that the executors who failed to join in the deed, "never did take upon themselves the burthen of executing the will, and never did relinquish their right so to do," when it appears that they were living at the time of the date of the deed, is so defective, that a *venire facias de novo* should be awarded.

This was an appeal from a judgment of the district Court of Petersburg, upon a special verdict in ejectment.

The jury found, that Robert Newsom was, in the year 1775, lawfully and rightfully seised in fee simple, and possessed of the premises in the declaration mentioned; and that, being so thereof seised and possessed, he departed this life on the first day of January, 1776, after having duly made and published his last will and testament in writing, which, with the probat thereof, they found in *hæc verba*; that the premises in the declaration mentioned, are a part of the piece of a lot of land in the town of Petersburg, described in the first clause of the said will, whereby the testator directed that his "executors hereafter mentioned, do make sale and dispose of the above-mentioned premises, for the best price, or prices, that may be had for the same;" that the feme plaintiff is the daughter and only child of the said testator, to whom, upon his death, and the death of the widow, (which happened immediately afterwards,) the said premises descended lawfully in possession, and who remained possessed thereof until the 30th of December, 1777.

The persons appointed executors by the will were, Richard Taylor, Edward Stabler, Francis Ruffin, and Thomas Barrett, of whom the two last mentioned qualified

**Executors—Renunciation of Trust—Evidence—Declarations in Pais.*—The renunciation of the executorship need not be by matter of record but may be proved by declarations in *pais*, or presumed from circumstances. *Thornton v. Winston*, 4 Leigh 187; *Thompsons v. Meek*, 7 Leigh 428, 431, both citing the principal case as authority for the proposition. In *Burnley v. Duke*, 1 Rand. 108, it is decided that a renunciation of the executorship of a will may be presumed from the facts of an executor's failing to qualify, and joining another who had qualified as administrator in a sale of land directed by the will to be sold, such joining being not in his character of executor, but as heir of the testator.

A testator, in the year 1874, having directed that his executors should sell all his real and personal estate for the payment of his debts, and having appointed four executors, three of whom qualified, a sale in 1794, by two of the acting executors, was held valid, and the third executor (as well as the fourth, who never qualified) was presumed to have renounced his right to administer, as at the date of the sale in question. *Nelson v. Carrington*, 4 Munf. 883. See generally, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

December 16th, 1776, "liberty being reserved for the other executors to qualify whenever they might think fit."

The jury further found, that Thomas Barrett departed *this life in November, 1788; Edward Stabler, some time about the year 1785; Richard Taylor, some time in the year 1801; and Francis Ruffin, in the year 1803; that the said Thomas Barrett and Francis Ruffin, on the 31st day of December, 1777, executed a deed for the premises in question, to Roger Atkinson, by virtue of which deed, the said Roger entered, and was thereof possessed according to law; that Richard Taylor and Edward Stabler, named as executors in said will, never did take upon themselves the burthen of the execution thereof, and never relinquished their right so to do; that, on the 27th of December, 1793, the said Roger Atkinson executed a deed to the said Francis Ruffin, for the premises in the declaration mentioned; by virtue of which deed, the said Francis entered, and was thereof possessed according to law; that, on the 28th of March, 1794, the said Francis Ruffin executed a deed for the same premises to Robert Cocke; by virtue of which deed, the said Robert entered, and was thereof possessed according to law; that the said Robert Cocke, now deceased, was, at the time of the conveyance last mentioned, the husband of the said feme plaintiff; and that, on the 29th of March, 1794, the said Robert Cocke and Patsy, his wife, (the feme plaintiff,) executed a deed for the same premises, to John Baird, jun. under whom the defendants hold; by virtue of which deed, the said John Baird, jun. entered, and was thereof possessed according to law.

The several deeds aforesaid, were founded in hæc verba; all which were duly recorded; but it was not stated whether there was any privy examination of, and relinquishment of her right to the land by, the feme plaintiff, to John Baird, jun. The deed from Barrett and Ruffin to Atkinson was from them as executors of Robert Newsom, reciting, that he, by his will, had appointed them executors (saying nothing about Richard Taylor and Edward Stabler); and had directed them to sell and convey the land in question; that they had duly qualified, &c. and, pursuant to, and under the authority to them bequeathed by said last will and testament, had bargained and sold the said land to the said Roger Atkinson, in consideration of the sum of 350l.

The deed from Atkinson to Ruffin conveyed the same land to the latter, "as surviving executor of Robert Newsom, deceased," for the same consideration of 350l.; and the deed from Ruffin to Cocke, referring to the preceding conveyances, stated, that doubts had arisen relative to the title under the same; in consequence whereof, Atkinson's bond for the purchase money had been given up by the said Ruffin, and the land had been reconveyed to him as surviving executor; and that the said Ruffin, "for, and in consideration of the premises, and of the sum of 5s. good and lawful money, by the said Cocke to him in hand paid, &c. had bargained and sold,

&c. the same land to the said Cocke," &c.

The purpose for which the land was directed by the testator to be sold, appeared, by the will itself, to be the payment of his debts.

The district Court entered judgment for the plaintiffs; whereupon the defendants appealed.

George K. Taylor, for the appellants, contended, 1. That if the power of the executor, in this case, to convey the land, depended upon the statute 21 Hen. VIII. ch. 4, which was in force in this country at the death of the testator, still the executors who qualified were competent to make the conveyance. By fair construction, those only are executors who take upon them the trust; not he who is named as executor. It is said in Co. Litt. 112, b. 113, a., that all the executors must join in the sale. But this dictum may be satisfied by all who qualify. Coke admits, that where one dies, the survivor may act. This shows that they take *ratione officii*. The same reason applies where one does not qualify. Hargrave's able note on sect. 169, folio 146, confirms the doctrine for which

I contend. He there refers to a great number of authorities since

Lord Coke's time, who also says, that where the devise is to the executors *nominatim*, the survivors cannot sell; because, otherwise the words cannot be satisfied. This shows a distinction between a devise to executors generally, and a devise to them generally; but, in the present case, the devise is generally, and they do not take *nominatim*, but *ratione officii*.

In Perkins, p. 238, sect. 545, the doctrine is laid down, that if one executor refuse to intermeddle, and the other only qualify, the sale made by him is good. This is an authority in point. The book was published in the reign of Edw. VI., shortly after the statute of wills, and is quoted by Coke himself.

A neglect to qualify, for a long time, is equivalent to a refusal. The statute 21 Hen. VIII. is a remedial statute, which should be construed equitably: and its fair and equitable exposition is, that he who neglects to qualify, refuses so long as he neglects. Richardson on Wills, p. 332, is to the same effect; that, *prima facie*, neglect amounts to refusal. Where the executor is summoned to qualify, and makes default, and an administrator qualifies, all the books agree that this is a refusal by the executor. The same reason applies to long neglect: a refusal may be by acts as well as words.

So far upon the general question. As to the words of this particular will: Lord Coke says, it is his advice, that the testator direct the sale to be made by those who qualify; in this will such a direction is evidently implied; for the testator "devises to those of his executors who should undertake the management of his estate, the sum of fifty pounds, current money, each, as compensation for their care and trouble in the settlement thereof;" from which, it is plain, that he contemplated the refusal of some, and therefore intended that the powers given, by his will, should be executed by those who should qualify.

349 *But, 2. The conveyance in question is good under the act of 1785, c. 61, sect. 42; (a) the date of the deed from Ruffin, the surviving executor, to Coke, being after that act took effect; notwithstanding the death of the testator was before it.

Hay, contra, insisted, 1st. That the sale and conveyance, by Ruffin and Barrett, in 1777, to Roger Atkinson, did not pass the legal title; that the words of this will being, "I desire that my executors, hereafter mentioned, do make sale," &c.; the power given was to the executors nominatim, and not ratione officii; and that the rule laid down by Coke is not contravened by modern authorities.*

3. The voluntary conveyance, in 1793, by Ruffin to Cocke, was not an execution of the authority given by the will, but a fraud on the face of the deed.

Wednesday, March 17th, 1813, the president pronounced the following opinion of this Court.

"The Court considering that, under the statute of the 21st of Hen. VIII., c. 4, by which the will in question is to be governed, a conveyance by part of the executors named in the will is justified, where the others refuse to take upon themselves the charge or administration thereof; and such refusal, not being found in this case; (and which may be found either from declarations to that effect in pais, or presumed, as in other cases;) but the jury having only found, that Richard Taylor and Edward Stabler never did relinquish their right to take upon themselves the burthen of the execution of the will of Robert Newsum, in the proceedings mentioned; (by which term, relinquishment, the jury, probably, meant a renunciation of record, which is not necessary to justify a deed made by the executors who acted;)

the Court is of opinion, that the special verdict, in this case, is too "defective, in this particular, in relation, as well to the deed, from Francis Ruffin and Thomas Barrett to Roger Atkinson, of the 31st of December, 1777, as to that made by Francis Ruffin to Robert Cocke, of the 28th of March, 1794, to justify the Court below in rendering the judgment." Therefore,

Judgment reversed, and venire facias de novo awarded.

Broadfoot v. Dyer.

Thursday, Dec. 8d, 1812.

Agreement under Seal—Voluntary Consideration—Effect as to Creditors—Case at Bar.—An agreement, under seal, by which A. (being much involved in debt) binds certain slaves to B., until they attain the age of twenty-one years, upon a condition, merely, "that B. shall treat them in a lawful and humane manner, and if he shall die, or remove from the country, they shall be treated equally well, or it shall be optional with A. whether they shall remain any longer in the said service," is not on valuable consideration, but voluntary only, and void against creditors.

On the trial of an issue, on the plea of non detinet, in an action brought by William Dyer against Charles Broadfoot, for

several slaves, the plaintiff gave in evidence, on his part, an agreement under seal, dated the 2d of June, 1797, between himself and one John Finney, setting forth that the said John Finney did bind the following negroes to the said William Dyer, to wit, Ned, aged eight years, Rebecca, aged five years, and Pleasant, aged three years; until they should each, and severally, arrive to the age of twenty-one years; upon condition, that the said William Dyer should treat them in a lawful and humane manner; and if the said William Dyer should die, or remove from the county, the aforesaid negroes should be treated equally well, or it should remain optional with the said Finney, whether the aforesaid negroes should continue any longer in the said service." The plaintiff also proved, that possession of the negroes in the said agreement mentioned, accompanied, on his part, the execution thereof; and that while they remained in his possession, which they did from the date of the said deed, until June, 1801, he treated them in a lawful and humane manner.

351 *The defendant thereupon proved, on his part, by William Mann, administrator of the said John Finney, that, in the year 1797, when the said deed bears date, the said John Finney was very much involved in debt; that he died in the following year; and that he, the said Mann, has not, and never has had, in his hands, assets sufficient to pay all the said John Finney's creditors; and that the defendant was one of his creditors who levied his execution on the said negroes.

Whereupon the plaintiff, by his counsel, moved the Court to instruct the jury, that, if they should be of opinion, from the said deed, that the raising of the slaves, in the said agreement mentioned, by the plaintiff, until they should arrive, respectively, to the age of twenty-one years, was the real bona fide consideration which induced the said John Finney to convey, to the said plaintiff, the services of the said negroes until they should so attain to the age of twenty-one years, respectively, such a consideration is, in law, to be deemed a valuable consideration. And the Court did so instruct the jury; to which opinion of the Court the defendant excepted.

The jury found a general verdict for the plaintiff; whereupon, the defendant moved the Court for a new trial, on the ground, that the agreement between the plaintiff and John Finney was insufficient, in law, to protect the slaves therein mentioned against the claims of the said Finney's creditors, of whom the defendant was one; which motion the Court overruled; "the question, as to the adequacy of the consideration, having been inquired of by the jury;" and the defendant again excepted.

Judgment being entered for the plaintiff, the defendant appealed to this Court.

Tuesday, January 12th, 1813, JUDGE ROANE pronounced the opinion of the Court, that the deed in the bill of exceptions contained, having been made by a

352 *person indebted at the time, being grounded on no valuable consideration, moving to the grantor for, and on account of, the slaves thereby transferred,

(a) Revised Code, vol. 1, p. 106, sect. 45.

*Note. See 1 Powell on Devises, from p. 298, to p. 311.

and having imposed no conditions even in favour of the slaves themselves, other than such as are imposed by the principles of law and humanity, upon every just and humane master, and a right having been moreover reserved to the grantor, under circumstances, to resume the possession of the said slaves, prior to the expiration of the term for which they are conveyed, in and by the terms of the deed aforesaid, ought to be considered, in relation to the appellant, one of the creditors of the grantor, as a voluntary deed; that, therefore, the instruction given by the district Court in the first bill of exceptions contained, was improper, and that the said judgment is erroneous.

Judgment reversed; verdict set aside; and cause remanded for a new trial, on which no such instruction is to be given.

**Freeland and Kennan, Administrators of
Peter, v. Cocke's Representatives.**

Monday, Dec. 1st, 1812.

1. **Account Rendered—Account Must Be Taken Together.**—When a party claims to charge another by virtue of an account rendered, he must take that account altogether, and not garble or alter it, unless he can surcharge or falsify the same, either by showing errors in calculation, or proving, from other testimony, that it is incorrect as to the amount charged or debited, or stated upon principles not conformable to the agreement or understanding of the parties at the time.
2. **Same—Same—Chancery Practice.**—In such case, the Court of equity may direct the books of the party rendering the account to be produced, to see whether such account is drawn up conformably with the books, or altered by an after thought: in the former of which events a presumption would arise, that such was the original understanding and intention of the parties, unless proof were exhibited to the contrary; and in the latter, such presumption would be done away.

Upon an appeal from a decree of the Superior Court of Chancery, for the Richmond district, affirming a decree of the county Court of Prince-George.

The appellees, representatives of 353 James Cocke, deceased, *were plaintiffs in the suit; the object of which, originally, was to recover of the administrators of Walter Peter, the sum of 140l. 16s. 3d., with interest thereon, from the second day of January, 1801, in consequence of the award and determination of certain arbitrators, made and rendered after the said Peter's death, in pursuance of an arbitration bond executed in his lifetime; the plaintiffs alleging that such award was made up by the consent of James Freeland and Robert Kennan, his administrators. This consent they denied by their answer, and also demurred to the bill, on the ground, that the powers conferred on the arbitrators ceased and determined at the death of Walter Peter, and that the proper remedy of the plaintiffs, if the award was valid, was in a Court of common law.

***Evidence—Production of Accounts of Adversary—Must Be Taken as a Whole.**—When a party calls for the production of and uses the writing or account of his adversary, the whole writing, the whole account, debits and credits, is thus made evidence in the case. It cannot be garbled: one side, or showing of it merely cannot be used for the hurt of one party to the benefit of another. *Rowan v. Chenoweth*, 49 W. 77, 33 S. E. Rep. 546, citing the principal case as authority for the proposition.

The plaintiffs then filed an amended bill, in which they prayed a decree for such balance of account, as might appear due, on a fair and final settlement of all matters between the estate of the said James Cocke, and the defendants' intestate.

In answer to the amended bill, the defendants admitted there had been various transactions between the said James Cocke and Walter Peter, on their partnership account, (as members of a company called the Hood's Company,) and individually; but relied on a settlement of all those accounts made between Walter Peter, in his lifetime, and Joshua Poythress, one of the executors of the said James Cocke, and himself, a partner of the Hood's concern, as would appear from a paper, (annexed to the answer,) signed by the said Joshua Poythress, and bearing date October 13th, 1783; according to which, the balance then due to the said Peter, from the said Cocke's estate, was 4,066 pounds of tobacco, with interest thereon, from the 19th of December, 1781; which tobacco balance, they extended in money, at 36s. per cwt., October 13th, 1783. They allowed, however, certain credits, for subsequent payments, so as to reduce that balance to 354 *13l. 14s., on which sum they charged interest from May, 1792.

No depositions were taken on either side. The county Court referred the accounts, between the parties, to a commissioner, who made a report, showing a balance due from Walter Peter to James Cocke, on the 30th of May, 1781, of 91l. 8½d., in paper money, which, reduced by the scale of depreciation, was stated at 12s. 1d.; debiting, also, (conformably with the account exhibited by the defendants,) Walter Peter with a cash payment of 12l. 5d., April 12th, 1785; with another, in the same year, of 40l.; and with two tobacco payments, July 12th, 1791, and May 5th, 1792, amounting to 4,145 pounds, rated, partly, at 15s. and 6d., and partly at 14s. and 6d. per cwt., and extended, in money, at 31l. 1s. 5d. The commissioner acknowledged, that the only document exhibited by the parties for his government, was an account furnished by Walter Peter, to the executors of James Cocke, embracing, not only the transactions between them as individuals, but all those of the said Cocke with the Hood's Company. With the latter, there appeared, from that statement, to have been several accounts kept, and left open until the time of making the same; the balances on which, as well as some cash payments entered in one of them, were extended in tobacco at various prices, and then carried to the account current, the balance in which, in favour of James Cocke, was also extended in tobacco; thereby giving a balance in favour of Walter Peter (including some interest) of 4,066 pounds of tobacco. This method of stating the accounts, operated so much to the injury of James Cocke, as to be deemed, by the commissioner, inadmissible, without a satisfactory reason therefor, which he had not been able to obtain from the parties; he thought it more equitable to bring all the transactions between the said Cocke and the Hood's Company,

nto a general account, and at the close of those transactions to carry the balance due thereon, to his debit, in account
55 current with Walter Peter; *as, at the time, there appeared to be a balance, in the said Peter's hands, more than sufficient to cover Cocke's debt to the Company; a method adopted by the said Peter in the account current, of date the 10th of September, 1778.

To this report the defendants excepted, 1st. Because the commissioner himself states, that the only document exhibited, for his government, was Walter Peter's account, exhibited to the executors of the said James Cocke many years ago, and yet he undertakes to change and new model that account, many years after it was rendered; against every rule of evidence, from which, it is plain, that no account, if relied upon at all, can be garbled, but that it must be admitted or rejected in toto,) and against the conviction of the executors themselves, (more conversant with their testator's affairs than the commissioner can be,) who did not dispute the account, but did actually, in part, discharge it; 2dly. Because the commissioner entirely disregards Joshua Poythress's settlement of this account, and his acknowledgment thereof, under his own hand, although such settlement was obligatory on the said Poythress, as the representative of the said Cocke, and on every representative of him; and, 3dly. Because the commissioner, after having struck a fancied balance against the said Walter Peter's estate, gives interest upon it; although such balance is one of his own creation, and was never adjusted until the time of his own report."

The county Court overruled the exceptions, and confirmed the report; which decree was affirmed by Chancellor Taylor.

In this Court, the cause was argued in the reporter's absence.

Wednesday, March 17th, 1813, the president pronounced the Court's opinion; "that he decree of the Superior Court of Chancery is erroneous: therefore,
56 *the same is reversed with costs; and this Court, proceeding, &c. is of opinion, that when a party claims to charge another, by virtue of an account rendered, he must take that account altogether, and not garble or alter it, unless he can surcharge or falsify the same, either by showing errors in calculation, or by showing, from other testimony, that it is incorrect, as to the amount charged, or credited; or by showing, in the present case, that there was no agreement, or understanding, that the balances should be turned into tobacco, and then that tobacco turned again into money; without which, although it makes a material difference in the result, the accounts rendered must, nevertheless, be taken in the manner in which they are stated, where such accounts, alone, are relied on to support the charge.

"The Court, however, is of opinion, that, as the county Court could have directed the books of Peter, and of Hood's Company, to have been laid before the commissioner, in order to see whether the accounts, when raised, were extended in tobacco, or whether that was an after thought; (in the former

of which events, a presumption would arise, that such was the original understanding and intention of the parties, unless proof was exhibited to the contrary: and, in the latter, that presumption would be done away; and the commissioner's report, consequently, be justified, or not, according as the fact should turn out;) but if nothing should appear to show that the accounts were expressly extended in tobacco, and that a given sum, in that medium, was due on the 19th of December, 1781; yet, as it appears that more tobacco has since been paid than the amount of that debit, with interest, (exclusive of 12l. 5d., paid in money,) the appellees ought to have had an opportunity of showing, that this second change of a tobacco debt into money, was not a mode of settlement agreed on; either by express proof to the contrary; or by proving those payments by other testimony than the account *thereof rendered; so as to oblige the appellants to prove such agreement.

"The Court is, therefore, of opinion, that the accounts, rendered and relied on, did not warrant the report of the commissioner in this cause; and that the decree of the said county Court is also erroneous; which, therefore, is hereby reversed, with costs; and the cause is remanded to the said Court of Chancery, and from thence to the county Court, with instructions to direct an inquiry to be made, and an account to be taken, agreeably to the above principles, in order to a final decree.

Hartshorne v. Whittles.

Thursday, Dec. 10th, 1812.

Covenant—By Parties Named in Instrument as Agents.*

—If persons contracting by a charter-party, under seal, bind themselves each to the other, as on their own behalf, each may maintain an action for covenant broken, against the other in his individual capacity; notwithstanding they were described, in the introductory part of the instrument, and in their signatures, as agents for other persons.

An action for covenant broken, was instituted in the borough Court of Norfolk, by William Hartshorne, jun. against Conway & Fortesque Whittles, upon a charter party of affreightment. The declaration set forth the instrument in question, as executed, by the defendants, to the plaintiff, without mentioning that either party acted as agents for other persons. Oyer being prayed of the charter-party, it appeared to have been signed and sealed by "Conway & F. Whittle, agents for John Bell," and by "William Hartshorne, jun. for the owners of brig Two Brothers;" the introductory part being worded in like manner; but all the covenants, by both parties, were expressed as on their own behalf; and for their due performance, they bound themselves, each to the other, in the penal sum of five thousand dollars." The covenants by C. & F. Whittles, were, "for themselves, their factors, and assigns." They demurred, generally, to the declaration; but their demurrer was overruled. They then pleaded "covenants performed;" and, issue being joined thereupon, a ver-

*See monographic note on "Covenant, The Action of" appended to Lee v. Cooke, 1 Wash. 806.

358 dict was found *for the plaintiff, and judgment entered accordingly, which was reversed by the district Court of Suffolk, on the ground that "the charter-party clearly proved the intention of the contracting parties to bind themselves as agents, and not as principals; although some of the expressions are strongly characteristic of the contrary." Whereupon, the plaintiff appealed to this Court.

Thursday, December 10th, 1812, the cause was argued by —, for the appellant: no counsel appearing for the appellees.

Saturday, March 6th, 1813. JUDGE ROANE pronounced the opinion of this Court; that the judgment of the district Court be reversed, and that of the borough Court affirmed.

Mayo v. Murchie.

October, 1811.

1. **Lottery*—Parol Evidence.**—If the owner of a tract of land, on a navigable river, was authorized, by law, to establish a town upon it, and dispose of the lots by way of lottery; and, in the scheme of such lottery, as advertised, adventurers therein were assured that the lots should be laid off in a town "convenient to the river, with public landings;" parol testimony is admissible, in aid of the inference deducible from such printed proposals, to establish an equitable title in the inhabitants of the town, as tenants in common, to a piece of ground, between the river and the lots actually laid off for the town.

2. **Chancery Practice—Suit for Legal Title to Land—Parties.**—Where a plaintiff in equity, having the equitable title to land, sues for the legal title, the person holding such legal title is a sufficient defendant; without making the person, of whom he purchased, a party to the suit.†

***Lottery—Construction of Deed.**—See principal case cited with approval in *Lyons v. Brown*, Gilm. 123. See generally, monographic note on "Lotteries" appended to *Phalen v. Com.*, 1 Rob. 713.

†**Printed Proposals—Parol Evidence.**—As deciding that parol testimony was admissible in aid of the inference deducible from the printed proposals, to establish an equitable title of the inhabitants of the town as tenants in common, the principal case is cited in *Skeen v. Lynch*, 1 Rob. 191.

Evidence—Printed Reports.—The principal case is cited in *Taylor v. Com.*, 29 Gratt. 785, 789, 795, where the question arose as to the right to introduce in evidence the report of the principal case as contained in 3 Munf., the original record in the case having been lost by fire.

Railroads in Streets—Rights of Lot Owners to Compensation.—Concerning the question as to whether owners of adjoining lots are entitled to compensation from a railroad company legally occupying a street, see *Spencer v. R. R. Co.*, 23 W. Va. 423, citing the principal case on this point. See the principal case also cited in *Yates v. Town of Warrenton*, 84 Va. 340, 4 S. E. Rep. 818.

‡**Chancery Practice—Parties.**—The rule is general and well established that all persons concerned in interest shall be made parties, for two purposes. 1. to settle the controversy all around; and 2. because no decree should be made effecting the interest of any man, unless he has had an opportunity to contest it: for if all parties are not before the court contradictory decrees may result, between which the right of a party may be overlooked or crushed. *TUCKER, P.*, citing the principal case in his dissenting opinion to *Buck v. Pennybacker*, 4 Leigh 11. To the same effect, see the principal case cited in *Buck v. Pennybacker*, 4 Leigh 9; *Collins v. Loftus*, 10 Leigh 10; *Morgan v. Blatchley*, 33 W. Va. 159, 10 S. E. Rep. 282. But a person, to be a party in interest, must be interested in the property involved in the issue. It is not sufficient that he may be interested in the question litigated, or that by the determination of the question litigated, he may be a party in interest to some other suit growing out of the decision of the question litigated. *Elean v. Lancasterian School*, 2 Pat. & H. 69, citing the principal case as authority.

[Note. The doctrine here laid down is not consistent with that expressed in the first marginal note to the case of *Hoover v. Donnelly*, 3 H. & M. 316.

3. **Chancery Jurisdiction—Consent of Parties—Effect.**—Although consent of parties cannot give a Court of equity jurisdiction, or supply the total absence of other necessary parties; yet such consent may dispense with the strictness of form, and enable the Court to decide a cause in relation to parties, who are, in fact, though possibly, irregularly, before it.

4. **Chancery Practice—Bill by Surviving Trustee.**—Under what circumstances a single surviving trustee of a town is competent to be the plaintiff in a bill in equity, for the purpose of asserting the right of the inhabitants generally, to land laid off and annexed to such town as a common.

John Murchie, surviving trustee of the town of Manchester, filed his bill in 359 the Superior Court of Chancery, *for the Richmond district, against John Mayo, Charles Carter, surviving trustee of William Byrd, and William Nelson, his agent; stating, "that, in the year 17—, Colonel William Byrd proposed to found the said town of Manchester, by way of lottery; and agents were appointed by him and his trustees, for superintending the laying off and bounding of the same; that the said agents proceeded to execute the business thus confided to them; and, in making out the boundaries of the town, they expressly declared and set apart the slip of land which lies between James River and the lots of the said town, near what is now called Mayo's bridge, as part of the said town, to be annexed thereto, and held by the inhabitants thereof, as a common, forever; and the same hath been so held and enjoyed by the inhabitants of the said town ever since; that, although this piece of ground is not described, as a common, in the plan of said town, yet that circumstance is not material; because none of the streets, or other public ground, belonging to the said town, is there described; and, therefore, it might as well be objected, that the town has no streets, as that it has not the common aforesaid; for both equally rest upon the verbal declarations of the agents, and the tacit consent of Colonel Byrd and his trustees; that this consent was manifested by various acts, and, particularly, on a certain occasion, when Colonel Byrd, through mistake, had sold a piece of the said slip of land to James Lyle; for, immediately on his discovering it, he gave up the sale, and made the said Lyle compensation for it in an adjoining part of the said town; that the said slip of land is absolutely necessary to the said town, in order to enable the inhabitants thereof to approach the river with facility; and, without it, the communication between a great part of the town and river, will be entirely cut off; although, in the printed scheme of the lottery, public landings were promised them; that all these facts were well known to — Mayo, who, nevertheless, for a tri-

360 fying consideration, *purchased the

But see *Edgar v. Donnelly & Jones*, 2 Munf. 387, pl. 2; and *ibid.*, 390, 391.—Note in Original Edition.

†**Chancery Jurisdiction—Consent of Parties—Effect.**—See, citing the principal case on this subject, *Echols v. Brennan*, 99 Va. 154, 87 S. E. Rep. 786; *Callaghan v. Circle*, 19 W. Va. 571 *et seq.* See further, monographic note on "Jurisdiction" appended to *Philppen v. Durham*, 8 Gratt. 457.

Chancery Practice—Construction of Bills.—To the point that "a rigid and technical construction of bills and proceedings in equity" is exploded in favor of substance, the principal case is cited in *Baugh v. Elcheiberger*, 11 W. Va. 220; *Sturm v. Fleming*, 23 W. Va. 412.

said Byrd's right to the said slip of land, and obtained a deed therefor (although the same was then in the possession of the said town) from him and two of his trustees, without any warranty; a circumstance which of itself, evinces a doubt about the title; and this is further manifested by the failure of the said — Mayo, to assert his right thereto during his lifetime; but John Mayo, his son and devisee, alleging, (since the death of the said — Mayo,) that the legal estate was never conveyed to the said town, and that it passed by the said deed to the said — Mayo, and from him to the said John Mayo, his devisee, had commenced an action of ejectment against the complainant, as trustee of the said town, in the Richmond district Court, and threatened to turn him and the said inhabitants out of possession; notwithstanding their equitable title aforesaid." The prayer of the bill, therefore, was, that John Mayo be enjoined from all further proceedings in his said suit; that he, and the said Charles Carter, by William Nelson, his agent, appointed by the High Court of Chancery, be decreed to convey the said slip of land to the complainant, as trustee for the said town; that the complainant, and the inhabitants of the said town, be quieted in the possession thereof; and for general relief.

The defendant, John Mayo, by his answer, "admitted that the late Colonel William Byrd did institute a lottery; but, for the particulars thereof, referred to such proof as the complainant should produce;" averring, "that the defendant knew nothing of the agents, of the said lottery, having declared or set apart the slip of land, in the bill mentioned, to be annexed to the said town, and held by the inhabitants as a common; nor doth he believe it to be so; and, among the proofs to the contrary, he appeals to the inability of the complainant to produce any written or printed document, which was ever made public, whereby it was so set apart." He denied, "that the

said inhabitants ever enjoyed the said
361 "slip of land by virtue of an assertion of right on their part, or any dereliction of right on the part of John Mayo, (the defendant's father, from whom he ultimately derived a title,) or of the defendant himself, or any other person, who had claimed under the said John Mayo: that the reasoning of the complainant, drawn from a supposed omission to describe the streets and public ground in the plan of the said town, need not (as the defendant believes) be answered; but, if necessary, the defendant would only refer to the plan itself, and to the impossibility of laying off the lots without laying off the streets, &c. as a consequence; that this defendant would not yield to any declarations said to be made by Colonel Byrd, or his trustees, nor to any act, which they may have done, in derogation of the deed from the said Byrd, and two of his trustees, (Peyton Randolph and John Page,) in the year 1774; that the defendant cannot speak of any act of Colonel Byrd, concerning a piece of the said slip, to James Lyle; but no such act could have varied the right of this defend-

ant; that, as to the necessity of the said slip to the said town, this defendant holds it to be immaterial, if true; but the complainant himself seems to admit, that the inconvenience to the inhabitants is only on the ground of the degree of facility with which the river is approached; that the landings may be approached without the use of the said slip of land; that the said John Mayo, when he obtained his deed aforesaid, did not know, think, or believe, (as far as this defendant believes,) that the said slip of land was in the possession of the said town; that the compensation, expressed in the said deed, was a fair one, in point of amount, and from the nature of the bargain; that the said deed was conformable to deeds, of that kind, in general; and no disadvantageous inference ought to be made from the want of a warranty; because the trustees were not in the habit of making a warranty; and Colonel Byrd, it is believed, made one to the trustees, in the original conveyance from him to the said trustees; that this defend-

362 ant "does not believe that the said John Mayo ever did doubt his title to the said land; but, on the contrary, it is notorious that he did frequently assert his title thereto; that, in consequence of the bill and suit of the complainant, this defendant had suspended the prosecution of his ejectment, and had obtained a decree of this Court against the said trustees; to which, and the proceedings therein, this defendant refers, in order that the whole of this controversy may be finally heard in this Court."

To this answer, the plaintiff replied generally; and commissions to take depositions were issued.

Daniel Moore deposed, that, at the time the town of Manchester was laid off, he acted as one of the chain carriers; and that the slip of ground between the mill canal and the river was run round with the chain, and was not laid off into lots, but left as a common, or street, for the use of the said town.

James Lyle deposed, that, in the beginning of the year 1769, he applied to the late Colonel William Byrd to purchase from him half an acre of the land lying below the mill, between the range of lots and the river, whereon to build a wheat house; promising to leave a street between the land meant to be purchased, and the range of lots; that Colonel Byrd agreed that he should have half an acre of that land for the sum of twenty-five pounds, which he paid in hand to the said Byrd, who promised to make him a deed for the same when required; that, shortly afterwards, Colonel Archibald Cary waited on the deponent, and expressed his surprise that he should purchase, or that Colonel Byrd should offer to sell or dispose of any of the land between the river and the mill canal, and said, that neither Colonel Byrd, nor his trustees, had any right to sell or dispose of one foot of that land; adding, that Colonel Byrd, and his trustees, had appointed and empowered him, with others, (viz. Benjamin Watkins and James Pateson, as the deponent believed,) and had given them full power and authority to survey and lay

off the town of Manchester, with
 363 *streets, and such other conveniences
 as they thought right and proper;
 and that, after mature deliberation, the
 managers resolved and concluded, that the
 whole of the land lying between the river
 and the mill-race and canal, from the fishing
 place to the upper extremity, except the
 ferry lot, and the three lumber and wheat
 houses, belonging to James Lyle, Thomas
 Yuell, and Alexander Stewart, with egress
 and regress, should be given up and allotted
 for a common to the town of Manchester
 forever. Soon after this conversation, the
 deponent waited on Colonel Byrd, and in-
 formed him thereof; Colonel Byrd said,
 "he thought that land had still been his
 own, and at his own disposal, but it was
 true that he and his trustees had trusted
 the whole management to Colonel Cary,
 and the others, to lay off the town of Man-
 chester, with streets and conveniences, as
 they thought right and proper; and what-
 ever they had done in this business, must
 be binding on him;" and added, "his sale
 of the half acre of land, being part of the
 common left to the town of Manchester,
 must be void;" which the deponent readily
 agreed to, and received back the considera-
 tion money he had paid. After this, there
 seemed to remain no doubt of the ground
 contemplated being a common to the said
 town.

The deposition of David Patteson, for-
 merly a manager of Colonel Byrd's estate, at
 the Fall's Plantation, was to the same
 effect with that of James Lyle, in relation
 to the transaction between Byrd and Lyle.
 This witness further stated, that, in De-
 cember, 1769, being in Williamsburgh, on
 the business of Colonel Byrd, his employer,
 he understood from him, that Peterfield
 Trent wished to buy some of his lots; on a
 conversation with Trent, the deponent
 found he wanted a part of the aforesaid
 slip of land near the canal bridge, and told
 him he would not make such sale, well
 knowing the trustees of the town of Man-
 chester would object, as they had done in
 the case of Mr. Lyle; that, after some
 time, Trent said he would give 20l.
 364 for the quantity wanted, "and if

Colonel Byrd had no right, the loss
 was to be his; on which terms, it appears,
 the bargain was made. This deponent had
 many conversations with Colonel Byrd on
 the subject of the slip of land aforesaid,
 and recollects that, in one of them, the said
 Byrd observed, "it was very hard" (or
 strange) "that they objected to his sale
 of it;" or words to that effect. The depo-
 nent always considered the said land be-
 tween the canal and river, laid off as a
 common, or street, for the benefit of the
 lots on the north side of the town of Man-
 chester, which extends northwardly to
 nearly the mouth of the canal; below
 which, there can be no communication
 with the river, without passing through
 that slip of ground, except by the street and
 road leading to the bridge. This witness
 also stated, that Byrd's trustees were in the
 habit of adding their names to deeds signed
 by him; without making further inquiry.

Samuel Weiseger deposed, that he removed
 from Col. Cary's to Manchester, in the fall

of the year 1773; that the slip of ground,
 between the mill canal and the river, was
 considered, by himself, and the inhabitants
 of the town at large, as a common belonging
 to the said town, and used and occupied by
 the inhabitants as such; and the same has
 ever since been so occupied and used by
 the said inhabitants; and he never heard
 that right disputed, until Mr. Mayo com-
 menced his suit in the district Court of
 Richmond.

The deposition of Nathaniel Quarles, an-
 other inhabitant of Manchester, was to a
 similar effect.

Robert Goode deposed, that about forty
 years ago it was contemplated by the late
 William Byrd, and his trustees, to dispose
 of two tracts of land, one on the north, and
 the other on the south side of James River,
 by way of lottery; supposing that there
 would be a sufficiency of land on each side
 of the river to comply with the terms, or
 plan, as advertised, for the said lottery,
 and to reserve the Fall's Plantation; and

Benjamin Watkins, the surveyor, first
 365 made a survey of the whole of the "land
 to be disposed of by way of the lot-
 tery, and found, that after allowing one or
 two thousand acres to the Forge Lot, there
 would not be a sufficient quantity of land
 for the purpose of establishing the town of
 Manchester, according to the plan of the
 lottery as advertised; and this deponent,
 having been long acquainted with the dif-
 ferent land marks, was frequently called
 upon by the surveyor, who told him that
 he should want land to make out as many
 lots as were promised to those who would
 become adventurers in the said lottery; the
 said surveyor then took out one link from
 his chain, and continued surveying, until
 the merchants and others, who were ten-
 ants, made a positive objection to having
 their tenements mutilated, or divided into
 lots. This objection was also made by
 other individuals, placed in the same situ-
 ation, on the Richmond side; and they
 unanimously declared, that they would not
 become adventurers in the said lottery, but
 would oppose it if their tenements were not
 left entire; and such was the opinion of
 Colonel Byrd's friends, generally, on find-
 ing that they should want the aid of the
 merchants to carry the lottery into effect.
 Colonel Byrd's steward and agent, (James
 Patteson,) as well as the surveyor, thought
 it proper to decline surveying and laying
 off the lots until they could hear from Colo-
 nel Byrd, and his trustees, upon this sub-
 ject; they were so dispersed that it was
 some time before the surveyor could be in-
 structed in what manner he should proceed;
 at length, after a considerable lapse of
 time, Mr. Patteson, the agent, and Mr.
 Watkins, the surveyor, were directed to
 leave the tenements entire, and to substi-
 tute twenty-five acres of land more, on the
 west side of that proposed for the establish-
 ment of the town of Manchester; and, at
 the same time, that these instructions were
 given to the said surveyor, he, with his
 former coadjutor, was informed, that, as
 so many difficulties had, and might, proba-
 bly, arise, they were, in future, to advise
 with Colonel Archibald Cary, who was
 fully authorized to direct and control,

366 *should any other difficulty arise in laying off the said town. The surveyor then proceeded in laying off the said town of Manchester into lots, until he arrived at the canal, between which and James River there was a narrow slip of land which he said he could not lay off into lots, in any manner, without manifest injury to the lots on the other side of the canal; particularly, as a free and direct passage, from all the lots in the said town, to the river, was guaranteed to the adventurers in the lottery, by the trustees, and was accordingly advertised to be so. When this difficulty arose, Mr. Watkins, the surveyor, and Mr. Pattenon, the steward, sent immediately for Colonel Archibald Cary, who (the deponent knows) was fully authorized by Colonel Byrd, and his trustees, to act for them in any matter respecting the laying off the lands for the establishment of the said towns of Richmond and Manchester. Colonel Cary went up the next morning, and, on his way to Manchester, called on the deponent; they rode together to the canal, where they met the surveyor and Mr. Pattenon on the land now in dispute; and, after some time, it was unanimously agreed not to lay off the land between the canal and James River, into lots. Mr. Watkins, the surveyor, then observed to Colonel Cary and Pattenon, that he was apprehensive that he should want land, or room, to make out the number of lots, on this side of the river, for the town of Manchester; Colonel Cary then directed him to measure the slip of land between the canal and the river; which was accordingly done; and when the quantity was ascertained, Colonel Cary directed the surveyor to add one row of lots on the back part of the said town of Manchester, as they had determined to leave all the land between the river and the canal for a street and common to the said town; and fourteen lots were, accordingly, added, which may now be observed as having no cross streets to them. The deponent had ever believed, and never had a doubt, but that it was left as a common for the town, and that it was acknowledged by every
367 person *(except two or three) that Colonel Byrd had no right to sell the said land; for they were all satisfied that it was the case; except Colonel John Mayo, the father of the present John Mayo.

This witness further stated, there are some lots below the mill which, if the slip of ground in question were to become private property, would be deprived of all communication with the other parts of the town, but by courtesy of the person claiming, or by crossing a navigable canal; as they are bounded on the other two sides by the Forge Lot, and Cary's fishery lot, which are private property; that it might, just as well, be asked, why the streets were not marked as streets in the plan of the town, as why this piece of ground, left as a common, was not marked in the same plan as a common; that, on the premises in dispute, there was a wharf built by Col. Byrd, for the convenience of shipping tobacco and landing goods, as also a public ferry below

the wharf; and that the navigation above that wharf, for tide water craft, was practicable but a few yards; it being very rocky above. Being asked, by the defendant, "what authority did Col. Cary exhibit when he undertook to act for Colonel Byrd and his trustees?" the witness answered; "I was present when Colonel Cary appeared before James Pattenon, agent for Colonel Byrd, and Benjamin Watkins, surveyor; and Colonel Cary did then and there produce a bundle of papers, which had the appearance of letters, which were handed by Colonel Cary to the said surveyor, and the said Pattenon, as his (the said Cary's) authority for giving them the directions for leaving the piece of ground in question as a common for the town of Manchester. One of those papers was a letter from Charles Turnbull, one of the trustees; and another a letter from Mr. John Wayles, both handed to the said Watkins and Pattenon, for the purpose aforesaid; and the letter of Mr. Wayles was handed about in the then circle, as containing a most difficult handwriting to read; and its contents,

with other papers then produced,
368 were found, *by the surveyor, and James Pattenon, to be full authority for them to leave the before-mentioned piece of ground as a common for the town of Manchester; and, from that time, I never heard of a doubt suggested, that it was left as a common to the said town, until the late Mr. Mayo made the purchase; every person who then heard of it, and had any concern in it, paid little regard to it, considering Mr. Mayo as having bought a bad title."

The three last-mentioned depositions were taken the 14th of September, 1805, "in the presence, and by consent, of the parties."

Austin Talman deposed, that, about the year 1784, he was employed by the father of the present defendant, to build a vessel for him, which he, the deponent, did on the land between the canal of the defendant's mill and James River, which is the land now in dispute between the said parties; that the said Colonel John Mayo, deceased, always exercised the right of ownership over the said land, by building and repairing vessels on it, getting stone, cutting down and taking timber for his own use; that the said deceased claimed the land, and the deponent never heard his right doubted until since his death. The deponent did not suppose that he would have allowed any other person to use the same privileges on the premises, and considered that land as much his, from all he had understood, as the house he lived in.

The exhibits in the cause are sufficiently described and commented upon, in the following opinions of the judges.

In May, 1807, the cause came on to be heard, "by consent of parties, as to the defendant, John Mayo;" whereupon Chancellor Taylor decreed, "that the said defendant do release all his estate, right, title, and interest in the land in bill mentioned, to the plaintiff and his successors, trustees of the town of Manchester, for the use of the said town; that the said town be quieted in the possession thereof; that the said John Mayo be perpetually en-

joined on commencing or prosecuting any action at common law for recovering the same; and that he pay, to the plaintiff, the costs about this suit expended."

From which decree the defendant, Mayo, appealed.

The cause was argued in the Court of Appeals, on the 17th and 18th days of December, 1812; and reargued the 1st, 2d, and 3d days of December, 1813.

Williams, Wirt, and Hay, for the appellant.

Samuel Taylor, and Call, for the appellee.

Saturday, February 26th, 1814, the judges pronounced their opinions, seriatim.

JUDGE COALTER. The land, concerning which this controversy exists, was formerly a part of the Fall's Plantation, belonging to the late Col. William Byrd, and lies on the south margin of James River, bounded by that river on the north; and on the east, south, and west, by the lot attached to the fishery, the lots of the town of Manchester, which are laid off north of the forge, or mill canal, and by the said canal to its junction with the river above. It joins no other lots of the town, except those above mentioned, being severed therefrom by the forge prize, or canal aforesaid, which lies between this land and the balance of the town. Previous to the establishment of Manchester, and that part of Richmond called Shockoe, the whole of the lands belonging to Byrd, on both sides of the river, had been conveyed, by him, to trustees, who were also his creditors, for the payment, as well of their own debts, as what he owed to others, he being about to go to Europe. Those trustees made sales of considerable portions of the property conveyed to them, but so far from being paid their own debts, they were induced (particularly John Robinson) to make large

advances to said Byrd's other creditors, in his absence; and, in the year 1770, the debt due to said Robinson's estate, amounted to about 20,000l. In the mean time, however, Byrd had returned to Virginia; and, in August, 1767, he, and his trustees, propose to lay off the towns of Manchester and Shockoe, and to dispose of the same by way of lottery, the scheme of which was then published. There were various improved tenements, fisheries, ferries, &c., which formed the large prizes; and, amongst others, on the Manchester side, was a double forge, or mill, with two and a half acres of land adjoining; the use of the landing; the canal, with ten feet on each side; and 2,000 acres of back land, estimated at 8,000l. This lottery was to be drawn in June, 1768, and, I presume, was so drawn, as the act of Assembly, establishing the towns, passed in 1769. It is not pretended that the piece of land in controversy was recognised by the survey and plan of the town, or by the act of Assembly, either as a street or common, or as otherwise appurtenant thereto; on the contrary, except where it joins a few lots laid off below what is now Mayo's Bridge, it is severed from the town by the forge prize aforesaid, one of the largest in the lottery.

After these transactions, to wit, in May, 1770, Byrd, and his surviving trustees, by deed, acknowledging the debt due to Robinson as aforesaid, convey to Edmund Pendleton and Peter Lyons, his surviving administrators, all that tract of land in Chesterfield, lying on James River, near the falls thereof, and all the other lands, tenements, lots, and messuages, lying in said county, and in the county of Henrico, belonging to said Byrd, or the trustees, and all the other lands and slaves comprised in the other deed to the first trustees, not before sold by them, or either of them, and which they have now a right, by virtue of said deed, to sell; (except the several prizes drawn by fortunate adventurers in the said lottery, &c. ;) to be sold, first, to pay any debts or securityships due, or obligatory on the surviving trustees, then, the debt due their intestate, &c. The land in controversy, *therefore, not being a prize drawn, nor a street belonging to the town, the fee remained in Byrd, and his trustees, and by this deed was passed to Pendleton and Lyons. The surviving trustees reserved the right of selling the premises, themselves, until the 10th of December, 1770; after which, Pendleton and Lyons, if their debt was not then paid, were to have the right to proceed to sell, &c. to effect which, said Byrd was to give all assistance in his power. This deed was acknowledged on the day of its date, by all the parties thereto, and recorded in the general Court.

In the year 1774, Byrd, and two of his surviving trustees, in the first deed, for the consideration of 100l., to them in hand paid, conveyed to John Mayo, father of the appellant, "two lots in Manchester, and one in Richmond, and the whole land between the river and canal, including the river, with all privileges, &c. which ever was vested in said Byrd, or his trustees, except such land as is laid off into lots, and disposed of by lottery, as by reference to the plan of the town, recorded in Chesterfield, will appear."

This deed was acknowledged in May, 1774, in the general Court, by Byrd, and two of the surviving trustees, Carter and Turnbull; the other two surviving trustees, though named in the body of the deed, not having signed it. In this deed, Byrd warrants against himself, his heirs, and assigns. Whether this money went to pay the debts still due to the surviving trustees, or that due Robinson's administrators, does not appear; but considering how difficult it had been to raise money to pay off those debts, and the probable magnitude of them, from the specimen of that due to Robinson, it is not likely that they had been all paid off in the short space of four years; much less that Robinson's also had been paid off. There is no reconveyance from Pendleton and Lyons; and, from any thing that appears, the legal title is now in their heirs.

*The appellant (who claims under his father, the grantee, in the last-mentioned deed) instituted his ejectment against Murchie, the appellee, as surviving trustee of the town of Manchester, who (instead of defending the suit at law,

either by showing the legal title in another, or by showing that this land, as a street or common, had passed as appurtenant to the town) filed his bill to stay proceedings in the ejectment; alleging that Byrd, and his trustees, had appointed agents to superintend the laying off and bounding the town; and that, in doing this, they set apart the "slip of land which lies between James River and the lots of said town, near what is now called Mayo's Bridge, as a part of said town, to be annexed thereto, and held by the inhabitants, as a common forever." He admits it is not described as a common in the plan of the town, and that there is no deed conveying it as such; but says, that neither are the streets described; in this, however, he is mistaken, as they are laid down in that plan, and the act of Assembly expressly recognises them, and enacts, that the town, as it is already laid out in lots and streets, containing 312 lots, as by said plan and survey may appear, is established a town; had this land been so established, and annexed to the town as a common, the defence, at law, against any infringement of this right, would have been clear. The party, however, admitting that no legal title had passed, comes into a Court of equity for relief; and the defendant answers the bill, submitting also to the jurisdiction of that Court. The bill further alleges, that this slip of land is absolutely necessary to the said town in order to enable the inhabitants to approach the river with facility; and, without it, the communication between a great part of the town and the river, will be entirely cut off; "although, in the printed scheme of the lottery, public landings were promised them." This printed scheme has been exhibited, by consent, to this Court; which, after designating the improved lots, and other high prizes on the Manchester side, states

300 unimproved lots, each half an
373 acre, estimated *as worth 25l. each, to be laid off in a town convenient to the river, with public landings. The scheme, as to the Richmond side, designates, amongst other prizes, 10 islands in the river, on some of which are valuable fisheries; and these islands are laid down and numbered in the plan of the town; some of them nearer the Manchester shore than the Richmond, and above what is now Mayo's Bridge.

On these written and public documents, I incline to think the inhabitants of the town of Manchester have strong claims to the justice of this Court, which I am willing to extend to them, as far as I can, in this action; and if, for defect of proper parties plaintiff, I could not, ultimately, decree in their favour, yet, as it is of great public consequence that this controversy should be speedily decided, I should think myself justified in intimating my present impressions as to their rights, sending the cause back to have the bill amended, or such steps taken as finally to conclude the inhabitants by the decree to be made. Taking the case up, too, on these documents, would greatly relieve me as to the question whether there are proper parties defendants; or the deeds, under which the appellant

claims, having reference to the lottery, the plan of the town, &c. will probably, make this scheme, as well as the plan, a muniment of title; against which he, or those under whom he claims, will not be intended to have purchased; and against which, Byrd, probably, will not be intended to have warranted. As to those lots which lie north of the canal, and adjoin this land, there being no street laid off in front of them, nor access to them, except through this land, the parties, not only from the scheme, which could not be intended to convey lots that should be inaccessible, but from the very nature of the conveyance itself, would be entitled to a street, or way, to their lots. So, also, as to the islands in the river, the very nature of the transaction implies that they shall be accessible from the main land. A street, therefore,

from the main road, as well down as
374 *up the river, so as conveniently to answer these purposes, would, I conceive, be demandable, and might be decreed by a Court of equity. So, also, as to public landings and ways to them; they being, not only generally promised, but the use of the public landing expressly reserved as to the forge prize, now the appellant's property. Had these things been provided for by those persons entrusted to lay off the town, no injury would have arisen to any party; but the scheme would have been fully carried into effect; and a Court of equity, considering that done which ought to have been done, might now designate and secure to the parties these rights, thus, as it at present appears to me, necessarily resulting from their respective deeds and title papers. The purchasers of tickets paid their money under the faith of the scheme advertised, and, as to every thing which can be fairly claimed under it, may be said to be purchasers for a valuable consideration; as to every thing beyond this, the party relies on a parol contract, or, rather, declaration, made by the persons laying off the town, and, under this, he now claims the whole of this land as a common.

As to this point, I should feel little hesitation in dismissing the bill on the merits, so far as it claims any thing beyond what the parties may be entitled to under the written documents, were I satisfied that there were proper parties plaintiff before the court; and this, although I think there are not proper parties defendant, to this branch of the controversy, to enable me to decree against the appellant; for why keep the appellant in Court in order to give him the aid of, or the appellee a recourse against, other defendants, when no case is made out against him? but as the appellee does not sue in his own right, but in the right of others, if he does not legally represent those others, then a dismissal of this bill would not bind the inhabitants of Manchester, whose rights ought not thus to be finally prejudged. Courts, however, will sometimes, in instances of this
375 kind, intimate *their present impressions, in order to save litigation, if the real parties cannot make a different or better case. This parol promise, or declaration, was either merely voluntary, and with-

out consideration, or it superadded to the scheme, as published, an additional inducement, and did induce purchasers to advance their money for tickets. In the former case, being merely voluntary, it would not be good against a subsequent purchaser for valuable consideration; in the second case, it would have vested an equitable right (if made by a person having a competent authority to bind Byrd and his trustees) in the party thus induced to adventure, to have the easement promised. Let me here remark, though, that it is neither alleged, nor proved, that any one was thus induced to advance his money, or that this additional inducement was made public, or known to any purchaser of a ticket; on the contrary, it appears that Mr. Lyle, a conspicuous inhabitant of Manchester, knew nothing of it until long after the lottery was drawn, nor does it appear that a single ticket was sold after this declaration. But take it, that an equitable right did vest in the holders of tickets who drew lots in Manchester, and has passed with the lots from purchaser to purchaser, and now exists in the holders of lots; has this right to an action, or suit in equity, been transferred to the appellee? The act of Assembly establishing the town, appointed nine trustees, any five of whom might act, with power to regulate buildings, &c.; and, in case of vacancies, the surviving, or remaining trustees, were authorized to make new appointments.

The act of 1778 empowers the trustees of Manchester, and their successors, by that name, to sue and implead, either in the county or General Court, any person or persons who shall commit a trespass on the streets of said town, or lands which may have been appropriated for the use of the inhabitants thereof, &c. "Provided nothing herein contained, shall be construed to

376 affect the legal rights of any person holding lands adjoining the "said town." The vacancies have not been supplied, and there are no trustees, now, to supply them, the appellee alone surviving. The legal number competent to act, have ceased to exist, and the body politic, in fact, is dissolved, and must remain so until the legislature shall again bring it into existence. The appellee does not, therefore, legally represent the town, and, I apprehend, could not sue in those cases expressly mentioned in the statute; and, a fortiori, not in a case where I have doubts whether the whole could have sued. It does not follow that trespasses and nuisances in the streets cannot be redressed, or that the right in question, if it ever did exist, and vested in the trustees, is gone with the corporation; those rights, and the proper remedies, still exist, unimpaired by the dissolution of that body, in the people; in whom they originally vested, and to whom they belong; and had they, or some of them, in their own right, united with the appellee in this suit, there would have been no objection with me as to the want of proper parties plaintiff in the cause.

Whether there are proper parties to a suit, or not, will not depend on the will or election of the suitors, who frequently go to trial (as in this instance) without objection;

as is evinced by all those cases where the Court themselves direct a cause to stand over for new parties to be made; (a) and they ought, generally, to be such, that the decree, if pronounced either way, will be obligatory on all parties interested, and not only in the controversy pending, but avoid the danger of contradictory decrees, thereafter, between any persons interested in the pending controversy. It will sometimes happen, though, that a bill will properly be dismissed, although the necessary defendants are not made, or are not before the Court, so as to justify a decree for relief; as in the case of an injunction against the assignee of a bond, on the ground of a latent equity between the assignor and obligor before assignment; if the assignee can show that the equity has been waived or abandoned, as to him,

377 he "will be dismissed; because this decree can never conflict with one that may be pronounced between the original parties. But if relief is to be had against the assignee, then the assignor must be a party, not only because he is the party consensant of the transaction, on which the equity is alleged to arise, and is, therefore, necessary to the defence, as well to confess, or deny, as to avoid it, by after agreements, &c. but because he, if not before the Court, would not be bound by the decree, and, on a subsequent suit by the assignee, would have the same right of defence that he could have urged had he been made a party to the first suit; and so there might be contradictory decrees as to the same matter of controversy. Moreover, the plaintiff may have a decree himself against the assignor. But, I believe, there is no case in which a Court has undertaken to decree against a defendant, merely because he has submitted to the jurisdiction of the Court, where, by the plaintiff's own showing, it appears that he is neither the party interested, nor the legal representative of that party; and, although I may be mistaken as to the fact, yet this appears to me to be the case in the present instance. As to the merits of this parol agreement, unless the parties interested can hereafter make out a better case than that which has now been made for them, my impressions are, that they cannot succeed under it. Take all the depositions in the cause, there is no proof, to me, of any authority in Cary and others, to stipulate or promise any thing more than the scheme would give to the parties; indeed, the bill itself does not allege any special authority to this effect, but merely a general authority to lay off and bound the town.

The sale to Lyle, it is true, was cancelled; but Byrd, in the fall, or winter, after, expressed his surprise that there should be any doubt as to his right to sell this land; and he did sell a part of it to Trent, as early as 1769, whose right remains undisputed; and, it is strange, as this claim was thus disputed prior to the passage of

378 the "act establishing the town, that this land was not designated, in that act, as a common, or otherwise belonging to the town; on the contrary, although the parties knew of the sale to Trent, and of

(a) 1 Atk. 290; 2 Atk. 111; 2 Eq. Cases Abr. 166, pl. 5.

the deed to Mayo, in 1774, and of his exercising acts of ownership on the ground, and of the appellants doing the same, by abutting thereon his bridge, spoken of in the bill, and laid down in the plat, that they should have permitted these rights, depending on parol proof, to have slept until nearly all the parties to this alleged contract were dead. But the evidence, in this case, is much weakened, if we reject the depositions of the inhabitants of Manchester, the real plaintiffs in this controversy, as it is said. Two of these depositions, to wit, of Weiseger and Quarles, are said to be taken by consent; but, I presume, that consent was merely intended to obviate objections as to want of commission, or notice, or something of that kind, and not to waive an objection to the competency of the witnesses, because they are interrogated as to their interest, which is also proved by another witness, and can surely be no waiver of objections to others. I think all the holders of lots in Manchester are incompetent witnesses; that their depositions are properly objected to, and ought not to have been admitted in this case. But, it appears to me, that the parties claim, in this Court, beyond what was either contemplated in their bill, or in the decree of the Court below. In order to extend the claim to the whole land between the river and the canal, we must construe that part of the bill, claiming the land adjoining the town lots, to mean the lots south of the canal, and so include the whole canal, at least, above the bridge, with the ten feet on each side; or, otherwise, we must restrict it to those lots which it really does adjoin, and thus leave the land above the bridge unclaimed. It is readily admitted, that there never could have been any foundation to claim the canal and twenty feet of land as a common, or street, it being part of the large prize.

But it is said, a bill may claim too much, and this is no objection to *decree what is right. Can we, however, suppose that the bill intended so extraordinary a claim? and if it was so understood in the Court below, why did that Court decree a conveyance of all the appellant's right to the land so claimed, and thereby take from him, not only the land between the canal and the river, but his mill canal, with twenty feet of land, and vest the whole in the appellee in fee, for the benefit of the town, not to be held by them as a common? This extent of claim was certainly not contemplated by the bill, either as to quantity of land, or estate.

Public landings were promised by the scheme. This is noticed in the bill. The highest possible public landing is some distance below the bridge, as is proved. There are lots near the bridge, joining this land, which (as before observed) have no street to them. The demands in the bill, then, (without putting so forced a construction upon it as that above supposed,) can be well defined, as extending to the land below the bridge. "They declared and set apart, the slip of land which lies between James River and the lots of the said town, near what is now called Mayo's Bridge, as part of said town," &c. These lots lie

near Mayo's Bridge; the ground, stated in the bill to have been sold to Lyle, lies down here; the public landings are here, which are the great object of an approach to the river, and which cannot be approached through the land above the bridge, unless the canal, and twenty feet of ground, can be also thrown open as a common. If, therefore, I could decree in favour of the plaintiff, on this parol agreement, I could not extend his claim beyond what it appears to me to be clearly stated in his bill, although the testimony might carry me further; the party, if he wished to go further, would have to amend his bill. But this claim appears to be of a shifting nature in another respect. The bill claims a common. In argument, we are told that Mayo has the fee, and that a decree to convey all his interest, is right; in other words, that (instead of an incorporeal

380 hereditament, "a right of common, or way, which can only exist as growing out of that fee remaining in another) the plaintiff is to have the fee, for the use of the inhabitants of the town, as tenants in common; or, if Murchie is not the plaintiff, but this suit is really by the inhabitants, (as was also contended for,) that, then, instead of a right of common, they are to have the fee. If they are to have the fee, or are to be cestui que trusts of the fee, as tenants in common, the property will no longer be attached to the lots, as a street, way, or common, forever to be kept as such, agreeably to the statement in the bill; but each tenant in common may dispose of his interest, and it may, finally, become vested in one man, who, having the fee, may sell or use it as he pleases. The decree, therefore, which directs Mayo to convey all his interest in the land, I think, is erroneous. A decree ought to be a regular consequence from the case stated and proved. If, as is contended, Byrd and his trustees agreed to vest in the inhabitants a right of common in the land, the fee remained in them, subject to this easement. This fee, with any right they held in the bed of the river, they could continue to hold, or sell and convey, and the Court, I apprehend, could not compel them, or their alienee, to convey this fee to the commoners. It is of no consequence in whom the fee is, if the incorporeal hereditament, growing out of it, is secured to the party claiming it, it may as well remain in Mayo as not; and the bill claiming no more, the decree ought not to have gone further.

But did I think there was a proper party plaintiff, and that a parol agreement, founded on valuable consideration, definite as to its object, and the quantity of estate to be conveyed, was proved, and that this suit, to set it up, had been prosecuted within reasonable time, still I should not be able to decree against the defendant in this case; because, I think, necessary defendants are wanting, in order to authorize such decree. There is no proof that the original trustees, who held the fee,

381 accompanied, "with a beneficial interest, were parties to this parol agreement, or that they were ever informed of it during their lives. They conveyed

the fee to Pendleton and Lyons, (in whom it is not alleged there was notice of this claim,) first, for the discharge of their own debts; and, second, for the payment of a large debt due the intestate of those grantees; and in them, or their heirs, the fee, probably, yet remains; although they, or some of them, may have received the purchase money from the ancestor of the appellant, in whom, also, no notice is proved; for, though he was bound to take notice of the scheme, and other written documents, yet, under them alone, notice of the claim to the present extent cannot be inferred, as this is a claim beyond the written testimony; and, even if he knew of the present claim, he would be protected against it by the ignorance of those parties, and so they are necessary parties, not only as probably holding the fee, but for the purposes of a just defence. (a) But, above all, Byrd, who warrants against his assigns, and under whom the appellee claims by virtue of this prior contract, being the alleged party to that contract, can alone defend against it—can alone confess, deny, or avoid it; and, not only for that purpose, but being responsible even under his warranty, would not be bound by this decree, but might show, in a suit brought against him by Mayo, a complete defence as to the merits of this case, so as to produce a contradictory decree; and, therefore, on every principle, I think, his representatives should be parties. (b) This appears to me to be according to the course of the Court. In *Hoover v. Donnally* and others, 3 H. & M. 316, the plaintiff, as assignee of a purchaser from Donnally, files his bill against him and Grattan, a subsequent purchaser, to have a conveyance agreeably to the first sale. Donnally confesses the first sale, but says, the purchaser being unable to pay, gave up the contract, &c. and had this been proved, it surely would have been a good defence. This case was reversed in part, because the first purchaser was not a defend-

382 ant, *to confess or deny the sale of his right to the plaintiff; so, in *Argenbright v. Campbell*, 3 H. & M. 144, Campbell, the elder, under whom both parties claimed, was made a defendant. In the case of *Lewis v. Madison's heirs*, 1 Munf. 303, Rowland Madison's heirs were not parties. But as the Court were clearly of opinion, that the heirs of the first purchaser had no equity against Lewis, the second purchaser, and that the bill, as to him, ought to have been dismissed; this question was not decided, although two Judges give it as their then impressions, that a decree could not have been pronounced against Lewis, without those parties. This suit is an injunction on the ground of an existing prior equity in the plaintiff, arising under a contract, or agreement, of the parties under whom the appellant claims; those persons, or their representatives, appear to me to be necessary parties.

On the whole, I am, at present, of opinion, that the inhabitants of Manchester have, under their deeds and written docu-

ments, certain rights, which a Court of equity may secure to them; but that they have no claim, under the parol agreement, which that Court can enforce. With this intimation of opinion, given for the sake of speedy justice, but without intending it to be obligatory, as to either point, on the parties, on either side, who, when properly convened, will be at liberty to make, or defend their case, as shall be advised, I am for reversing the decree, and sending the cause back to the Chancery Court, with liberty to the plaintiff (who, as surviving trustee, would, perhaps, not improperly unite, as plaintiff, with the inhabitants of Manchester, or some of them, and, for the purposes of speedy justice, I am, in this case, willing, so far to recognise him as such, as not to dismiss the bill altogether) to amend the bill and make new parties, that the cause may be proceeded in to a final decree.

383 *JUDGE ROANE. This is a bill brought by the appellee, as surviving trustee of the town of Manchester, on behalf, and for the benefit, of the said town and its inhabitants, against the appellant and William Nelson, the agent of Charles Carter, who was the surviving trustee of William Byrd. It prays, on the ground of an equitable title, alleged to exist in his and their favour, in and to a slip of land, the subject of controversy, and for which they have never obtained a deed, or other legal title; and on the further ground of the appellant's having brought an ejectment against the appellee as surviving trustee aforesaid, for the said land, to which he claims the legal title by virtue of a deed from the said William Byrd, and two of his trustees, (Charles Carter, the surviving trustee, not having joined therein;) that the said appellant may be enjoined from proceeding in the said ejectment; that he and the said Charles Carter, by his agent aforesaid, may be decreed to convey the said land to the appellee, as surviving trustee aforesaid; that the said appellee, for and on behalf of the said town and its inhabitants, may be decreed to be quieted in the possession thereof; and for further relief.

On a hearing of the cause, by consent of parties, as to the appellant Mayo, the Court of Chancery decreed, that he should release all his right, title, and interest, in and to the land in the bill mentioned, to the appellee, and his successors, trustees of the town of Manchester for the use of the said town; that the said town be quieted in the possession thereof, and that the appellant, Mayo, be perpetually enjoined from commencing or prosecuting any action at common law, for recovering the same.

With respect to the said Charles Carter, or his agent aforesaid, the appellant, Mayo, having procured the legal title as to him also, prior to the hearing of the cause, by the decree in the proceedings mentioned, no decree was made, or was deemed necessary to be made, in this cause, as to that party.

384 *From this decree of the Court of Chancery Mayo appealed to this Court.

Before I go into the merits of the case

(a) 2 Atk. 139.

(b) 1 Munf. 303; 2 Eq. Cases, 682; 1 Wash. 41.

I will briefly notice such preliminary objections, made or occurring in the cause, as appear to me to deserve an answer.

In the first place, it has been objected, that the demand in the bill does not extend to all the slips of land lying between the canal and the river, but only to so much thereof as lies immediately between the lots laid off on the north side of the canal and the river. Without adverting, at present, to the uniform tenor of the decisions of this court, which, in favour of substance, have exploded a rigid and technical construction of bills and proceedings in equity, I may here remark, that this tract is demanded as a slip of land, and not as a part of that slip; that, in fact, the whole of that slip does lie between the lots aforesaid and the river, though a part of it, indeed, lies in a diagonal direction; and that while the continuity of the slip is an overruling obstacle to the construction now contended for, it would be difficult for the appellant to assign any precise limit by which the land, admitted by him to be demanded, would be regularly bounded. It is not shown that the present road to Mayo's bridge in fact existed at the commencement of the present controversy: and both that road, and the road to the former ferry, (the only other plausible boundary which can be resorted to under this hypothesis,) would leave so small a part of the slip, as the object contended for by this bill, as neither to answer the avowed object for which the appropriation for the use of the town was made, nor to be worth the trouble and expense of the controversy. Either of these boundaries would throw the land, admitted to have been appropriated for the use of the town, to the extreme corner thereof, in exclusion of other land lying breastwise with the bulk of the said town, and emphatically convenient thereto; and in point of quantity would whittle it down to a spot, of no account whatever as to the purpose intended.

385 "It is next objected that three of the most important witnesses, on behalf of the appellee, are incompetent, and that their testimony ought to be excluded, by reason of their being inhabitants of, and landholders in, the town of Manchester, and therefore interested in the question in controversy. While the legality of this objection is not denied, as an abstract proposition, I am strongly inclined to think that the appellant has precluded himself from making the objection, as to two of them (Quarles and Weiseger) in the case before us. The depositions of those witnesses, together with those of Goode and Talman were taken on the 14th September, 1805, in the city of Richmond. They were taken by two magistrates, and the same two. While these depositions were all taken at the same time, by a competent number of justices, and by the same justices, it is not shown or alleged that there was any want of a commission, or of due notice to the adverse party, of the time and place of taking them: on the contrary, from the circumstance of its being stated that Goode's deposition was taken

"agreeably to notice," and yet, also, that it was sworn to in "the presence and by consent of the parties," that consent cannot, as to this deposition, be referred to the want of notice: nor, consequently, is it reasonable to refer it to the want of notice, in relation to the two depositions in question; especially, as there is another ground on which to apply and account for it, viz. the ground of interest. When, therefore, in these two depositions it is expressly stated in the introductory part thereof, that they were taken "by consent of parties," and, again, when (after they had been interrogated as to their interest) the magistrates also certify that these depositions were sworn to "by consent of parties," and no other defect is shown or presumed to exist, to be cured by this consent of parties, must it not be irresistibly inferred to relate to the objection of interest, and to waive it? to waive it, at least, as to the reception of the testimony, however the circumstances disclosed on

386 the subject might still weigh "as to their credibility? This construction could not admit of a possible doubt, were not this consent also extended to the depositions of Goode and Talman, who are not also shown to be interested:—but as to them, this phrase may have been kept up through inattention; or there may also have been some supposed objections existing against them, also, at the time which (like the interest of the other witnesses) this consent was deemed necessary to cure, and which, on account of the agreement of the parties to waive the same, have not been brought forward for the consideration of the Court. Under all these circumstances, to object to the reception of these depositions altogether, (and that in the appellate Court,) would seem to be a departure from the principles of good faith and fair dealing, (as, but for this stratagem, the same facts might have been proved by other, and unexceptionable witnesses,) and is an objection, of which, consequently, the appellant ought not to be permitted to avail himself. I shall, therefore, consider the depositions of the said Quarles and Weiseger, as legal and competent evidence in this cause; and as strengthening and fortifying that construction, which irresistibly result, from the other testimony existing in the cause.

I come now to consider the merits of this case; and I am clearly of opinion that the appellees have an equitable title to the premises in question, by having purchased and occupied the same prior to the purchase by the appellant's ancestor; and that that ancestor had notice thereof at the time of his purchase, both by reason of the general reputation which existed as to this purchase and possession, and of the inferences, to that effect, which he must unavoidably have drawn, from the situation and position of the land itself, taken in connexion with the plan of the town, the scheme thereof published by the trustees, and the various acts of assembly passed upon the subject: the appellant had also express notice of the title aforesaid, (prior to the consummation of his title by

387 *the decree in the proceedings mentioned,) by the very exhibition of the bill before us.

With respect to the purchase of the premises from the trustees, (throwing the testimony of Lyle out of the question, as being an inhabitant of Manchester, and whose deposition is not brought into the cause by consent, as are those of Quarles and Weiseger, and who proves unequivocally the authority of Cary,) it is proved by Col. Goode that Messrs. Patterson & Watkins were authorized by Byrd, and his trustees, on account of their dispersed situation, to lay off the town, and to advise with Colonel Cary, should any difficulties arise, who (Cary) was "fully authorized" to act upon the subject; and that the slip of land now in question was set apart for a street or common for the town, by his direction, by the parties aforesaid. It is again emphatically stated by said Goode, that he knew "that the said Cary was fully authorized by Byrd, and his trustees," to act for them in laying off the town aforesaid; the force of which affirmation is not at all impaired by that part of the testimony of said Goode, given on his cross-examination, which refers to two letters therein specified, as conferring the authority; for the witness, also, says, that these letters, "with other papers, then produced," were found to confer an ample authority. This sale, and the agency of Cary, is also recognised and admitted by Byrd, who proved, by Patterson, to have revoked a sale of a lot to Lyle, (a part of the premises in question,) on the ground of its being previously disposed of, on being informed thereof, and remonstrated with on the subject. The appropriation of this slip to the use of the town, is also proved by Moore, a chain carrier, at the time of laying off the town; and is corroborated by the possession thereof, proved to have existed in favour of the town, from a date coeval with the transaction itself; the only exceptions to which are the equivocal acts of possession proved, on the part of Mayo, by the witness, Talman, and which were not of a character to require the corrective in-

388 terference of the "trustees of the town. With respect to that possession, while it is proved to have existed in favour of the town, prior to the date of Mayo's deed, it is objected, on his part, that there were no such decisive marks of the actual occupancy of the town as were competent to give him notice thereof. In answer to this objection it may be replied, 1st. That their possession was of a character equal to that of his possession; for while a solitary act of building a vessel thereupon, is proved, on his part, by a single witness, who, also, declares, in a sweeping clause, that similar acts of ownership were always (not, I presume, before the date of his deed) exercised thereupon by the said Mayo, it is also inferable that the inhabitants of the town (who, it is proved, "occupied" the same) manifested that occupancy by acts of as high a dignity, for example, by grazing their cattle thereupon, and taking stone and turf from the premises: and, 2d. It

may be replied, that these were the only marks of possession that could be exhibited, in relation to a street or common: it would not have been lawful to have erected houses upon the same, or the like.

But that general reputation, which existed as to all others, in relation to a transaction so public and notorious as the laying off a town, and the enjoyment of its commons by the inhabitants, Mr. Mayo was also bound to notice. While that reputation is proved to have been general, and known to several witnesses, it is not shown that a single person was ignorant thereof; for, although it is shown that Lyle purchased a part of the premises early in the next year, it is not further shown that he purchased it under an ignorance of the rights of the town. He might, for any thing appearing in this record, have purchased, as Trent did, with a full knowledge of this claim, and running the risk of the title: he might have ventured to have even bought a bad title, as Mayo himself is proved by Goode to have done, in the general estimation of the people. With respect to Byrd himself,

it by no means follows that he sold 389 Lyle's lot under an "ignorance of the title of the town; for he himself sold the same land, five years afterwards, to Mayo, after he had been warned in the transaction with Lyle, that the land sold was the land of the inhabitants of Manchester.

I may therefore say, with perfect confidence, that here was a general reputation, without a single exception to the contrary, of the right and the possession of the town, which could have arisen only from the public and notorious acts before mentioned, and which, coming to the knowledge of everybody else, must certainly have been known to the elder Mr. Mayo at the time of his purchase. That inference is carried beyond the possibility of a doubt, by the internal evidence inherent in, and resulting from, the nature of the property in question, considered in relation to its actual situation, and to the public terms under which the town aforesaid was offered to the consideration of the adventurers.

It was decided in the case of Wilcox v. Calloway, (a) that the purchaser of a legal title is to be affected by any latent equity, of which he has, either actual notice, or which appears in some deed, or, (I will add) document, necessary to the deduction of the title, so as to amount to constructive notice. Under this position, abundantly supported by all the authorities, the plan of the town of Manchester was brought before the eyes of Mayo; for it is particularly referred to in his deed; he having purchased all the land therein described, with the exception of "such land as is laid off into lots and disposed of by lottery." His deed having also referred to the lottery, under which the town was disposed of, the public scheme of that lottery is also a document of which he was bound to take notice. To this I will add, as an undeniable position, that he was bound to notice the act of the legislature which established the town aforesaid. He is bound by such act, if not on the ground that acts of this

(a) 1 Wash. 28.

character are bound up with the public acts of every session, and promulgated by the authority of the legislature, at least on the ground that his deed refers to the town of "Manchester, as ascertaining the position and boundaries of the lots of land thereby conveyed, the extent of which town could only be known by recurring to the act establishing it, and the plan of the town laid off conformably thereto. I will go further, and add, that every purchaser is bound to take notice of a right or claim inherently and necessarily affecting the subject purchased. For example, if I purchase a tract of land surrounding another tract, contained in the centre thereof, I am bound to know that the owner of the land comprehended has a right of way through the land I have purchased: and if I purchase a tract of land (as in the case before us) abutted by a square, or number of lots in a town, having no other street or way of communication with the other parts of the town or the adjacent country, I am bound to know that the inhabitants of such lots have a right to a street (not a mere right of way) over the land I have so purchased. These are things of which a purchaser must take notice at his peril, unless we are at liberty to consider him ignorant of the plainest principles of right and justice.

By these several principles and positions, let the purchase of the present appellant be tested.

In the case before us, Mr. Mayo, with the very plan of the town before his eyes, which his deed refers to, and calls for, as a part of itself, purchased a slip of land extending up to the very lines of the range of lots laid off below the canal, the owners of which have no possible way to pass, in the direction of the other part of the town, the public ferry, and the river, but through the slip aforesaid; that slip of land being, on an inspection of the map, in several places, perhaps, not wider than the other streets of the town, and in none materially wider. Is it possible that he could have been ignorant (independently of all other information) of the right of the people to a street on the premises, and which, in one point at least, just between the aforesaid range of lots and the ferry, is

so narrow, as, by extending to the river, would, perhaps, "divide the slip of land into two parts? Again, with the same plan before his eyes, which laid off the town down to the mill canal, and extending up the river to the mouth thereof, and also having before him the scheme of the lottery, which promised to the adventurers that the lots should be laid off convenient to the river, and with public landings, could Mr. Mayo possibly have supposed, that this bit of land was withheld from the town, which intercepted a communication with the river, at all points, but one, (the public ferry,) and which rendered that part of the scheme which promised the public landings, a mere delusion? If it be said that public landings on this part of the river were unimportant, as the river at that place was not then navigable, the answers are twofold: 1st. That the pretensions of the

appellant equally occlude such landings, at any other place convenient to the town, or, more particularly, in the space comprehended between the head and the mouth of the canal, although the navigation, below the ferry, was not interrupted by rocks; and, 2dly. That, although such was the then state of the navigation of the river, above the ferry, the same scheme held up the most flattering expectations of removing the obstructions through the falls within a short time, and extending the navigation of the river to an immense distance into the interior of the country, in which event public landings, even at that place, would have been all important.

Again, with the same documents before his eyes, as also the act of assembly of 1769, establishing the town of Manchester, which act established the said town, "in the manner it is already laid off into lots and streets, agreeably to a survey thereof by B. Watkins," which is particularly referred to by the act, ought not the said Mayo to have examined that survey? and had he done so, I expect, from the testimony exhibited in this cause, (for the survey itself is not before us,) it would have thereby appeared, that the land in question was set apart for the use of the town.

These are damning documents, 392 "against which Mr. Mayo, at the time of his purchase, could not possibly have winked so hard as not to see that the right in question, or some right in the premises, existed in favour of the inhabitants of Manchester, and in consideration of which the adventurers and purchasers of lots in the said town paid a higher price for their property. It was the knowledge of this title existing in the town, also, which induced Mayo to offer, and Byrd to accept, for this slip of land, a price, perhaps, not one twentieth of its value, had the title been good; which induced Mayo, for this trifling consideration, to purchase "a bad title," hoping that time and chance might render it good, and to accept a deed not containing a warranty therefor. The purchase was, therefore, with full notice of the title of the town, and mala fide; which is entirely strengthened by the length of time during which the appellant forebore to assert his claim; during which time a multitude of witnesses may have died, and documents been lost, all tending to corroborate the testimony, even now sufficiently strong in favour of the appellee's title.* I will ask, more particularly, how it has come to pass, that when the act of 1778, to enlarge the

*Note by JUDGE ROANE. Since this opinion was delivered, I have seen, in the Journals of the House of Delegates, on the 14th of November, 1776, a petition was presented by the trustees of the town of Manchester, asserting the title now set up to the premises in question, and praying that an act might pass, more effectually to enable them to remove obstructions placed thereon. This petition was rejected on the 12th of December of the same year, on the ground, "that the matter thereof was cognizable before a Court of law." It further appears, by the same Journals, that, at this time, the elder Mr. Mayo was a delegate for the county of Chesterfield, in which the said town lies. He, therefore, undoubtedly, had notice of the appellee's claim as early as the date aforesaid; and hence it was, that that claim was never contested by him in his lifetime.

powers of the trustees of the town of Manchester, had made it the duty of the trustees to bring suits against all such as were committing trespasses on the "streets of said town, or lands which may have been appropriated to the use of the inhabitants thereof," (a description emphatically applicable to the premises in question,) and had directed "the money, to be recovered in such suits, to be applied in 'repairing the streets, or erecting wharves and improving the public landings within the same,' why did not the ancestor of the appellant take the alarm for his legal title, and contest, by a judicial investigation, this legislative judgment, (if I may so express myself,) which had decided the right to the premises to be in the town, by legalizing the erection of wharves, and the improvement of public landings in and upon the same? as, certainly, no other part of the contiguous land would have admitted of wharves or landings. Where, then, was his redoubtable, though solitary witness, Talman, who proves acts of possession, of the premises, six years afterwards, as equivocal, and as little satisfactory, as is the title which such acts of occupancy were intended to bolster up or consummate? In all probability, Talman, and such witnesses as he, would have been, at that time, frowned into annihilation by a horde of respectable witnesses, now consigned to the grave by the lapse of thirty or forty years.

But if Mr. Mayo could be supposed not to have had notice of the appellee's claim, at the time of his purchase, why did he not stop his hand from proceeding and perfecting his deed, after the said claim was made known to him by means of the law aforesaid, founded, no doubt, upon the petition of the people of Manchester? why did he even proceed to perfect his said deed by a suit in Chancery, against the surviving trustee of Byrd, after he had notice of the said claim by the institution of this very suit? In the aforesaid case of Wilcox v. Calloway, it is held, that a purchaser, in a case like the present, must be a complete purchaser, by having a conveyance and having paid the purchase money, before notice; for if he have notice before either of these acts be perfected, he ought to stop until the equity be inquired into, or he will be bound by it. The same doctrine is held in Mitford, 216, and many other authorities; and Mitford adds, that, in a plea of this kind, if the deed purports an immediate transfer, (as in the case before us,) it must also aver that the seller was in possession of the premises; because (I presume) the want of possession is, *prima facie*, an indicium of the want of title, and calculated, at least, to put the purchaser upon an inquiry. This possession, as existing at the time of his purchase, in Byrd, or his trustees, the appellant has not thought proper to aver, and, if averred, would have been disproved by the whole current of the testimony. I will here add, that not only did the appellant himself consider his deed incomplete up to, and after, the institution of the present suit, (as is evinced by his proceeding in equity to perfect it,) but that

he was also correct herein; for we are told in 1 Harr. 256, (old edition,) (a) that trustees have all equal powers, and cannot act separately, but must all join, both in conveyances and receipts.

I have thus examined this case by circumstances, and, criteria *dehors*, the deed under which the appellant claims. The conclusion resulting therefrom is entirely confirmed by the internal evidence contained in the deed itself; for while the grantor, Byrd, had thus a second time sold this land, which, in equity, belonged to the appellees, and sold it (in the second instance, at least) with a full knowledge of that fact, he only warrants the title against himself, his heirs and assigns. A warranty, so contrary to the usual course which prevails, in relation to bona fide purchasers for full and valuable consideration, in itself creates a suspicion. These *clausulæ inconstutæ*, taken in relation to a bona fide purchase for full value, and without notice, not only create a violent suspicion that such is not, in fact, the character of the purchase before us, but are entirely accounted for by the very inadequate price given for the land in question, to be presently particularly noticed. As to the two trustees (out of four) who joined Byrd in this deed, and who are proved to have been in the habit of adding their names to deeds executed by him, without any further inquiry; while this fact would go far, in a Court of equity, to affect any *deeds in which they have so joined, and especially such as are also impeachable on other grounds, it is to be observed, that they have not joined in the warranty contained in this deed, even in relation to themselves, although they are included in the conveying part. Such a deed, accepted by a man who could not be ignorant that the title to the land in question had been originally conveyed to them by Byrd, and who, except as to the claim of the appellees, (I here keep the deed to Robinson's administrators out of question,) were the true owners, carries with it internal evidence of the weakness of a title, which, at that time, would not stand the test of scrutiny, however available it might afterwards become, against an agreement existing only by parol, through the lapse of time, and the death of witnesses. That title is also impugned by the circumstance disclosed by the deed itself, that not more than, perhaps, one twentieth part of the value of the land, at the time of the purchase, was given for it. I infer this, because, although the exact quantity of the land in controversy has not been ascertained, yet, as fourteen lots (exclusively of streets) were substituted for it, on the back of the town, and each of these lots had sold for a sum equal to that given for this whole slip of land, (for three fourths of the hundred pounds, the consideration of the deed, went to pay for the three lots thereby also conveyed,) it follows, that, estimating this tract at only ten acres, and that each half acre here is only worth as much as the half acre lots

(a) Page 775-6, of the 7th London edit. with Williams's additions.

in the interior of the town, (which is certainly far below the mark, in relation to these water lots,) not more than one twentieth of the value of this land, at the outside, was given for it. While this great inadequacy of price, singly and abstractedly taken, might be insufficient to vacate the contract altogether, it goes far, indeed, to show, that the extent of that contract is not such as the appellant now contends for. That inadequacy proves the full knowledge of Mayo and of Byrd, that the latter did not sell, nor the former acquire, the

396 indefeasible right to the "premises in question; but that, on the contrary, Byrd's title only (such as it was) was conveyed for this paltry consideration. It proves, in the language of Colonel Goode, as applied to the general understanding of the neighbourhood, that Mayo only purchased "a bad title." To have made out his case, the appellant should have proved Colonel Byrd to have been so great a fool, as to have sold twenty of his water lots for the price given for one of the frontier lots of the town; for, perhaps, less than a fortieth part of their real value. But this gentleman was no fool, although (but for his known character for probity and honour) he might deserve a harsher epithet for selling a lawsuit to Mr. Mayo, under the name of land, after he was informed, by the transaction with Lyle, that he had no land at the place in question.

Such is the inference irresistibly resulting from these circumstances, considering the value of the land in controversy as only equal to that of the adjacent land. But if we could, for a moment, embark into the regions of fiction, with one of the appellant's counsel, and consider this land as worth the enormous sum of five hundred thousand dollars, such a palpable and glaring inadequacy of price would be presented to the view of the Court, (even making all due allowances for its intermediate rise in value,) that all men must at once exclaim, "this thing is not right;" all men must admit that this paltry sum of 25l. was only given for the mere right to sue for this immensely valuable property; trusting that time and chance might perfect the title.

As to the merits of this case, therefore, I cannot have a scintilla of doubt, that the appellees are entitled to recover.

Notwithstanding, however, the strength of these merits in favour of the appellees; notwithstanding that these merits are susceptible of various additional views, all tending to show the utter iniquity of the appellant's pretensions, we are now told, that, after the appellees have run this long race, at the instance of the appellant,

397 "and in the very character with which he was pleased to clothe them, another chance must be given the appellant, by sending the cause back for want of parties. This is an objection which, as to the counsel for the appellant, has been, probably, produced by the queries propounded from the bench. In the former argument of this case, while it was asserted by the appellant's counsel, on the one hand, that a decision upon the merits was desirable, it was not pretended, on the other,

that there were not proper parties plaintiff in the cause; and it was expressly admitted, that if (as the fact is) the legal title were in the appellant, Mayo, the objection would not lie for want of parties defendant. While this Court is certainly not to be bound, by the omission of counsel, to state the real grounds on which any cause ought to be decided, it is not very likely that, in a case in which equal talents and industry have been displayed by the able counsel who argued it, points, so substantially material to their success, would have been omitted. The omission of these counsel, therefore, to take this objection, spontaneously, and in the first instance, is a circumstance which goes to corroborate my opinion upon the question.

As to this objection of the want of parties, it amounts to an objection to the Court's decreeing, at all, in that stage of the cause, on account of the absence of parties necessary to enable the Court to proceed, according to the principles by which it is governed. If the party defendant stands merely neutral, the Court is bound to see that all necessary parties are brought before it; but if he prays the Court to decree in that stage, or consents that it should so decree, it amounts to a waiver of the objection. In the case before us, it is true, the appellant neither prayed the Court to decree, nor consented, totidem verbis, that it should decree; but he consented that the cause should be heard as to himself, which amounts to the same thing. The Courts of justice are not to be so trifled with, as to be invited to hear causes without being suffered to decide them.

398 A consent, therefore, "that the Court should hear a cause, amounts to a consent that it should decree therein, and a consent that the Court should decree in the case, wholly abandons the objection arising from the want of parties. This objection was not only, in fact, waived, but also might have been well waived by the appellant, in the case before us; for he had the whole title in himself, and was competent to a complete defence; it was not until that title was found to be against him, on the merits, that this objection was started, or thought of.

On this broad principle, then, I am clearly of opinion, that the objection does not lie in the case before us. I am willing, however, to consider that objection more particularly, and under the idea that it had not been thus waived and abandoned on the part of the appellant.

It is now objected, in the first place, that there are not the proper parties plaintiff in the cause. That party, it is true, is only John Murchie; but it is expressly shown that he does not sue merely for himself, and in his private character. This is shown by its being stated in the bill, and admitted in the answer, and other proceedings, that he sues as surviving trustee, and for the benefit of the town of Manchester. In the case of his wishing to appropriate the proceeds of the recovery to his own use, therefore, he would be forever estopped from such pretension, as well by such proceedings, as by the decree in this cause, which, pursuing the character

of the claim set out in the bill, decrees (beneficially, at least) only in favour of the town of Manchester. Nor does it follow that, in the case of the appellant's success in this instance, the inhabitants of the town could disclaim Murchie's agency, and harass him with a new suit hereafter. If, however, it were even so, the appellant possessed full power to subject himself to that inconvenience, by the shape and character of his proceedings. In the event of a future suit brought by them, many circumstances might be urged by Mayo, tending to show that Murchie

was their authorized agent, (admitting that, on general *principles, he was incompetent,) and that, with a full knowledge of all circumstances, they acquiesced in his assuming that character, and carrying on the suit. While it is entirely admitted, that all persons concerned in the demand, made by a bill in equity, ought to be parties plaintiff, with the exception of cases in which they are very numerous, and the like; there is no rule or principle which prohibits the defendant, where such parties are really represented, from dispensing with the strictness of form, or with objections of a merely legal character, in deducing the character of the representative. There may be a difference between the total absence of parties, for want of whom the Court of equity is disabled from its favourite object of doing complete justice in one suit, and cases in which there is a mere defect in the power of the agent, to which the adverse party, desirous, perhaps, of a speedy decision, is content to abandon his objection. This distinction derives abundant support from those principles of the Courts of equity, by which some, of many numerous parties, are permitted to sue; those under the influence of which that Court even supplies and appoints trustees, or guardians, for the purpose of suing, and the like; and which disregard form, for the purpose of dispensing substantial equity to those beneficially interested. However the case might be, in the present instance, had the appellant stood merely still, or objected in an earlier stage of the cause, he has estopped himself by the course taken by him in his proceeding. He has worked such estoppel, by bringing an ejectment against Murchie, as surviving trustee of the town of Manchester, of which ejectment, the present suit may be considered as merely a continuation in another forum; by recognizing him as such trustee, not only by that suit, but by his answer in the present; and by consenting that the cause should be then "heard," (as is before said,) as to Mayo, which term, "heard," was undoubtedly intended to mean a trial upon the merits, as contradistinguished from the

dilatory exception for want of parties. I consider *all these acts, and those, too, in relation to parties who are in fact, though, possibly, irregularly, represented, as amounting to a waiver of the objection on the part of the appellant. But for such waiver, the appellee (if his authority were otherwise defective) might have set the objection at defiance, by showing a private act of Assembly, a written

power by the inhabitants of Manchester, or the like, giving him full and complete authority. Under circumstances like the present, the Court will presume any and every thing tending to show that the waiver was not made without due consideration, and that, if it had not been made, every objection to the appellee's competency could, in the Court below, have been easily obviated. This view of the subject precludes the necessity of considering how far the appellee would have been authorized to maintain the suit, on general principles, or by virtue of the acts of 1769 and 1779, or either of them. It goes on the principle, that it is unfair and unjust for a party to decoy another, by false signals, into the appellate Court, where the objection cannot be obviated; that it is competent for a party to release a right intended for his benefit; that it is not competent to a court to decree against the consent and admissions of both parties; and that, in this case, no inroad is made upon the jurisdiction of the Court of equity, as all parties necessary to a complete decree, are, in fact, (though, possibly, irregularly so,) before the Court.

It is, in the next place, contended, that there are not the proper parties defendant in this case: and this objection is branched out to extend to Byrd's trustees, or their representatives, and to Lyons and Pendleton, or those representing them under the deed of 1770. As to Byrd's heirs, against whom he warrants by the deed to Mayo, the objection is not, I believe, extended to them: if those heirs should be construed to be bound, under the warranty in the deed, by an alienation made by Byrd's authority many years before, yet, Byrd, having before parted with the legal title to his

401 trustees, and, as it is *contended, to Pendleton and Lyons, they are not necessary parties to this suit, unless the Court is prepared to say that you are to hunt through all the intermediate alienors up to the original owner of the land, and that he, or his heirs, are indispensable parties. With respect to the representatives of those from whom the appellant purchased the mill and canal, they need not be before the Court, under the actual opinion of the Court, as I understand it, which only gives to the appellees the land up to the canal aforesaid. There will be nothing in this decree by which those parties can be possibly affected.

As to the necessity of making Byrd's trustees parties, the appellee certainly wants no decree against them: they have parted with the legal title to the appellant: even Carter, who, at the time of the institution of this suit, had the remnant of that title abiding in him, was deprived of the same, by the decree in the proceedings mentioned, which was prior in date to the decree now appealed from. Byrd's deed to Mayo, which, at law, was objectionable for want of Carter's signature, has been freed from that objection by the decree aforesaid. The appellant was, thereafter, possessed of the complete legal title, and the appellees are in quest of it. On general principles, it would seem, that those who have, and those who want, the entire subject of

controvery, would be proper and sufficient parties. It is enough that all those should be parties defendant to the suit, who possess all the rights in controvery in that suit, and therefore can enable the Court of equity to make a complete decree upon the subject. It is not necessary that all those should be also parties, who will be necessary parties in other suits, to which the decision in the suit in question may give rise, by reason of a warranty, or otherwise. That would lead to a never-ending line of parties, would carry you up through all the mesne alienations to the original owner, and impose upon the plaintiff, without necessity, the burthen of comprehending parties who are to him unknown, and perfect strangers. It is a great

402 *matter gained to the jurisdiction of

Courts of equity, to settle the controvery, and avoid circuity, as to all interested, in the very question in contest in the suit; that is, (as applied to this case,) as to all possessing or claiming the legal title. There are sufficient difficulties and delays already existing under this rule, and arising from the number of parties indispensably necessary. There is no need to go further to outgo the demand in the bill, and essay the vain attempt to settle by one decision, all other suits, and every consequential claim or injury, which may grow out of the decision of the point in issue. It is a consequence of these principles, that no person need be a party to a suit in equity, against whom if brought to a hearing, there can, or need be, no decree; although he be interested. (a) On this principle, it is held that a residuary legatee need not be a party; nor need a bankrupt in a suit against his representatives; though they are both much interested in reducing the amount of the sum demanded. Again, it is said not to be necessary to make the assignor of a bond a party, in a suit against the assignee impeaching the same, although he is interested in the consequence of the suit, by virtue of his assignment. All these parties are as evidently interested, as the trustees in this case would be if they had warranted the appellant's legal title. In that case they would be evidently interested in defeating the plaintiff in this suit; for they would thereby defeat the appellant's remedy over, against themselves, for retribution. In principle, there is no difference between the cases: between the case of the residuary legatees, bankrupt, and assignor aforesaid, and that of vendors warranting the legal title. The contingent liability of the party warranting, to be affected in another suit, is therefore no ground on which he should be held a necessary party in the suit in question. This suit, as to its whole extent, may be decided without entering at all into the question of that liability; that question is to be discussed in another suit, in which the person warranting is a party, and in

403 which it is to be *decided, whether in fact he warranted, or is liable to retribution, or not. The general principle, dispensing with such parties in the case of an actual warranty, will, however, be

much strengthened, if, in the suit before us, it appears that no such warranty was made; and that, in fact, no liability to make retribution exists in favour of the appellant. That circumstance cuts up this pretension by the roots, if, otherwise, it applied to the case before us. If this contingent interest does not entitle the person warranting to become a party for his own sake, far less will it for the sake of his alienee, the defendant, who stands in the preferable situation of having his immediate recourse over, against him, in case of eviction. Although, in the case of a warranty, the party warranting is eventually interested, no decree can, in a suit like the present, be made against him. Such decree cannot be made in favour of the plaintiff, because he goes for the land; for the legal title, which the person warranting has not, but his alienee has; and he (the plaintiff) has no right to the money; for which only, in case of eviction, the warrantor is liable. Nor can a decree be made against him in favour of the defendant; 1st. Because no decree can be made in favour of one defendant against another; and, 2dly. Because, then, there would be two decrees in the same cause; one in favour of the plaintiff, for the land, and another in favour of the defendant, for the money; whereas, the most that Courts of Equity have aspired to, was, to settle the whole claim demanded in the bill by one decree. If, then, there can be no decree, against the party warranting, either for the plaintiff or defendant, he need not be before the Court, on the only ground on which such parties are held necessary, namely, to avoid circuity of action. In that case, this circuity (though for another and distinct cause of action) must be encountered; for you can only come at him by another and a separate suit.

There is another principle on which, in favour of a party defendant, persons are sometimes held to be necessary
404 *parties, who would not otherwise be so considered; and that is the principle of affording aid to the title set up by such defendant. Thus it was held in the case of *Lowther v. Carlton*, (b) that, in a suit against a purchaser with notice, from a purchaser without notice, the former is entitled to have the aid of the latter, to enable him to defend his title. In the case before us, however, (admitting that the trustees had warranted the title of the appellant,) they have no such shield, which would enure to cover him from the present claim. They had before conveyed the equitable title to the appellees, (which drew the legal title with it, except as against a purchaser without notice,) and had also parted with the legal title itself, before the decree in question was rendered. There was nothing, therefore, abiding in them, which might aid the title of the defendant; but if this case had a common principle with that of *Lowther v. Carlton*, (in which, too, the objection, of the want of parties, was taken by the defendant,) it will be seen that the Court adopted the principle in that case, by analogy to the

(a) Wyatt's Pr. Reg. 804.

(b) 2 Atk. 189.

cases of aid-prayer at the common law. In those cases, the tenant for life, for example, is allowed to pray in aid of him in the reversion. The Court, by resorting to that analogy, seems to have admitted that this was a privilege in favour of the defendant, which he might claim on the one hand, or waive on the other; and it is probable that he would be even considered as waiving it by not claiming it. The Court considered it as ground of defence incident to the case of the particular defendant, and of which he only had knowledge, and was competent to claim or relinquish: they did not consider it as an ingredient of the jurisdiction of the Court of equity, and which, for the purpose of avoiding circuitry, should be had, whether demanded or not, on the part of the defendant. While the ground of claim I am now considering is, in this case, widely different from that existing in the case of *Lowther v. Carlton*; as, in this case, the

405 vendor has no shield which would be competent to defend *and protect the rights of the vendee as aforesaid; the cases are similar as to the character of the pretension, which I have just mentioned. The pretension, in this case, as in that, would be only a privilege in favour of the defendant: it is not a *sine qua non* of the jurisdiction of the Court, without which no complete decree could be rendered in the cause: a complete decree may be made against him who has the complete legal title. There is this further difference between the cases, that, while, in that case, the aid of the vendor was in fact prayed, in this it was disclaimed. It was renounced on the part of the defendant; if not by not praying it, at least by the various positive acts of disclaimer already mentioned. It was not until the appellant saw the prospect of being defeated on those merits, which he had challenged, or invited the appellees to try, single and alone on his part, that he took this ground of objection; or, rather, it was then taken for him; and that in the appellate Court, in which it is not practicable for the appellees to obviate the objection.

These views of this subject preclude the necessity of examining the decisions of this Court, on the subject of parties. Whatever dicta, or doubts, may be found to exist therein, there is certainly no positive and solemn decision in conflict with these principles. It seems to have been the fashion in this Court, without always knowing why, or wherefore, to object, in suits in equity, for want of parties. The *ignes fatui* arising out of this prolific subject of parties, have sometimes served to bewilder and mislead the Court; but, I believe, that this is the first time in which the subject has been fully and fairly met by this tribunal. I shall be happy if, in the decision now to be given, such criteria shall be established by the Court, as will bring all future questions of the kind to the proper test; and render these sightless and floundering objections less fashionable.

The foregoing remarks go upon the admission, that the trustees of Byrd had, in fact, given the appellant a

him, which would enable him to recover over, against them, in case of eviction. That, however, is far from being the case. That warranty is not only entirely wanting, but the deed carries the most ample proofs upon its face, that no such warranty was intended. In addition to the enormous inadequacy of price before spoken of, and which is in utter hostility with the idea of passing a complete title, the omission of a clause of warranty, as to the trustees, while one exists as to Byrd, and his heirs, is decisive that none was intended as to the former; on the principle that "*expressio unius est exclusio alterius*." Again, that deed only disposing of the lots and land thereby embraced, with the exception "of such land as is laid off into lots and disposed of by lottery," it may well be doubted (especially when it is found that the deed to Pendleton and Lyons has a similar exception) whether this land passed thereby, it having, in fact, been disposed of by lottery, as an appendage to the lots, and for which, consequently, the purchasers gave an enhanced price. The deed, therefore, relied on by the appellant, to show the necessity of these parties, is a complete *felo de se* in this particular; it not only leaves it doubtful, to say the least, whether this land passed thereby, but shows, beyond a possibility of doubt, that no warranty was by them made or intended.

As to Pendleton and Lyons, and those representing them, under the deed of 1770, they have nothing to do with the present controversy. Their right, if any, will remain wholly unaffected by the present decision. However (as it at present appears) their right may be considered as being prior to, and intercepting the legal right of the appellant, it cannot affect that of the appellees, it being posterior to the equitable contract, which is the ground of their claim. It neither lies in the mouth of the appellant to object the want of a party under whom he does not claim, nor to impose it upon the appellees to engage in another and distinct subject of

407 controversy. *It is no reason why the plaintiff should be delayed, or retarded, in his claim against the present appellant, that he shows another to be entitled, which also shows that he himself has no title. The object of praying in aid is to protect the title of the defendant—not to defeat that of the plaintiff. The deed of Pendleton and Lyons cannot affect this claim, (if that deed be taken to be still in existence, and unsatisfied,) for another reason, namely, that it did not pass nor affect this land. It only passes to those grantees, such lands as were not "before sold" by the trustees, "and as they now" (in 1770) "have a right to sell," under the original deed from Byrd to them. This land having been, however, before sold to the lotholders as aforesaid, or, at least, it being land which, in 1770, the trustees had not "a right to sell," in consequence of the contract which is the ground of this bill, it did not pass by the said deed. The exception, in the deed, immediately following the foregoing passages of "the prizes drawn by the fortunate

adventurers in the lottery," cannot narrow the effect of those passages, so as to pass the land in controversy by that deed; 1st. Because a deed is to be so construed as to reconcile and give effect to all the material expressions thereof; and, 2dly. Because this land ought, on a liberal construction, to be considered as a part of those "prizes," and, therefore, as exempted from the operation of this passage also. This deed, of 1770, therefore, has nothing to do with this land; and, if it had, the appellant has not shown that he has derived any right under it. If it be said that the appellant should be protected, on the ground of being a purchaser from Pendleton and Lyons, who it is also alleged were purchasers without notice of the appellees' title; it is answered, that he not only did not purchase from them, but, also, that all and every of the notorious acts before relied on to convict Mayo of being a purchaser, with notice, from Byrd's trustees, would equally apply to Pendleton and Lyons; and, indeed, perhaps, more so, as their purchase was more recent, after
408 *the contract and circumstances aforesaid had their existence, than the purchase by Mayo.

Upon the whole, while I am of opinion that there was never a just ground of objection for want of parties defendant to this cause, and, however the objection, as to the party plaintiff, may be, on general principles, I am clearly of opinion that that objection ought not to be available under the circumstances existing in this cause. We ought not to suffer the appellee to be entrapped by this objection, after the appellant has elected to go to trial on the merits, and those merits are found to be against him.

I am of opinion, therefore, that the decree is right in the main; but it is erroneous so far as it invades the appellant's right to the ten feet of land lying along the canal. As to that extent, I am of opinion, that the decree should be reversed, and in all other things affirmed.

JUDGE FLEMING. This being a cause of much expectation and great interest to the contending parties, and having been argued with great ability, on both sides, the Court bestowed on it peculiar attention and deliberation; though much of what I had to remark on the subject, especially, respecting the capacity of the appellee to sue, and the want of parties (the only points on which I ever doubted) has been anticipated, and ably discussed by my brother Roane. I shall, therefore, confine myself principally to the merits of the cause; and, there being a division in the Court, shall, as the ground of my own opinion, take the liberty of briefly stating the origin, foundation, and establishment of the town of Manchester; (where there was previously a public warehouse, for the inspection of tobacco, called Rocky Ridge, a few traders and others settlers in the vicinage;) and, notwithstanding the jurisdiction of a Court of equity, in the case, was vehemently denied by Mr. Williams, proceed to decide the cause purely on equitable principles; premising, that the appellee, after
409 stating in his bill the *ground of his

equity, proceeded to charge, "that John Mayo hath commenced an action of ejectment at common law against him, (John Murchie,) as trustee of the said town, in the Richmond district Court, and threatens to obtain judgment, and to turn your orator, and the said inhabitants, out of possession, notwithstanding this equitable title aforesaid;" and prays relief. To the above charge the appellant answered, "that, in consequence of the said bill and suit of the complainant, this defendant has suspended the prosecution of his ejectment, and has obtained a decree in this Court against the said trustees," (meaning Byrd's trustees,) "to which, and the proceedings therein, this defendant refers; in order that the whole of this controversy may be finally heard in this Court." To this answer the plaintiff replied generally; and thus were the parties, by mutual consent, fairly at issue, on the equitable merits of the cause. It was urged, however, in the argument, that "consent cannot give a Court jurisdiction." True, the maxim is correct, but applies not to the case before us; which needed no consent to give jurisdiction to a Court of equity; a Court of equity being the only proper tribunal for the hearing and decision of the cause; and a party may, undoubtedly, by consent, waive every advantage that might be taken of error in form of the proceedings, in a Court of competent jurisdiction, and rely altogether on the merits of his cause; which is precisely what was done in the present case, if there be any such error in the record; and the party shall be stopped and concluded by his own consent, so solemnly and deliberately stated, and sworn to, in his answer; and error in form only was stated, and objected to by one of his ingenious and learned counsel.

Let us now inquire in whose favour the equity of the case preponderates.

The late Colonel William Byrd, a gentleman of great influence in the country, as well from his rank as the *im-
410 mensity of his fortune, distinguished and esteemed also for his strict honour and great liberality, claimed and obtained the entire confidence of his fellow subjects; and being proprietor of the soil where the town of Manchester stands, and of a large tract of country around, on both sides of James River, and wishing to raise a sum of money, proposed to dispose of a great portion of that estate by way of lottery, and to establish a town on each side of the river; and, in order to enhance the value of the lots, and encourage adventurers, he, in the month of July, 1767, published the scheme of his lottery in the public newspapers; in which he stated, that the advantageous situation of the estate was too well known to require a particular description, though it might be necessary to inform the public that the obstructions through the falls, and in other parts of the river, might be removed, and the river made navigable to the said towns: "the navigation (said he) thereby will be extended and made both safe and easy for upwards of two hundred miles above the said falls, and a communication opened to the western frontier of the middle colonies;

whereby there will be not more than sixty or seventy miles portage from James River to the Ohio; so that the immense treasure of that valuable country must necessarily be brought to market to one or other of the said towns; which will occasionally raise the rents, and enhance the value of the lands and tenements, under mentioned, beyond the power of conception."

In designating the prizes on the south side of the river, he stated the first prize to consist of a double forge mill, valued at £8,000 With two acres and a half of land adjoining, and 2,000 acres of the back land; the use of the landing, the canal, with ten feet on each side, &c.

And (after noticing twelve lots already improved) headed "lots unimproved, each half an acre, to be laid off in a town convenient *to the river, with public landings:

number of lots 300, at 25 pound each." £7,500

"Tickets to be had of the trustees, named above, also of Colonel Archibald Cary, John Hayles, and of the subscriber.

Signed, William Byrd."

From the encouragement and allurements thus held out to the public, the tickets met with a rapid sale; and the greater part of them having been disposed of, the lottery was drawn the ensuing summer. I purchased four of the tickets, but they all having turned up blanks, I have no further interest therein. In the mean time, Mr. Benjamin Watkins surveyor of Chesterfield county, a gentleman well skilled in his office, and of undoubted integrity, was employed, by the agents of Colonel Byrd, to lay off the town, agreeably to the terms held out by the scheme of the lottery: the events and circumstances which took place on that occasion have been detailed in sundry depositions filed in the record, and have been sufficiently commented upon, and need not be recapitulated.

In the year 1769, an act of assembly passed "for establishing towns at Rocky Ridge," &c. and, after a long preamble, it was enacted, "that the said first mentioned piece of land, lying and being at the falls of James River, on the south side thereof, be, and the same is hereby, constituted, appointed, erected, and established a town, in the manner it is already laid out into lots and streets, agreeable to a plan and survey thereof, made by Benjamin Watkins, surveyor of Chesterfield county aforesaid, containing the number of three hundred and twelve lots, as by the said plan and survey, relation being thereto had, may fully and at large appear; and shall be called and known by the name of Manchester."

When we cast our eyes on the plan and survey of the town referred to in the act of assembly, it appears to extend upwards of half a mile parallel with the river; between which, and the canal mentioned in the proceedings, lies the narrow slip of land now the subject of controversy; which Colonel

Byrd, in the year 1774, sold to 412 *the father of the appellant, for about 25 pounds; notwithstanding the

same was, by the surveyor, when he laid off the town, specifically reserved for the general use and benefit of the proprietors and inhabitants thereof; for doing which, he was authorized by his employers; (as appears by sundry depositions in the record; and was also, as such, ratified and confirmed by the aforesaid act of assembly, in the year 1769; and whether it was called a street, a common, a way, an easement, or was distinguished by any other name, seems to me quite immaterial; as, I conceive, the fortunate adventurers in the lottery, and the subsequent purchasers of town lots under them, have, by solemn compact, an undoubted right to the free use of the land in question forever: for this compact ought to receive as liberal and beneficial a construction, in behoof of the purchasers, as the site for a commercial town, and other circumstances, can admit of; because they promptly paid, for the premises, the full stipulated price, affixed by the vendor himself, thus avowedly and publicly bought and sold for that individual purpose.

I should not have taken notice of the small consideration the father of the appellant paid for the land in litigation, had not one of his counsel repeatedly asserted, with great emphasis, that it was worth half a million of dollars; but from what motive, or with what view, those assertions were made, we have yet to learn; nor will I even hazard a conjecture on the subject, lest I be mistaken: but, be it as it may, and admitting them to be correct, or, that the land be worth double the sum stated, the counsel knows, or ought to know, that its value cannot, in the smallest degree, influence the decision of the cause; for, whether it be worth a dollar only, or a million of pounds, the rights of the parties are the same; and the Court will judge of them without regard to the value of the subject in litigation.

It was asked, too, with exultation, as a question unanswerable, "if the slip of land in dispute be decided to 413 *belong to the town, how the inhabitants thereof could pass through it, from the upper streets to the river, in a direct course, without committing a trespass on the proprietor of the canal?" It was an inauspicious question on the part of the querist: as it seemed an effort of a desponding advocate, to puzzle and raise difficulties in a tottering cause, unsustainable on rational grounds, rather than to define and enlighten one that might be supported on just and equitable principles; and tended more to strengthen than impair the equity of the appellee, had aid thereto been wanting. The answer to the question, however, is prompt and easy; to wit, "by erecting bridges across the canal, at such places as the inhabitants may think convenient, leading from any street in the town directly to the river; taking care not to obstruct the passage of the water to the mill, nor otherwise to injure the canal."

The bridges erected may be such as that now standing across the canal, on the public road, leading from the main street of the town, to the bridge on the river, and to Coutt's ferry-landing below the town, which would be no detriment to the canal.

That this position is reasonable and just, will appear evident, by considering the purposes for which the canal was made, and why the use of it became an item in the great prize of the lottery, of which the appellant is, by purchase, now the proprietor.

It was obviously to convey water, from the river above, to the forge and mill; and, therefore, the use of it was, of necessity, made a part of the capital prize. The mill has been rebuilt, and is now in useful operation. The ten feet of ground annexed to the canal, on each side thereof, was, principally, to furnish earth and stone to repair breaches that might be made therein, by tempests, floods in the river, or other accidents, several of which have happened within my observation, and by those means have been repaired. The same ground may serve also for other purposes, at the discretion of the proprietor; Provided, di-

414 rect passages, from the streets *to the river, be not thereby obstructed; for, although, on general principles, the grant of the use of a thing, without a qualification, may be construed a grant of the thing itself; yet the use may be so modified and appropriated, as to admit of a different interpretation; and such, I conceive, the case before us admits of, and requires. For instance, the use of the landing was included in the first prize of the lottery; evidently, for the convenience of shipping iron, flour, &c. from the forge and mill, and for receiving necessities by water, which cannot be construed into an absolute grant of the landing itself, to the exclusion of all others; so, with respect to the canal, the use only of which, as appurtenant to the forge and mill, was held out to the public by the scheme of the lottery; and equity will construe it such a use as fully to answer the purposes intended, without prejudice to others; thus may it be useful to both parties, without injury to either, and the original object and intention of the framer of the lottery be fulfilled; for that was the foundation of the claims of the parties on both sides, and the appellant can claim no better right than was vested in Harry Morse, the fortunate adventurer who drew the capital prize in the lottery.

It cannot be fairly presumed that the inhabitants will wantonly erect bridges across the canal, at heavy expenses, where they are not necessary, merely to vex the adverse party; but in progress of time, and future improvements of the town, several may be found convenient and requisite; and such, in my apprehension, they will have an undoubted right to erect.

By the act of Assembly, "to enlarge the powers of the trustees of the town of Manchester," passed in the year 1778, it is (among other things) enacted, "that all sums of money to be recovered by this act, shall be applied, by the trustees, towards repairing the streets of the said town, or erecting wharfs, and improving the public landings within the same."

415 *It is not contended, however, that this act strengthened the rights of the inhabitants to the land in controversy; but it shows the great attention the legislature paid to the improvements of the town in

its infant state; and their sense and understanding to have been, (perfectly coincident with my own,) that the purchasers had previously acquired the right to public landings, to erect wharves, and to every convenience the river, parallel with the town, can afford; which several rights, in my conception, were vested in them by fair purchase from the proprietor, for a valuable consideration, many years prior to the sale of the premises to Mr. Mayo; otherwise, where are the conveniences to the river, the public landings, and other advantages from an extensive commerce with the western country, ostentatiously held out to the public, and promised in the scheme of the lottery, to be found? Are they on the back lots of the town, half a mile from the river; at the toll house of the bridge, on an island, or, in the moon?

That a large commercial town, on a navigable river, which was contemplated and calculated to endure for ages, and is now daily improving in wealth and population, should be laid off, and established by law, under a solemn promise of the proprietor of the soil, held out to the public, of every convenience the river could afford, to induce our citizens to become purchasers of lots, and inhabitants of the town, and the purchases, by solemn compact being made, that the proprietors and inhabitants are to be forever excluded from the free use and benefit of the river, is, in my conception, a position so preposterous, and such a solecism in jurisprudence, as not to require a serious refutation.

The appellant claims all the land between the river and the canal, parallel with the town; and should he succeed in his demand, and himself, or his successors, at a future day, through interest or caprice, erect a wall, or dig a ditch along the margin of the river, the inhabitants
416 could not even water their horses, but by going without the limits of the town.

On mature consideration of the cause, it seems, to me, that the proprietors of lots in the town of Manchester, and the inhabitants thereof, are, by fair purchase, well entitled to every convenience of public landings, wharves, navigation of the river, &c. appertaining to the slip of land in controversy, which the late Colonel Byrd, as proprietor thereof, might have used and enjoyed prior to the publication of the scheme of his lottery, and that, by the after sale of the premises to Mr. Mayo, he committed a fraud on the adventurers therein, and those who have purchased under them.

But yet there appears a material error in the decree, which gives to the appellee not only the slip of land in controversy, but also the canal and its appendages, the free use of which, with ten feet of land on each side thereof, under the restrictions before mentioned, unquestionably belongs to the appellant, as appurtenant to the mill, of which, it appears, he is the lawful proprietor. I am, therefore, of opinion, that so much of the decree as gives to the appellee, for the use of the town, the canal, and ten feet of land on each side thereof, ough

to be reversed, and the residue of the said decree affirmed.

The following was entered as the Court's opinion.

"The Court is of opinion, that the said decree is erroneous, in having therein ordered, 'that the defendant, John Mayo, do release all his estate, right, title, and interest, in the land in the bill mentioned, to the plaintiff, and his successors, trustees of the town of Manchester, for the use of the said town;' therefore, it is decreed and ordered, that the same be reversed and annulled, and that the appellee pay to the appellant his costs, by him expended in the prosecution of his appeal aforesaid here. And this Court proceeding, &c. it is further decreed and ordered, that the appellant do release to the appellee and his successors, trustees of the town of 417 Manchester, *for the use of the proprietors and inhabitants of the said town, for the time being, all his estate, right, title, and interest in the slip of land in the proceedings mentioned, lying between the river and the canal, also in the proceedings mentioned, except ten feet of land adjoining the same, on the north east side, and the whole length thereof, as annexed to the said canal; that the proprietors and inhabitants of the said town, for the time being, be forever quieted in the possession thereof; and that the appellant pay to the appellee his costs, by him about this suit in the said Court of chancery expended."

Lusk v. Ramsay.

Argued, Monday, Sept. 23, and Saturday,

Nov. 9, 1811.

1. *Fieri Facias—Lien—Release of—Forthcoming Bond.*—The lien, by virtue of a writ of *fieri facias*, upon the property of the debtor, is not released by his giving a forthcoming bond, but continues until such bond is forfeited.
2. *Forthcoming Bond—Right of Surety to Deliver Property.*—The surety in a forthcoming bond has a right to deliver the property on the day of sale, if he can, on that day, peaceably obtain possession thereof.
3. *Same—Prevention by Sheriff of Delivery of Goods for Sale—Rights of Surety—Equitable Relief.*—If the sheriff after taking a forthcoming bond, accept the same goods from the defendant, in discharge of his body from another execution, and prevent the surety in such bond from delivering them on the day of sale therein appointed: a Court of equity, on a bill for discovery and injunction, exhibited by the surety, will require the sheriff, and all parties concerned, to answer a charge of fraud and combination, and (whether fraud be established or not) will perpetually enjoin a judgment rendered against the surety upon the forthcoming bond, as unconscionable against him; leaving the plaintiff, in that judgment, to his remedy against the sheriff: and the sheriff to his remedy against the person who indemnified him, or to whom, by mistake, or in his own wrong, he paid the money in satisfaction of the second execution.
4. *Same—Same—Same—Same—Parties.*—The plaintiff in the second execution, to satisfy which the sheriff improperly sells the goods, need not be a party to such suit in chancery; because the surety in the bond wants no decree against him.

William Ramsay filed his bill in the superior Court of chancery, for the Staunton

**Fieri Facias—Lien*—See monographic note on "Executions" appended to *Palne v. Tutwiler*, 37 Gratt. 440. The principal case is cited in *Cole v. Fenwick*, 61m. 189, 140.

**Forthcoming Bond—Right of Surety to Deliver the Property*—See monographic note on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107. See the principal case cited in *Langford v. Perrin*, 5 Leigh 555, 558.

district, stating that the goods of a certain David Lusk, of Rockbridge county, being under execution at the suit of Jones & Co., (which property was principally store goods, or the remains of a store,) the complainant, and a certain Robert Moore, at the request of said Lusk, became his securities in a forthcoming bond for the delivery of said goods, on the day, and at the place of sale; the complainant having explained to the said Lusk, in the hearing of Troyman Waytt, deputy sheriff for

James Caruthers, the high sheriff of 418 *Rockbridge, who had the goods in possession, that said goods were to remain in the possession of the complainant, and the said Moore, as their security, until the day of sale; to which said Lusk cheerfully consented, and, in pursuance of that agreement, gave up the goods into their hands, together with the key of the room in which they were stored; and thus things stood, until a few days before that appointed for the sale, when the said Lusk, with the said Waytt, (who were prayed to be held as defendants to the bill,) came into the house where the goods were, then in possession of said Moore, and taking the key out of the door delivered it to the said Waytt, and at the same time gave him possession of the goods, in discharge of his body from another execution, in behalf of —, then in possession of the said Waytt, and probably served on said Lusk; although the said Moore was then in the house, and in possession of the goods, and for the express purpose of delivering them (say three days afterwards) to the said Waytt, in discharge of the forthcoming bond given as aforesaid; with all the circumstances whereof the said Waytt was well acquainted; that, on the day of sale, the key and goods were pointedly demanded from the defendants, that the goods might be delivered in terms of the bond; and when these reasonable demands were refused, the said Waytt was requested, as the goods were in his hands and possession, to proceed to sell them in terms of his advertisement, and in discharge of the bond; which he refused to do, and, under all those circumstances, returned the bond forfeited, and gave the complainant notice thereon; and a judgment was afterwards entered upon the said bond against the complainant alone; no notice having been given to the said Moore; that, on the return of said bond forfeited, the said Waytt proceeded to the sale of the goods aforesaid, in discharge of the second execution, and actually sold them; which second execution (as a circumstance of fraud the complainant stated) was on a judgment confessed by said Lusk, without 419 *service of writ, the usual forms, solemnities, or delays of the case.

The bill charged both the defendants with fraud, of which it prayed a discovery, and also an injunction against "the plaintiffs at law, the sheriff, and all parties," to stay all further proceedings on the judgment upon the forthcoming bond. The complainant alleged, in an amendment to the bill, that he could not prove at law the knowledge of the defendant, Waytt, that the goods were actually pledged to the

complainant, and Robert Moore, as their security against that bond; this fact resting in the knowledge of himself, and the said Waytt and Moore only, the Court at law refusing to hear Moore's evidence; and, further, that the judgment on which the second execution was founded, was confessed in terms of stay of execution until September next following; which fact, although known and believed by the complainant, he could not prove in opposition to the entering of judgment upon the forthcoming bond.

The defendant, Lusk, by his answer, said, "that about the time the delivery bond was entered into, or shortly after, the complainant, in a conversation with the said Moore, and this respondent, observed that the goods ought to be taken care of, or locked up, or something to that effect; whereupon the respondent observed, that the house was secure; that he did not wish the same to be locked up, as he did business therein, and wished to have the use of it; but that he would be careful not to sell or lessen them; that the complainant, and Moore, then had some few words together, which he did not hear, but heard the said Moore say, he supposed it would do; that the key was then in the respondent's possession, and continued so; he continuing to occupy the said store as a counting room, until the execution of Boys & M'Calmont was levied on him; on which day the said Moore came to the respondent's house, and the respondent having asked him if he had come for the purpose of delivering said

goods in discharge of said bond, he 420 replied he had; *the respondent then told him, he had not time to say or do any thing on the subject at that time, as he was going to muster, but desired him to stay in the store until his return. This, he supposes, must have been the possession, or delivery of the key, mentioned in the bill, but denies that the same was so considered by him, neither did he obtain the same from the said Moore by fraud, as stated in the bill; but when he went to deliver the goods to the sheriff, in discharge of his body, the key was in the door as usual." This respondent admitted, "that the said Moore did demand the key of him on the day of sale mentioned in the delivery bond, but the same was not delivered, being, before that, delivered to, and being in the possession of, Troyman Waytt, deputy sheriff as aforesaid."

Waytt, by his answer, admitted that, "about the time the bond was entered into, some observation was made, by some person, he knows not who, that the goods ought to be taken care of, and not sold or lessened before the day of sale, or something to that effect; but denied that he heard them pledged, or particularly delivered to the complainant and said Moore, to be by them delivered at the day of sale, or any thing to that effect: on the contrary, it appeared to him that the complainant reposed confidence in the said Lusk to deliver the goods; for not only the complainant, but the said Moore went off the next day, leaving the said Lusk in possession of the property as usual; and the said Moore did

not return until about the time of levying the second execution." This respondent "had no knowledge of any pledge or other lien on the property, to indemnify the said securities, than is usual in other cases; neither does he believe that any such did exist; but, on the contrary, he then did, and yet does, believe that they were restored to the owner, the said David Lusk, as in usual cases, to remain in his possession, and at his risk, and to be delivered at his pleasure on the day of sale."

The respondent further stated, 421 "that, after this transaction, *and before the day of sale, a writ of ca. sa. came to his hands in behalf of Boys & M'Calmont, against said Lusk, and which was executed by the respondent on the body of said Lusk, who was then in his store; the said Moore being also present, or in town, and acquainted therewith, as the respondent believed; that the said Lusk and Moore had frequent conferences together, relating, as the respondent believed, to the delivery of the goods aforesaid, to discharge his body; which proposition was made, but the respondent would not agree thereto, (the said property not being sufficient to cover the debt mentioned in said execution,) until the said Lusk procured written instructions from the attorney of the plaintiffs, to the respondent, to receive the same. The respondent then went with said Lusk into the store, where the said Moore then was, and where some conversation, not heard by the respondent, passed between the said Lusk and Moore, whereupon they all came out of the door together, and the said Lusk (Moore being then present, and making no objections) locked the door, and delivered the key to the respondent."

The respondent denied "that the complainant came forward on the day of sale appointed in the delivery bond, or at any time before that time, and after the levying of the execution of Boys & M'Calmont as aforesaid, (although he was frequently in Lexington,) to claim the property, or to direct a sale thereof under the first execution; but still signified he supposed there was no danger; nor did he make any such claim, or give any such directions, until some time before the sale on the last execution; when he told the respondent that he would attend on the day of sale appointed by the last execution, and demand the goods to be sold on the first: (this, the respondent believed, was after the time judgment was rendered against him on the delivery bond:) it is true, on the day of sale, on the last execution, he did use these words: "Mr. Waytt, I believe I will claim the goods on the delivery bond, for which

I am security." This he said, at 422 the time *when the goods were about to be offered for sale, by virtue of Boys & M'Calmont's execution; but made no other demand: on the contrary, he bid at the sale. The respondent admitted that, on the day appointed for the sale in the delivery bond, the said Moore did apply to him for the key of the store, in order, as he said, to deliver up the said goods to be sold on the first execution; but which the respondent refused, supposing himself an-

answerable for the said goods on the execution of Boys & M'Calmont. He denied all fraud, collusion, or other improper conduct and declared that, in every respect, he had acted as he supposed the law required."

William Jones, the acting partner of the mercantile house of William Jones & Co., also answered, observing that, although he was not named a defendant in the bill, he was in the subpoena. He declared himself entirely ignorant as to the conduct of the deputy sheriff, Waytt, or the other defendant, Lusk; and contended that he ought not to be affected by any fraud or deception of which they might have been guilty; but the complainant's remedy ought to be against the sheriff; that if the property was vested in the complainant and his co-security, Moore, (as he pretends,) it is, then, the ordinary case of an officer executing process upon the goods and chattels of another, for which he has his remedy at law; that, even if the complainant and this respondent had equal equity, a Court of equity would not take his legal advantage from the latter, and give it to the former, but would leave the parties where the law left them: that if the goods were restored to the defendant, Lusk, upon his entering into the forthcoming bond, as the law directs, this respondent had not such a property or interest in those goods, as to prevent Lusk from disposing of them as he pleased; and he having delivered them to the sheriff, in discharge of his body, the respondent supposed the only inquiry to be made, as to him, was whether the goods were delivered, or the bond forfeited. This was a perfectly legal question, properly triable in a Court of law, 423 and not of equity; and, therefore, upon this ground, also, the injunction, as to him, ought to be dissolved.

A great number of depositions were taken by the parties, chiefly for the purpose of proving, or disproving, the allegation, that goods were pledged, by Lusk, to Ramsay and Moore, for their indemnification, and of charging the defendants, Lusk and Waytt, with a fraudulent combination to fix the loss resulting from the insolvency of Lusk, upon the complainant, or exculpating them therefrom. But as this Court decided the cause upon the general doctrine, that the lien of the first execution continued, in law, to bind the property after the forthcoming bond was given, the reporter thinks it proper not to notice the depositions further.

The suit having abated by the complainant's death, was revived in the names of Edward Graham and Sally Ramsay, his administrators; and came on to be heard the 5th of April, 1805; whereupon Chancellor Brown delivered the following opinion and decree:

"This is a case of considerable consequence to the parties, but of still greater importance to the public; inasmuch as it involves the inquiry, 'whether the giving of a forthcoming bond is a satisfaction of the execution, and a release of the property upon which it has been levied?' It is contended by the counsel for the defendant, that the question has been decided by the Court of appeals, in the cases of Dun-

dass & Taylor, 1 Wash. 92, and Eckhols v. Graham, 1 Call, 493; and that the same principle has been decided in England, in a case of replevin. (This last case I have not been able to find; but conclude that there can be nothing in it, strictly applicable to the case at bar.) If this is so, our inquiries ought to be at an end. Let us examine the authorities in the Court of appeals. In Taylor & Dundass, the question was on the propriety of quashing a second execution, the first having been returned, 'levied on slaves, and a replevin bond taken,' and no other proceedings had 424 thereon. *Here the Court say, 'that the replevy is the same as if the estate had been sold to the amount of the debt; and, though it is an indulgence given to the defendant, still the execution is considered as levied, and the judgment discharged; and that, under the act of Assembly, a bond to replevy is as complete an execution of the judgment as if the estate had been sold to the full amount of the debt; and the party is left to pursue his new remedy upon the bond.' 'What is the act of Assembly here spoken of?' That, where goods taken in execution cannot be sold for three fourths of their value, it shall be lawful for the debtor to give bond and security, &c. to pay the money, or tobacco, and costs and interest, to the creditor, within twelve months; and on such bond being given, the sheriff shall restore to the debtor the goods or estate so taken. The principle established, or recognised by this decision, is, that the taking a replevy bond was the same thing as levying an effective or productive execution; after which, and while it was in force, no second execution could issue, though the goods taken on the first should never be sold. What is the doctrine established by the judgment of the Court in the case of Eckhols v. Graham? That the plaintiff, by suing out a second execution, waives all benefit under the first, and destroys the lien which the first execution had upon the property on which it was levied. In that case, the appellee had, on the 25th day of September, in the year 1788, purchased certain slaves, on which it was said (though the fact is not found) that an execution had been levied, on behalf of Craig, and a bond given for their delivery on the day of sale, in the August preceding. After the sale, in September, a second and third execution issued, under one of which the property was sold. It seems, indeed, to have been conceded by the counsel for the appellant, that, if the forthcoming bond had been legal, the property would thereby have been released from the lien created by the execution. And it is positively asserted by the appellee's counsel, and in 425 some degree *admitted by the Court, that the sheriff's return, 'that a forthcoming bond was taken, and the property restored to the debtor,' was a clear release of the property, and enabled the debtor to dispose of it. But as this was not the point on which the Court decided, and as the judge, in delivering that opinion, adds, 'But be this as it may,' I am induced to believe that the assertion of the counsel, and the acquiescence of the Court,

may have proceeded from not attending particularly to the distinction between a replevy and a forthcoming bond. And I am the more inclined to think so, from the language used by the counsel; viz. 'The restoration of the property.' Where a replevy bond was given the sheriff was bound to restore the property. To replevy is to release. But when a forthcoming bond is given, the law uses a very different language. The sheriff, in that case, 'shall suffer the said goods, &c. to remain in the possession, and at the risk of the debtor, until the day of sale.' Considering myself, then, unfettered by any express authority on the subject, my duty obliges me to hazard my own opinion on the law of this case. This opinion I pronounce with great diffidence, as it is different from what I understand the general opinion to be; but it will afford an opportunity of settling the question (as I think) it remains unsettled."

"The intention of the legislature was to indulge the debtor, without hazarding the rights of the creditor. For this purpose, the debtor, on giving bond and security to deliver the property on the day of sale, is permitted to retain the possession and use of it, until that time, and relieved from the inconvenience and expense of a removal by the sheriff, until such removal becomes necessary for the purpose of satisfying the execution. If he pays the money, no sale or removal is necessary. He is also free from the expense of supporting or keeping his property, between the execution and sale, and is much interested in its safe
426 and proper keeping and support. "The

creditor can sustain no injury, if the property is delivered according to the condition of the bond; if not, the bond has the force of a judgment, on which a new execution may issue. But does it follow that the giving of a forthcoming bond releases the property from the execution? Must a new execution issue before a sale can take place, if the property is delivered according to the condition of the bond? If not, and the forthcoming bond discharges or satisfies the execution, (as contended,) by what authority does the sheriff proceed to sell? How is he to make a return on his execution? In the case of a replevy bond, the execution is always returned without waiting for the day of payment, and the property can never be sold without a new execution. In the case of a forthcoming bond, the execution is seldom returned until after the day of sale, (perhaps it ought not to be returned before,) and none but the goods levied upon can be sold, except by consent, under the execution; and yet we are told that the goods are released from the power of the execution by the forthcoming bond! What is the language of the act of Assembly? If the debtor gives bond and sufficient security to have the same goods and chattels forthcoming at the day of sale, it shall be lawful for the sheriff to suffer the said goods, &c. to remain in his possession, and at his risk, until that time. Why at the risk of the debtor, if the goods are released from the execution? The debtor's own goods are always at his risk. Why until the day of

sale? If they are released, the sheriff has no right to call for them on that day, more than for any other goods. The bond creates no obligation to produce them, and yet the sheriff has the right, and it is his duty to demand and receive them, or to be, at the time and place of sale, ready to demand and receive them; and the delivery of other goods will not satisfy the condition of the bond. I am, therefore, of opinion, that the goods are not released from the execution until the day of sale, notwithstanding a forthcoming bond may have been given."

427 "But it is said, the debtor may dispose of the goods in the mean time, and that the sale will confer a good right to purchasers. How far a bona fide purchaser of such property, without notice, might be protected against a security demanding to deliver in discharge of his bond, is not necessary now to determine. There is no such person before the Court. Perhaps, in that case, the security might suffer for his folly, in putting confidence in a man who was base enough to deceive him. But what is the case at bar? A deputy sheriff levies an execution on certain store goods, and takes a bond for their delivery on the day of sale. A day or two previous to the sale, he receives those very goods from the debtor, in discharge of his body taken on a subsequent execution; he puts the key of the store room in his pocket, and, in the solemn mockery of his official duty, goes to the place of sale at the time appointed, to receive those goods, after he has put it out of the power of the sureties to deliver them; the key is demanded that the goods may be brought forth; the demand is refused; the first debt is secured at the expense, perhaps, the ruin, of the innocent securities; and the second is to be satisfied through the baseness of the debtor, and the connivance of the sheriff! What follows? The bond is forfeited; one security alone is notified, and that one, who was not present at the place of sale, to know what passed there; an execution is awarded against him; and his property must be sacrificed, because the sheriff prevented the delivery of the goods! I mean here not to insinuate that the deputy sheriff acted corruptly. His character stands far above all imputations of that kind. He appears desirous of doing his duty, and to have acted on the opinions of others, in whose judgment he had greater confidence than in his own. But are the securities to suffer because he has erred? Was it ever intended that the law, for the relief of debtors, should be made the engine of fraud and oppression upon their innocent securities? That a sheriff, having two executions against a man, whose integrity

428 *could be relied upon, and who could, therefore, easily obtain security for the delivery of his whole property, if necessary, should levy one of them upon his property, and, as soon as a bond was obtained for its delivery at the day of sale, should then immediately re seize the same property by virtue of the second execution, and thus subject the securities, in the first place, to the payment of the debt? Yet this

is the doctrine contended for. Instances of such proceedings I have before heard of. It is time to establish, firmly and unequivocally, or to discountenance, for ever, such doctrines and such practices. If the lien remains upon the goods, the proceedings are illegal. If it does not, whatever may be the motives of the sheriff, however pure his intentions, yet it is a fraud upon the securities, against which this Court, until better advised, will always relieve. If the goods had been delivered, the bond would have been satisfied, and no execution could have been awarded on it. They would have been delivered, but for the improper interference of the sheriff, who is responsible for his conduct to the creditors. This Court will, therefore, relieve against all persons claiming any benefit under an execution thus improperly obtained."

"It is, therefore, adjudged, ordered, and decreed, that the injunction awarded the intestate of the plaintiffs, be perpetual," &c.

From this decree the defendants appealed.

Wirt, for the appellants.

Peyton Randolph, for the appellee.

Wednesday, March 2d, 1814, the judges pronounced their opinions.

JUDGE CABELL. Jones & Co., having obtained a judgment against David Lusk, issued a fieri facias against his goods and chattels, which execution was put into the hands of Troyman Waytt, a deputy sheriff for the county of Rockbridge,

and was levied on certain goods, which were restored to Lusk, on his giving a forthcoming bond, in the usual form, and with the usual condition. A very short time before the day of sale, another execution, a ca. sa., in favour of Boys & M'Calmont, against the said Lusk, was put into the hands of the same deputy sheriff, Troyman Waytt, who had taken the delivery bond aforesaid; and he levied it on Lusk's body. Lusk being still in the possession of the same goods embraced by the delivery bond, tendered them to Waytt, in discharge of his body. Waytt, who appears from the testimony to be a man of most unexceptionable character, and incapable of intentional impropriety in the discharge of his office, received the goods, knowing them to be the same included in the delivery bond, and thereupon discharged Lusk's body; but he did not receive them until he had convinced himself of the propriety of the measure, by consulting those in whose judgments he had more confidence than his own, nor until he had obtained from the attorney of Boys & M'Calmont, positive instructions to receive them. Waytt attended at the time and place appointed for the delivery and sale of the goods, and was required, on behalf of the securities in the bond, either to produce the goods as he had the possession of them, or to give up the key of the store where they were lodged, that the friend of the security might deliver them up in discharge of the bond. He refused to comply with either of these propositions, but returned the bond forfeited. A judgment, and award of execution thereon, having been rendered against Ramsay, one of the securities, he obtained

an injunction, from the chancellor of the Staunton district; who, on the hearing, was of opinion that, an execution being once levied, the lien on the property still continues, notwithstanding the giving of a forthcoming bond; and that the conduct of Waytt (although he believed him incapable of intending to commit a fraud) was, nevertheless, ipso facto, a fraud against the securities; that the goods would have been delivered but for his improper interference; that, by such interference, *he made himself responsible to the creditors, and that the Court of equity ought to relieve against all persons claiming under an execution, thus improperly conducted; and, finally, perpetuated the injunction. From which decision an appeal was taken to this Court.

This case must, in my opinion, be decided on general principles; for it has no special circumstances. Those parts of the bill which allege that the securities were induced to join in the bond, solely on a previous stipulation, made in the hearing of the deputy sheriff, that the goods were to remain in their care and safe keeping till the day of sale, and then to be delivered by them to the sheriff, in discharge of the bond; and that, in consequence of this arrangement, the goods were actually committed to the securities. All these circumstances are flatly denied by the answer. The answer, moreover, is strongly supported by the testimony of John M'Clelland, who was present, and aided in taking the inventory of the goods. He thinks there was nothing more than the general trust and confidence in cases of delivery bonds, and deposes positively that Lusk, the principal, had, after the execution of the delivery bond, the use of the store, and might have sold the goods if he had been disposed to do so. The allegations of the bill are not supported by a single witness; for I throw out of the case the deposition of Robert Moore, one of the securities in the bond, as being an incompetent witness. The release executed to him by his security, Ramsay, was a mere nullity. Moore was bound to Jones & Co., the obligees; and they only could release that obligation. They have not done it, and the obligation remains. But, admit him to be competent, I cannot believe him; for, in addition to the interest which he still feels to vacate the delivery bond, it cannot be forgotten that he endeavoured, in the first instance, to shield the goods against the operation of the execution, by setting up a fraudulent claim of interest in them. I call it fraudulent, because it was quickly abandoned, and has not been *since asserted. I have thought it necessary to strip the case of these circumstances, that we may more clearly perceive the real question in controversy; but I am not prepared to say that they would have produced any change in my opinion, even if they had been fully established.

The great question in this case is, whether it was competent to Lusk, after the execution of the delivery bond, to tender the same goods, in discharge of his body, taken on another execution. The minor questions, whether it was competent to the

same sheriff, who had levied the first execution, and had taken the delivery bond, to receive them, in discharge of the second execution; and whether, having thus received them, and being thus in possession, he was bound to sell them under the first execution, are, in fact, only different modifications of the same proposition. They must all depend on the legal effect of an execution, in relation to the lien upon, or change of the property against which it issues, or on which it has been levied. When I use the term legal, I shall, of course, be understood as alluding as well to our statutes, as to the common law.

The delivery of an execution to the sheriff does not alter the property of the goods, for that still continues in the defendant. It however binds the property, by which nothing more is meant, than that any subsequent sale by the debtor will be void; the goods being, from that time, in the language of Gilbert, (*Law of Executions*, p. 13, 14,) "attendant to answer the execution;" or, as is more distinctly stated in 2 Equity Cases Abr. (p. 381,) "if the defendant make an assignment of them, unless in market overt, the sheriff may take them in execution." But by levying the execution, the property of the goods is changed, and they are in the custody of the law. The sheriff acquires, by the seizure, a special property, but it is a special property only; the general property being divested, and in abeyance. (1 Salk. 323, Clerk v. Withers; also, 6 Mod. p. 293,

where the same case, and particularly
432 this*principle, will be found more at large.) As a consequence of this principle, that the property is divested, and out of the defendant, and that the goods are in the custody of the law, he is said to be discharged of the judgment; that is, the plaintiff cannot proceed on the judgment by sci. fa., or action of debt, but must proceed against the sheriff. But what is the nature of the special property acquired by the sheriff? It is only that he acquires the right, and incurs the obligation, to possess, take care of, and sell the goods. As a consequence thereof, he is liable to the plaintiff for rescous, or other casualties, and may therefore maintain trover or trespass against any person who may take away or injure the goods. (a) But if, at any time, the state of things be such that (in the language of Lord Holt, in Clerk v. Withers, 6 Mod. 292,) "there be none who can make title to the goods under the execution, the first owner ought to have restitution." By which I understand, that the debtor is restored, not only to the possession, but to all his right of property.

I have premised these general principles, that we might clearly perceive the situation of the goods when under execution at the common law, and the nature of the lien which the execution has upon them. Let us now consider the situation of the goods after a delivery bond has been given; and we shall thus be able to determine whether the above principles are still applicable to

them, and whether there remains any lien upon them.

When an execution shall be levied on any goods and chattels, our act of assembly, (b) instead of making it the duty of the sheriff, as at common law, to take them out of the possession of the owner, and to retain that possession till the day of sale, gives to the owner a right to tender, and imposes an obligation on the sheriff to receive, bond and good security, payable to the creditor, with condition to have the goods and chattels forthcoming at the day of sale appointed by the sheriff, who "shall thereupon suffer the said goods and chattels to remain in the possession, and at the risk of the debtor until that time;
433 *and if the owner of such goods and chattels shall fail to deliver up the same according to the condition of the bond, or pay the money or tobacco mentioned in the execution," the bond is to be returned to the proper office, and to have the force of a judgment. This procedure is unknown to the common law. What is its effect, and what becomes the situation of the goods? The sheriff has no right to seize them, by that execution, against the will of the debtor, either before or after the day of sale; for the function of levying has been already performed, and he has nothing more to do than to sell them, in case they shall be forthcoming at the day of sale, according to the condition of the bond. He is not liable for the taking away, or for the injury or total loss of the goods; for they are no longer in his custody, but in the custody of the debtor, and at his risk. He can bring no action for, or concerning them: for none of the reasons, on which a sheriff's right to sue is founded, are applicable to his case. He can take no measure to force the debtor to have the goods forthcoming at the day of sale; for the debtor has his option to deliver them, or to incur the consequences of a forfeiture. If, then, the sheriff, by receiving the delivery bond, parts with the possession of the goods, has no right to seize them again, is in no manner liable for them, can bring no action concerning them, nor take any measure to compel their delivery, it would seem to me to be a necessary inference, that the execution retains no vestige of lien on the goods; "there is no person who can make title to them, by virtue of the execution;" and, of course, the debtor is restored to all his rights over them.

It is the business of Courts to decide, not the moral duties, but the legal rights of the parties litigant. Delivery bonds were introduced for the benefit of defendants in execution. I presume there can be no doubt, but that the principal in a delivery bond has the legal right, which no Court can obstruct, to forfeit his bond, by failing to have the property forthcoming on the day appointed for its delivery and sale.

He incurs thereby the penalty annexed
434 *by law; and that is all that others can require of him. If he has the right to hold back the property on the day of sale; by means whereof the bond becomes forfeited, and the execution is at an end; cui bono, and on what principle, shall

(a) Gilbert's Law of Executions, p. 15; 2 Saund. 47; 1 Lev. 282; 1 Salk. 322; 2 Ld. Raym. 1072, and 6 Mod. 290.

(b) Revised Code, vol. 1, 298.

he be prevented from making any disposition of it he may please, before the day of sale? This power of previous disposition of the property, forms, in my opinion, one important ingredient in the policy of our laws on this subject, and has been often exercised to the great benefit of defendants, whilst it can never injure the plaintiffs in the execution.

It is said that the execution is an entire thing. This is unquestionable; but it is equally true that a delivery bond, before its forfeiture, is a part of the execution; and although it was introduced for the benefit of defendants, yet it is in no way injurious to the plaintiffs, as it affords them ample amends for the lien on the property which the execution before had, but which lien is removed and substituted by the delivery bond. The execution is not at an end; it is not discharged; but from the moment of giving the delivery bond, and until the day of sale, it does not operate as at common law upon the property; it exists, during that period, in the delivery bond only. If the property is produced on the day of sale, the bond has accomplished its object, and is as much out of the case as if it had never existed; the execution resumes its operation as at common law, and the sheriff proceeds to sell accordingly. If, however, the bond is forfeited, the execution is then completely at an end; the bond assumes a new character, attains the dignity of a judgment, and becomes the foundation of a new procedure.

Much reliance was placed, in the argument of this case, on the different forms of expression applied by our acts of Assembly, to forthcoming, and to replevy, bonds. It is admitted, on all hands, that the latter operated a complete discharge of the property; and with respect to them, the language of the law is, that the sheriff shall restore the goods to the debtor; 435 whereas, with respect to *delivery bonds, he is to suffer the goods to "remain" in the possession, and at the risk, of the debtor. From this difference of phraseology, an effort was made to prove a difference of intention in the legislature. But I think the difference of expression may be easily accounted for, without this result, by attending to the history of our laws, and the known practice of the country. The first of our statutes now extant, on the subject of executions, is the act of Car. I. March, 1642-3, (1 Hen. Stat. at large, 259,) referring to a former law on the same subject, which, however, appears to have been lost. From that period, to the year 1726, executions were payable in property at valuation, which the plaintiff was bound to receive in discharge. The proceeding was a very speedy and summary one. The act of 14 Car. II. March, 1661-2, (2 Hen. Stat. p. 80,) directed, that if either party neglected to appoint appraisers, within three days after the service of the execution, the sheriff should appoint appraisers for the party so failing; and that the sheriff should not, before the appraisement, remove the goods out of the possession of the "plaintiff." This is certainly a typographical error. The assembly clearly meant defendant, for the

act goes on to say that the surplussage shall be paid to him, and that, after appraisement, the property shall vest in the sheriff, for the use of the creditor, to whom the sheriff is directed to give notice, that he may take it into his own possession. The act of 4 Anne, 1705, (3 Hen. Stat. at large, 385,) gives us the first notice of a delivery bond; but it was a bond to produce the property at the end of three days, for appraisement. The act of 1726, (Virginia Laws, edit. 1733, p. 356,) repeals the former laws, allowing executions to be paid in kind, and directs the sheriff to sell the property, on giving three days' notice, allowing the debtor, however, to give a delivery bond, to have the goods forthcoming on the day of sale, whereupon the sheriff is to suffer the goods to remain in his possession, and at his risk; and provides, also, that if the debtor, on the 436 day of sale, shall *tender the debt, damages, and costs, the sheriff shall accept the same, and restore the property to the debtor. The act of 1748, (edit. of 1769, p. 190,) so far as relates to this subject, is substantially a copy for the act of 1726; and so stood the law until the year 1769. I account for the term "remain," in the first clause, on this consideration, that the usual practice is for the defendant, who means to avail himself of the privilege of giving a delivery bond, to give it on the service of the execution, before the property is removed from his possession. It is indubitable that this is the course usually pursued now, and must have been much more frequently pursued formerly, when the time between the service of the execution and the day of sale, was so much shorter than it is at present. The goods, although seized, not having been taken out of his possession, were very properly said to be suffered to remain in his possession. Besides, the legislature contemplated not only the possibility, but even the probability, that they would not, in the mean time, be disposed of by the debtor, but be forthcoming at the day of sale; and on this ground, also, the expression would be appropriate. But, then, it is contended, that the term restore is used in the proviso relating to the tender of the debt, &c. on the day of sale, both in the act of 1726, and of 1748. There is one state of things which would render that term, or some equivalent one, necessary; and that is, where the debtor delivered the property on the day of sale, but, afterwards, on the same day, tendered the money, &c. In that case it would be incumbent on the sheriff not to sell, but to restore the goods to the debtor. There is no other state of things to which that term could, with propriety, be applied. If the goods were not produced at the day of sale, and delivered to the sheriff, he could not "restore" them to the debtor. They were already in the possession of the debtor; he alone had the control over them, and he required no act on the part of the sheriff, to complete his title to them. This expression, how- 437 ever, is omitted *in the act of 1769, in relation to delivery bonds. The act of 1748 gives a new privilege to defendants, by allowing replevy bonds, and direct-

ing that where an execution has been levied, and the debtor shall, within five days, or at the time of sale, tender bond and security to pay the debt, &c. within three months, the sheriff shall restore the goods to the debtor. This law expressly contemplates a case where the goods have been actually taken out of his possession, and, therefore, it provides, not for their remaining in his possession but for their being restored to him. But I think it unnecessary to rely on the critical disquisition of terms, for the discovery of the legislative intention when that intention has been clearly and positively expressed, as I conceive it is in the preamble of the act of 1769, (Chan. Rev. p. 3,) which explicitly declares, that the previous act of Assembly, allowing the debtor to give a delivery bond, had provided no remedy for the creditor or officer, in case the debtor refused to deliver up the goods and chattels according to the condition of the bond; and that the creditor or officer, being therefore obliged to commence a new suit on such bond, was compellable, on serving another fieri facias, again to accept security to have the estate taken forthcoming, and might be thereby prevented from ever recovering the debt. This proves, to my mind, that the legislature thought that the giving a delivery bond released the property; and although that legislative exposition of the law might not be binding on the Courts, as to cases occurring before, yet I should think it conclusive as to all subsequent cases.

I am, therefore, of opinion, not only on general principles, but on a construction of our acts of Assembly, that a defendant in execution, on giving a delivery bond, is restored to all his rights of property; and, of course, that it was competent to Lusk, in the case before us, to tender the property embraced in the delivery bond, in discharge of his body on the second execution. If it be competent to him to tender the property, it follows, necessarily, that

438 *It was competent to, and obligatory on, the sheriff to receive it. The circumstance of the sheriff's knowing that the goods tendered were the same included in the delivery bond, cannot affect the case. That knowledge cannot destroy the rights of the debtor over his own property. Nor is there, in my opinion, any thing in the assertion that the sheriff, being in possession of the goods, should proceed to sell them under the first execution. He is in possession, and has a special property in them by virtue of the second execution, and is authorized and bound to sell them under that only. Nor can the plea of disability, by the act of the law, apply to this case; for it was the party's own act that put the goods into the custody of the law.

One word as to the securities to this delivery bond. I see nothing in their case to distinguish them from other securities. The law contemplates the liability of securities for the default of their principal. It is for the sole purpose of making them liable, that the law has required them to be given. They arrested the progress of Jones & Co.'s execution, by their own voluntary act, by their confidence either in

the integrity of Lusk in delivering the property, or in his ability to pay the debt, or to indemnify them for the failure. They voluntarily became bound that Lusk should deliver the property, or pay the debt, or that they would pay it for him. They now complain that he has disappointed and defrauded them. Admit it. But let the loss fall on those who have imprudently trusted him, and not on just creditors, who, but for their interference, might long ago have received their debt.

On the main question, then, I am of opinion that the decree is erroneous, and ought to be reversed. I give no opinion on the other points, made as to parties and jurisdiction, not deeming it necessary, according to the view that I have taken of the subject.

439 *JUDGE ROANE. I am not certain that the proofs in this cause fix upon the appellant, Waytt, any particular knowledge of Lusk's agreement, that the appellee, and Moore, should retain the custody of the property until the day of sale, or of their actual custody thereof, in pursuance of such agreement, so as to convict him of a fraud, in acting in contravention thereof; yet the circumstances of the case clearly justified a resort to a Court of equity, to obtain a discovery of this fact from him, and to eviscerate the transaction. That resort was also necessary, for the purpose of making Waytt a party to this suit, who was no party to the judgment on the forthcoming bond. It is also justified by the consideration, that although the goods taken under the first execution, and for the delivery of which a forthcoming bond was taken, were not, in fact, delivered by the parties thereto, on the day appointed for the sale, (a circumstance which might, possibly, have weighed with the Court of law, in rendering the judgment now enjoined,) yet that delivery having been, in fact, prevented by the act of the sheriff, who also had them already in his possession, by virtue of the second execution, with a full knowledge that they were the same goods, it was unconscionable in him to sell them to satisfy the last execution, and to return the bond forfeited which was taken on the first. The case, stripped of the circumstances tending to convict the sheriff of a fraud as aforesaid, depends upon the question, whether the lien acquired on goods seized in execution, and redelivered to the debtor on his entering into a forthcoming bond, is lost, by that circumstance, before the day of delivery has arrived, and the bond is forfeited by the nondelivery of the goods?

This question has never yet received the deliberate consideration of this Court. There have been decisions in relation to replevy bonds, and to forthcoming bonds, after the same had become forfeited. The cases of Downman v. Chinn, (a) and Echols v. Graham, (b) are of this last description.

But there are no decisions of this
440 *Court applying to the effect of such bonds, before the day of delivery has arrived. I shall, therefore, consider this as a new question.

(a) 2 Wash. 189.

(b) 1 Call. 492.

I will consider this question, 1st. Upon the acts, allowing a forthcoming bond to be given, anterior to that of 1769, ch. 3, which placed them their present footing; and, 2dly. As affected by that act; but I will first premise some general observations, under the influence of which the case, in both aspects, is to be tested.

I will remark, in the first place, that an execution is the life of the law; that it is the end, and effect, and fruit of the law; that it differs from an action, which only continues until the judgment is rendered; and that, consequently, a release of all actions would not release it. (a)

I will observe, secondly, that, as the law subjects the sheriff to an action, at the suit of a creditor, in respect of the goods taken, so it vests him with such a possessory property therein, that if they are taken out of his possession, he may maintain trespass or trover for them, against the wrongdoer, as well as a carrier or bailee of goods may; and that it is no plea for him to say that they were rescued. (b)

Thirdly, I will remark, that, by the common law, the *fi. fa.* had relation to the time of awarding it, and that if, after the teste of it, the defendant had sold the goods, although bona fide, they were liable to be taken in execution, with the exception of a bona fide sale in market overt; and that the principle of this position is not changed by the act of 29 Car. II., (and our act on the same subject,) by which the property is bound only from the time of delivering the writ to the sheriff. (c) This principle is conclusive, to show that the possession of the goods may be in the defendant, and the right in the creditor; that this right accrues even before the service of the execution, and relates back, after, by a service thereof, it has attached on particular goods, so as to overreach all intermediate dispositions thereof.

441 "Fourthly, But that the general lien on the debtor's property, arising from the delivery of the writ to the sheriff, is released by the particular one acquired upon the identical goods, seized by a *fi. facias*. I infer this as a corollary, from its being held that, by the seizure to the amount of the execution, the defendant is discharged; for that the plaintiff having made his election, and taken his goods, no other remedy could be had against the defendant, but only against the sheriff; (d) and again, that the judgment is discharged by a seizure on a *fi. fa.* (e)

Fifthly, It is held that, by the seizure, the property is divested out of the defendant, and in abeyance; (f) and being so divested, it will require, I presume, clear and explicit acts, or provisions of the law, to revert the same in him before the execution has performed its office.

Sixthly, That an execution is an entire thing, and if once lawfully begun, must be completed; (g) and that when it is once

begun it cannot be suspended. (h) This principle would equally go to reprobate any suspension of the lien, (which is the life of the execution,) unless there be positive words to that effect; and, especially, if there be other grounds on which to account for the custody of the goods seized being granted to the defendant.

And, seventhly, That subsequent statutes, which give cumulative remedies, or penalties, neither repeal former statutory ones, nor such as are given by the principles of the common law; (i) and that the criterion, determining whether they are accumulative or not, seems to be, whether the first statute or remedy may stand with the last.

Bearing in mind these several principles and positions, let us examine the first branch of our inquiry; namely, the state of the question before us, as depending upon the acts prior to that of 1769, ch. 3.

This provision in favour of forthcoming bonds, seems to have been first distinctly introduced into our code in the year 1726.

(See edit. of 1733, p. 362, sect. 16.)

442 "That act (after declaring, in the previous section, that where goods shall be seized by a *fi. fa.*, and the debt shall not be paid within three days, the sheriff shall proceed to sell the same on the third day after the next Sunday, on which day due notice of the time and place of sale shall be published at the adjacent church, or chapel) enacts, in substance, by way of proviso, that, if the debtor shall give sufficient security to the sheriff, or other officer serving the same, to have the same goods forthcoming at the time of sale, it shall be lawful for him to accept such security, and thereupon to "suffer the same goods to remain in the possession, and at the risk of such debtor, until the time aforesaid;" with a further proviso, that if, at the time of sale, the amount of the debt shall be paid or tendered to the sheriff, he shall accept the same, and restore the said goods to the owner. This last provision, for a restoration of the goods after the debt is paid, not only amounts to the reversion mentioned as being required as aforesaid, and shows, that when such restitution was intended, the legislature knew how to use the appropriate terms to effect it, but would have been wholly superfluous, if such restitution had been effected by the previous provisions of the act, allowing a forthcoming bond to be taken.

This was, at that time, the only legislative provision on the subject of forthcoming bonds; it was not until the year 1769, that they were, in event, declared to have the force of judgments, and placed on their present footing. Nor was it until the year 1748 that the provisions relative to replevy bonds were introduced into our code.

We have already seen that a particular lien is created upon the identical goods seized in execution, in lieu of the general one existing prior to levying the same; and that the sheriff, in consequence of his

(a) 2 Bac. Abr. 648.

(b) Ibid. 730.

(c) Ibid. 738.

(d) 1 Salk. 322, Clerk v. Withers.

(e) 1 Burr. 34, Cooper, &c. v. Chitty, &c.

(f) 1 Salk. 322, Clerk v. Withers.

(g) 1 Burr. 34; 1 Salk. 322.

(h) 1 Salk. 322.

(i) Cowp. 298, Rex. v. Jackson; & 11 Co. Rep. 63, Dr. Foster's Case.

liability to the plaintiff, and of this lien, may recover the goods seized by an action of trespass or trover. There is nothing inconsistent with this lien, in the permission given to the *debtor by this act, to hold his goods for a few days, and until the day of sale. The latter right is merely an exception out of the former, for the convenience of the debtor, and whose custody is, for the time, the custody of the sheriff. It merely amounts to this, that the custody of the defendant, allowed by the act, is not such an eloigning of the goods as would authorize the sheriff to sue therefor. It would excuse him in case of non-delivery. There is no such incompatibility between the right of the sheriff, and that of the defendant, under the delivery bond, as must repeal the former by implication, and deprive the debtor's custody, authorized by this act, of its accumulative character. The two may well stand together; the one respects the right, and the other the possession, of the property, until the day of sale. There is not only no such incompatibility between the two, as, in default of an express provision of the act to that effect, would deprive the debtor's right of custody of its accumulative character, and make the bond, before its forfeiture, a substitute for the execution, but that construction would exhibit a case entirely anomalous in our laws. It would exhibit the spectacle of an execution, which still remains in force, (for it is only by its virtue that the goods, if delivered at the day, can be sold,) losing its lien upon the goods, on which it attached by their seizure, and having lost its general lien before, by that seizure, continuing to exist without any power whatsoever over any of the debtor's property. It would exhibit this spectacle, and by depriving the execution of its soul, (if I may so express myself,) leave it a mere caput mortuum, in the face of the principle, which declares, that when the execution has once begun it cannot be suspended. It would, in fact, suspend the essence of the execution, although the execution itself would be permitted to remain in existence. It is acknowledged, on all hands, that if the goods are delivered, that sheriff is to proceed to sell them. He is so to proceed, although no new seizure or lien on them is revived or created, and *although no power to sell them, in case of delivery at the day, is given by the act; but the common law right to sell, after seizure, and by virtue of the lien thereby created, is only admitted, or recognised, by the preceding provision of the act. He is to sell them, although, certainly, the condition of the bond (which is merely to deliver them at the day and place of sale) cannot, of itself, confer a right to sell. When, therefore, the sheriff is authorized to sell the goods, in the event of the delivery, under the bond and that right is neither expressly given by the act, nor is any new lien created or revived thereby, or by the bond, competent to carry with it the right to sell; and as a mere compliance with the condition of the bond does not confer such right, it is only the old lien which gives that right; unless we are pre-

pared to say, that a sale may be made under an execution which has never been levied on any goods, and much less on the goods offered for sale, or (which is the same thing) upon goods which, though once under a lien, have been absolutely and completely liberated therefrom. There is not only no provision in the act reviving a lien on the goods supposed to be liberated, or expressly giving to the sheriff a right to sell them in case of delivery, but such provisions would have been equally unimportant and unnecessary. It was not necessary to destroy or disturb the even tenor of the existing lien, for the mere and sole purpose of reviving it again, at the end of a few days. There is, therefore, an equal defect of such a provision, and of any rational ground on which to have founded it. The admitted right to sell the goods, therefore, under all these circumstances, is conclusive to show, that the old lien has never been lost, nor extinguished; it is more conclusive from this consideration, that that right is confined to the same goods which were seized under the execution.

If it is asked, to what purpose is it that this lien is continued, when the sheriff has no right to disturb the custody of the debtor until the day of sale? I answer, it *is equally necessary to enable the sheriff to sell the goods, if delivered, and to preserve his right thereto, if not delivered. I here speak of the case as depending upon the acts prior to that of 1769, which gave to forfeited forthcoming bonds a new character, and destroyed the lien after the day. If it be further asked, why, when this last-mentioned circumstance destroys the lien after the day, (under the present acts,) and when the sheriff's power over the goods was obstructed by the delivery bond up to the day of sale, is the lien to be considered in force for the mere pittance of time comprised in the day of sale? the answer is still the same; to enable the sheriff, then, to sell; to preserve the principles and symmetry of the law, and to hold the debtor's goods liable to pay his debts (if he or his sureties should deliver them) in case of his said sureties.

I may ask, on the other hand, why is this lien not to continue? Is it to enable a debtor to saddle an innocent surety with a debt due by himself, by releasing the proper fund for that purpose? Is it to enable a subsequent creditor to get the advantage of a prior one, who has been diligent, and, certainly, did not contribute to the act by which such release is supposed to be effected? Are these the favourite objects of the law? Are they to be effected by remote implication and construction? and under a provision introduced solely for the debtor's benefit and convenience? Certainly not.

It is not a natural construction, in considering the effect of the act in question, that an execution, which is the end of the law, and cannot be suspended, should be surrendered up, or deprived of its power, for a mere right of action upon the forthcoming bond; a right of action, too, only inchoate up to the time of forfeiture; and that, under circumstances which, for want

a provision (prior to the act of 1769) that "no security should be taken" on serving the execution founded thereon, would involve a plaintiff in the never-ending course of litigation, stated as the evil intended to be remedied by 446 *that act. It would have been a great aggravation of that evil, if the lien acquired by the sheriff, by executing the writ of *fi. fa.*, and which gave the creditor his remedy over against him, should be also adjudged to have been lost.

If that lien in favour of the sheriff, and the plaintiff's remedy against him, bot-tomed thereupon, should be adjudged to have been lost by the delivery of the goods to the debtor, on his executing the forth-coming bond, and if, prior to the act of 1769, the said debtor's goods could again have been restored *to him on executing a new forthcoming bond, under the judgment rendered upon the former one, and so, toties quoties, ad infinitum, the plaintiff would, indeed, have been without all reme-dy to obtain satisfaction for a just debt. This is a state of things which would never have been submitted to in this enlightened country, for nearly forty years, and until the act of 1769 provided the remedy. If that state of things did not exist, it was only because the sheriff's lien, acquired by levying the execution, still remained, notwithstanding the execution of the de-livery bond, and in virtue of which he re-mained liable over to the plaintiff. If it be said that this lien was obstructed by the delivery of the goods to the debtor, up to the day of sale, and impaired by the non-delivery of them after the day, that proves nothing as to the principle of the point in question; it proves nothing as to the effect of a bond as before the day of delivery, and which it is not to be presumed will be forfeited; and even after the non-delivery at the day, it could only impair the plain-tiff's right of recovery, and graduate it by the scale of the sheriff's impaired right of possession under his lien. It proves nothing as to cases in which the sheriff could, in fact, make that lien effectual. Again, if it be said, that the act of 1769, ch. 3, sect. 1, (a) declares, that no other remedy existed prior thereto, for the creditor or officer, than the inadequate one of suing on the forthcoming bond, as is therein partic-ularly stated; the answers are, 447 *1st. That this is only legislative construction of the existing law upon the subject, and, therefore, not binding upon this Court; and, 2dly. That that act does not say that no other remedy existed, but only that none such was therein (i. e. in the act of 22 Geo. II, ch. 48,) provided. It does not profess to speak as to any remedy arising from any other source, or one given by the princi-ples of the common law.

This construction is corroborated by every provision of the act; for, 1st. This remedy of a forthcoming bond is given by way of proviso, which always operates as an exception; the lien acquired by the sheriff exists, therefore, subject to the right of custody of the debtor; 2dly. The goods are to be suffered, by the sheriff, to

remain with the debtor until the day of sale; which expressions, "suffered, and remain," are equally indicative of a right in the sheriff, and inconsistent with the idea of an absolute and exclusive owner-ship in the debtor; 3dly. They are to re-main in the possession of the debtor, which provision also excludes the idea of property in him; 4thly. They are also to be at his risk until the day of sale; a pro- vision wholly superfluous and unnecessary, not to say absurd, if the lien on the goods was discharged by giving the bond; 5thly. The omission to provide, in the act, that the property should be restored at the time of giving the bond, and only provid- ing therein, on the contrary, that it should be restored in the event of a pay- ment, or tender of the debt, at the day of sale, is conclusive that it is the latter, and not the former, circumstance which re- leases the lien.

These considerations, growing out of the very provisions of the act itself, are en- tirely corroborated by the aforesaid princi- ple, that the property in the goods being de- vested from the debtor, by levying the execution, and in abeyance, (as we have seen,) it would require explicit affirmative words to restore the same to him. No such words are found, however, in the act, but entirely the contrary. No such restoration is provided for, until 448 *after the money has been paid.

There are not only no words in the act adequate to restore the property to the debtor, prior to that event, but neither are there any adequate to revive the lien (on a supposition that it has been suspended) in favour of the sheriff, nor to authorize him to sell. His acknowledged right to sell, therefore, under these circumstances, is conclusive to show, as aforesaid, that this lien has never been suspended nor extin- guished.

This construction thus resulting, as well from the general principles of the law, ap- plying to the case, as from the particular provisions and expressions of the act of 1726, is supported by analogous provisions in some of our ancient statutes.

For example, by the act of 1705, ch. 37, (h) in relation to goods taken in execution, subject to appraisement, and delivered to the debtor, he giving bond to have them forthcoming, for the purpose of apprai-ement, at the end of three days; that the goods so seized are not released by the giving of the bond, is evident from this circumstance, that the property thereof, after appraisement is, also, declared to be in the sheriff, for the benefit of the cred-itor. The lien of the sheriff, acquired by the seizure of the goods, so far from being yielded up to the debtor before the day, is, after the day, extended into a permanent one in favour of the creditor.

In this case, notwithstanding the custody of the goods remains for a short time with the debtor, exempt from the power of the sheriff, and notwithstanding the existence of a bond for their delivery, for the purpose of appraisement, the goods, so far from being released by either circumstance, are held to be specifically bound, after ap-

(a) Ch. Rev. p. 2.

(b) 8 Hen. Statute at large, p. 385.

praisement, in favour of the creditor. If they were released from the lien created by the service of the execution, by reason of the custody and bond aforesaid, they would not thereafter remain bound in favour of the creditor, without the operation of some new seizure or lien, of which none is pretended to have existed. So, in the

449 *case before us, the lien on the goods remains, without any new act, and the same goods are to be sold, without any new seizure, if delivered agreeably to the condition of the bond. This result is not varied by the circumstance that, by a subsequent act, another and additional remedy is provided in the event that the goods shall not be delivered.

If, in the case made by the before-mentioned ancient statute, therefore, it is found, that neither the custody of the goods thereby permitted to the defendant, nor the bond given, to have them forthcoming for the purpose of appraisal, was construed to restore to the defendant the goods de-vested out of him by the execution; this construction holds a fortiori in the case before us, in which the act in question has provided that another event only, namely, the payment or tender of the sum due, should work such restoration. I may add, as a convincing circumstance in both cases, that the shortness of time, in which the goods were to remain with the debtor, forbids the idea that the destruction of the lien was intended. It could answer no purpose, and would be even ludicrous, to destroy the lien for the mere purpose of reviving it at the end of three days.

Thus the law stood till the revisal in the year 1748, when the three months' replevy bonds were first introduced into our code. (a) A replevy bond under that act operated a release of the property: 1st. Because it is expressly provided, that, on the giving thereof, the property shall be restored to the debtor: 2dly. Because the surety therein is to be approved by the creditor; a circumstance very material in a bond considered as a substitute for an execution, and wanting as to the sureties upon forthcoming bonds: 3dly. Because a replevy bond obtained the force of a judgment, by the mere giving thereof, though its execution was suspended till the expiration of the three months, and did not owe its obligation, as a judgment, to the breach of the condition thereof, as is the case of forthcoming bonds: and, 450 4thly. Because no *security was to be taken on the executions issued thereon; a circumstance wholly wanting as to forthcoming bonds, prior to the act of 1769. There being these material points of difference, therefore, between the two descriptions of bonds, it by no means follows that, because the replevy bonds operated a release of the property taken, the forthcoming bonds, taken under the act of 1726, had a coextensive effect.

We are next to inquire, whether the act of 1769 made a change in this respect, and operated a release of the property, taken in execution, prior to the forfeiture of the condition of the bond?

The act of 1769, ch. 3, (b) after reciting the before-mentioned provision of the act of 1726, in relation to forthcoming bonds, adds, that, in case the debtor refused to deliver up the goods, no remedy was therein provided for the creditor or officer, who, being therefore obliged to commence a new suit on the bond, was compellable, on another *fi. fa.*, to accept security to have the goods forthcoming, and might be thereby prevented from ever recovering his debt. The provisions of this act (as I have before remarked) seemed confined to the remedy provided by the act of 1726; namely, that upon the forthcoming bond. It does not purport to relate to any concurrent remedy given by the common law; nor, if it did, would its decision, that none such existed, be binding on this Court. It is not conclusive, therefore, to prove that, prior to the act of 1769, giving to forthcoming bonds a new character, the lien on the goods did not continue, even after the non-delivery thereof by the debtor. The mischiefs intended to be remedied by this act, were, the being driven to a new action upon the bond, in case of forfeiture, and compelled to submit to a new forthcoming bond, on the service of the execution founded thereon. The remedy provided was, that, as to the first, the bond, after forfeiture, should have the force of a judgment; and, as to the last, that no security whatever should be taken. These mischiefs and remedies, however, contemplated, and only contemplated, the case of a bond

451 *after the forfeiture; as to the operation and effect of such bond prior thereto, and under which the delivery of the goods may be presumed, no mischief is alleged to have existed, nor is any remedy provided. Under this act, therefore, every thing already said in favour of the existence of the sheriff's lien, notwithstanding the indulgence given to the debtor, equally applies, until the bond acquires a new character by the forfeiture, as it did before the passing of the act. When that act provides, that the same goods shall be delivered up to the sheriff at the day of sale, it is difficult to conceive how the lien created by the service of the execution has been released. It is not easy to discern how a penalty, devised to enforce the delivery of the property at a certain day, could absolve the party from the necessity of such delivery: or how a duty enjoined by law, is to be dispensed with by a construction arising out of the act enjoining it. In fine, if the sheriff's lien on the property is released by the mere giving of the bond, it is not easy to see by what authority he is justified in selling the goods when delivered agreeably to the condition thereof. A condition to deliver property to the sheriff, does not authorize him to sell, unless some coeval lien is created, (which is not pretended in this case,) or unless the former lien still remains; no new lien is created, and it is an anomaly in our law that the sheriff shall sell without a lien.

Admitting that there is an analogy between forthcoming bonds, under the act of 1769, and replevy bonds, that analogy com-

(a) Edition of 1769, p 194.

(b) Ch. Rev. p. 4.

mences only after the forfeiture of the condition of the former. After that event, they become perfected under the act; which is the case of replevy bonds from the beginning, with the exception that three months must elapse before they are to be put in force. Prior to such forfeiture, the former class of bonds have not the force of judgments. Prior to the day mentioned in the condition, they are defeasible by the delivery of the property. Prior to the forfeiture, they are mere collateral and inchoate bonds; liable to be ripened,

452 however, by *the efflux of time, and the non-performance of the condition thereof, into instruments having the force of judgments. Admitting, therefore, that, from the superior dignity of a replevy bond, or a forthcoming bond after the forfeiture thereof, they are to be considered as substitutes for the execution, and to release the property attached thereby, it does not follow that the same dignity is due to this conditional, inchoate, and imperfect instrument; imperfect, I mean, when considered as a judgment. It is conceding enough, on the ground of construction, that an execution, this life, and end, and fruit of the law, should yield to a perfect judgment, and not to this imperfect, inchoate, and conditional one. It is too much to expect that the lien created by the execution should be lost, before even a perfect right of action is given in lieu thereof; for no right of action accrues upon the bond, until the forfeiture thereof has been incurred. It is too much to yield to construction, on this subject, that the execution should lose its hold on the property, before even a right of action has been perfected, for which that execution is to be exchanged. It is too much that a provision introduced for the mere convenience and accommodation of the debtor, and which, according to every rule of construction, is a mere cumulative one, should receive a construction deranging every principle of law applying to questions of this kind, and leaving the execution without any effect or power whatsoever. If it be said, that the lien of the sheriff is lost, in consequence of the right of custody being in the defendant, on the principle that where there is no remedy there is no right, the answer may be repeated, that it is no novelty in our code that the right of property should be in one man, and the right of possession in another. Another answer is, that this argument equally held in relation to these bonds, prior to the provisions of the act of 1769; and, then, if the lien of the sheriff (for the benefit of the creditor) had been held to be lost, it was altogether without an equivalent; as forfeited bonds had

453 not then *the force of judgments: a construction so unjust, that it ought not for a moment to be entertained. If it be said that this construction would render unalienable all the property covered by the bond, several answers occur to the objection. 1st. That it was not the policy or intention of the act to give the debtor power over the property of the goods seized, and delivered to him on executing the forthcoming bond; but only over the

custody or possession thereof. This is sufficiently manifest from the words of the clause itself, already noticed; 2dly. That this supposed exemption would continue but for a very few days; and, 3dly. That the right of the debtor to sell the property, or of another creditor to seize it, subject, however, to the first execution, is not impaired by giving the bond. The right over the property, in this last respect, is exactly similar to that which exists over property actually held by the sheriff; and the right of the debtor, or a subsequent creditor, as aforesaid, to sell or seize it, subject to the former lien, is a sufficient check against abuses in covering too much property. It may further be remarked, not only that this act depends on the officer, and not on the debtor, but also that the provision of the act, prohibiting unreasonable seizures, extends as well to property relieved by forthcoming bonds, as to such in which no such bonds have been given: it extends to all cases of seizures by *fi. fa.*, whatever the ultimate fate or destination of the goods may be.

An idea seems to have gone forth, that the creditor may sell the property for the purpose of paying the debt at the day. A right to sell implies a right of property in the articles sold: but this right is reprobated, in the case before us, by the provisions of the act in question, which imply merely a right of custody or possession, and not a right of property. Besides, the rights of the surety are to be attended to; he ought to be permitted to do that which the law authorizes him to guaranty to be done; to deliver the property. If the debtor has a right to sell the property, to

454 pay off the execution at the day, *he may sell, and not pay it, but saddle the securities with the loss, by squandering the money. Their interest, as well as every other consideration, combines to hold the property liable. The convenience of the debtor, in other respects, and to save him the expense of supporting the property by the sheriff, were the motives of this indulgence; and not to give him an opportunity to sell. He has the same right to sell this property, however, as property in the actual custody of the sheriff. It has been said, that the forthcoming bond operates a release of the property, from the time of its execution, in consequence of the obligor's right to forfeit the same. There is no such right of forfeiture, in a case in which the bond admits a duty, and provides for its fulfilment under a penalty. The bond is entirely collateral to, and was intended to preserve the lien, and enforce the performance of the duty. I entirely concur in opinion with one of the judges* in the case of *Cook v. Piles*, (a) that a forthcoming bond is no satisfaction of a judgment, until the forfeiture; and I think it follows that, until such satisfaction has taken place, the lien created under the judgment is not extinguished. The old right does not cease, until the new one is authorized to succeed it. No chasm between the two, is to be created by implication or construction.

*JUDGE CABELL.
(a) 2 Munf. 153.

In fine, while I see no utility in considering the property as release prior to the day of sale, I can, by a very simple process of reasoning, consider the property, though loaned to the debtor for a few days, to promote his convenience, as still in the hands of the sheriff, and liable to satisfy the execution; which property, however, is liable to be redeemed, and revested in the debtor after the day, if, by a non-compliance with the condition of the bond, that bond shall then assume the new dignity given to it by the provisions of the act of 1769.

The foregoing remarks have considered the question *principally in relation to the debtor himself. If the object of the law was (as it is not) to enable the debtor to make sale of his goods, for the purpose of paying the debt at the day, (a duty which, from his standing out so long already, he has evinced he had no desire to fulfil,) that object would be entirely answered by extending the power over the goods to him only: but that is not the case. This doctrine, of a release of the lien, lets in the power of other and subsequent creditors, who, by instantly seizing the same goods, would disable the debtor from effecting the alleged object of the indulgence. If the case be considered in relation to the creditors, there is no reason why prior creditors should not be preferred to those who are subsequent. There is no reason why goods, let out to the custody of the debtor, should be differed, in his favour, from those actually holden by the sheriff; nor why, in the first case, as well as the last, the right claimed by the last execution should not be considered in subordination to that vested under the first. I can see no such magic in the custody of the debtor, holding under the sheriff, that it should derange all the principles and symmetry of the law in this particular: nor why property, under those circumstances, should be differed from that actually in the chambers of the sheriff. There is no principle of the law, on which such a diversity can be justified; there is no principle, which, on this immaterial and unimportant ground, can affect the rights of innocent sureties, disable them (and even the debtor himself) from performing that which the law has allowed and enjoined them to do—discharge the property justly liable to pay the debt, and give subsequent a preference over prior creditors. If such is the doctrine of the law, I see no solid basis on which it can be erected.

In assigning the above as some of the reasons in which my opinion, on this question, is founded, I beg leave also to refer, in corroboration thereof, to the able argument of the chancellor, found in the record.

He has also added some very appropriate remarks, as applicable to *this particular case, which, in the view I have taken of the subject, do not appear to me to be absolutely necessary.

It was observed, that Boys & M'Calmont should be parties to this suit. The answer is, that the appellee wants nothing from them. They have received their money; and if any body has a claim against them, it is the sheriff, who, by mistake, or in his

own wrong, paid them the money made under their execution. Every purpose of the appellee will be answered by enjoining the judgment on the forthcoming bond. It is next objected, that Jones, the creditor in that bond, is no party. He has answered the bill, and, I think, is, undoubtedly, a party. It is admitted that the subpoena extends to him; and so does the bill, which prays, "that the plaintiff, (Jones,) the sheriff, and all parties may be enjoined," &c. As to Waytt, he may have acted by advice, and his motives may not have been improper; but he has erred, to the appellee's prejudice, and should make retribution. If, in consequence of the decision now to be given, he is liable to Jones for his money, he has probably, from the proofs in the cause, his remedy over against M'Cleland.* At any rate, the decree of the chancellor, that this money should not be coerced from the appellee, after he has, in effect, complied with the condition of his bond, or the non-compliance was owing to the sheriff, is entirely just and equitable, and should be affirmed.

JUDGE FLEMING. I have ever been of opinion that goods taken by virtue of a fieri facias, for the delivery of which, at the day of sale, a forthcoming bond had been given, were not released until the day of delivery had past; but were only suffered to remain in possession of the debtor, for his own convenience, and the ease of the sheriff; nor were they subject to another execution until after that time, for, in my conception, the law cannot (nor was it ever intended by the legislature that it *should) step in by its own officer to arrest and render impossible, to frustrate, or obstruct, what the law itself requires or permits to be done; especially, when it may tend to the distress and irreparable injury of an innocent third person.

In the case before us, the reasoning of the chancellor, as well as that of the worthy judge who last delivered his opinion, appears to me too sound, cogent, and conclusive, to require any further observations on the construction of the act of Assembly permitting forthcoming bonds to be given.

Besides, on a careful perusal of the whole record, it seems to me, that there was a combination among Lusk, Moore, Waytt, and M'Cleland; in which they artfully practised a palpable fraud on William Ramsay, the intestate of the appellee, (who was wheedled and entrapped into the suretyship in the delivery bond,) in order to secure a desperate debt of Boys & M'Calmont, and to saddle that of Jones & Co. on Ramsay, a credulous, unsuspecting, and innocent security in that bond; or why was not judgment rendered also against Moore, a former partner of Lusk, in trade, who at first claimed the goods taken in execution, but afterwards gave them up, and was also the other security in the bond, and who has, hitherto, had the address to keep his own neck out of the collar?

Without further remark, I most cordially

*Note. He was the attorney who obtained the judgment for Boys & M'Calmont.—Note in Original Edition.

concur in the opinion that the decree, perpetuating the injunction, is correct, and therefore affirmed.

458

***Wells v. Jackson.**

October, 1811.

1. **Trespass—Joint Action—Appeal by Plaintiff.**—The plaintiff cannot appeal from a judgment in favour of all the defendants, except one, in a joint action of trespass, until the suit has been abated, dismissed, or decided, as to that one.
2. **Same—Illegal Warrant—Effect as Evidence.**—A warrant, to arrest a person of whom surety for the peace is demanded, being executed neither by a sworn officer, nor the person to whom it was directed by the magistrate, but by an individual selected by the prosecutor, who erased the name of the person appointed by the magistrate, and substituted that of the person selected by himself, is thereby rendered altogether illegal and void as a justification, but may be given in evidence in mitigation of damages.
3. **Warrant of Arrest—Failure to Give Christian Names—Effect.**—Quære, if the persons, to be arrested, be described only by their surnames, the counties they reside in, and their professions, or trades, without their christian names; is not such warrant too general and uncertain, and, therefore, illegal and void?
4. **Same—Persons Designated as "Associates"—Effect.**—A warrant, directing the "associates," of persons named, to be arrested, without mentioning the names of such associates, is illegal and void as to them.

This case was argued November 23d, 1811, though not decided until the 26th of March, 1814. The points in controversy are sufficiently stated in the following opinions of the judges, pronounced seriatim.

JUDGE COALTER. A point has arisen, in the consideration of this case, which was not noticed by the bar, but on account of which, as at present advised, it appears to me this appeal must be dismissed, as being improvidently allowed. I shall be willing, however, to hear the parties on this point, if their counsel, on consideration, desire it.

This suit, which is an action of assault, battery, and false imprisonment, is brought by the plaintiff against eleven defendants. The proceedings which were had in the office are not in the record; nor is the writ, or the return thereupon. The record begins with the declaration, which was filed in October, 1801.

The next steps given us are the proceedings had in Court, at September term, 1802, when the plaintiff enters a nolle prosequi as to the defendant, Triplet; and at the same time the other defendants, "except John Black," set aside the office judgment as to them, (from which it would seem inferable that there was also an office judgment as to some one else,) and plead not guilty, &c.; upon which the trial was had, at the same term, from the judgment in which the appeal is taken.

459 ***Whether there was an office judgment against Black, or not, does not**

***Trespass—Joint Action—Appeal by Plaintiff.**—A verdict and judgment in favor of all the defendants, except one, in a joint action of trespass, is not a final judgment, and no writ of error will lie from it until the action has been abated, dismissed, or decided as to that one defendant. *State v. Hays*, 30 W. Va. 118, 3 S. E. Rep. 183, citing the principal case. See the principal case also cited in *White v. Railway Co.*, 26 W. Va. 808. See generally monographic note on "Appeal and Error" appended to *Hill v. Salem*, etc., *Turnpike Co.*, 1 Rob. 263.

certainly appear; but the suit is neither abated nor dismissed as to him.

If there was an office judgment and writ of inquiry as to him, the same jury ought to have been charged to inquire of the damages, which might have been satisfactory to the appellant, (a) which he might have taken judgment for; and unless he had taken it with a cessat executio, or in some other way, so as to leave open his election until the event of the appeal, and of a future trial, as to the other defendants, (should that be the consequence,) was known, the election to take the damages against Black (as he can have but one final judgment in this action) would have justified, I apprehend, a judgment for the other defendants, whatever might be the opinion of the Court as to the points arising out of the exceptions. This writ of inquiry may have been since executed, or an office judgment and writ of inquiry may since have been obtained and executed as to Black; and, at all events, at the time of this appeal, a part of the cause was still depending in the Court below, the proceedings in which might have an important effect on this judgment, so as, in fact, to justify its affirmance; and, therefore, it appears to me there has not been such final judgment in the case as to justify the appeal, and that it must consequently be dismissed as improvidently granted.

The cause taking this course, it might seem unnecessary to say any thing on the points arising out of the exceptions, as the case may again come back upon the same record, when final proceedings are had as to the other defendant; and any opinion now given would not, then, be obligatory, and would readily be departed from, if, upon further consideration, I should be dissatisfied with it. As, however, it may be some guide to the parties, and perhaps prevent future litigation between them, and the other judges thinking there would be no impropriety in doing so, I have no objections, briefly, to state my present impressions on those points.

460 ***Edward Jackson having made oath before Hedgman Triplet, a justice of the peace for Harrison county, that he had just cause, from their threats, to fear that — Wallas, of Brooke county, lawyer, — Wells, of said county, yeoman, and their associates, would burn his house, or beat and abuse his person, the said Triplet issued his warrant against them, by the above descriptions, to cause them to be brought before him to find sureties, &c., in the usual form.**

This warrant had been originally directed by the magistrate to John M'Cully, constable, or Major John Jackson, to execute; but the prosecutor, without the knowledge of the magistrate, or Black, struck out the name of Jackson, and inserted that of Black, so that it stood directed to the constable, or Major John Black, to execute. The latter, taking with him the other defendants to assist in the execution, proceeded to execute it on — Wallas, lawyer, of Brooke county, — Wells, of said

(a) 1 H. & M. 488; 2 H. & M. 40; *Ibid.* 357; 1 Saund. 207, note (2); 6 Term Rep. 100; 2 Tucker's Bl. Appendix, 48.

county, yeoman, and their associates, Stephen Gappin, of the state of Pennsylvania, and — Wells, in said county, (Harrison, I presume, that being the county mentioned in the caption of the commitment in which they are thus described,) who are brought before the said Triplet, on the same day in which the warrant issued, at which time the substitution of Black was made known to the magistrate, who said it would do as well; and thereupon the said Triplet, "after examination," (and they failing to find sureties,) committed them to jail by the above descriptions and names. William Wells, one of these persons, (and, I presume, Wells, of Brooke county, as in his exception he does not state himself to have been arrested under the term associates,) brings this action. The warrant, &c. are permitted, by agreement, to be given in evidence, and to have the same effect as if pleaded; and the Court instruct the jury as to the substitution of Black, which seems to have been the main objection relied on, that, if the defendants were ignorant of that circumstance, the warrant, as to them, 461 was not void, "but justified the arrest."

The jury found for the defendants, and an appeal was taken.

Two objections are taken to the warrant, as furnishing a complete justification, it being properly conceded that it was admissible in mitigation of damages.

1st. That Black could not be substituted by the prosecutor, or any other person than the magistrate, to execute it, in lieu of those to whom he directed it.

My impressions are, that this objection is sustainable; (a) and had we jurisdiction of the case, as at present advised, I should be for reversing the judgment, on that ground, and sending the cause back for a new trial, with direction that the warrant, under these circumstances, was not a complete justification, but only proper in mitigation of damages.

2d. The second objection is, that the warrant was general, and therefore void.

First, That it is uncertain and general as to every person.

Secondly, That it is so, at all events, as to the associates; and that part of it being uncertain, the whole is void; and that it would, therefore, not justify an arrest, even of those well described.

Thirdly, That, if void for either of these reasons, it is no justification for the arrest, even of the persons really complained of, and of whom sureties were demandable.

These are important questions; and, were I now pronouncing a final decision upon them, I would give them a farther consideration and discussion than I think it necessary to give under present circumstances.

As to the first, considering the plaintiff to be Wells, of Brooke county, and believing that a warrant is good, and will justify the arrest of an offender, who is described with reasonable certainty, (b) although his name is not known, and that this certainty will be more or less apparent from the circumstances attending the transaction,

and stated in the warrant; I can readily suppose, that when two persons, of another county, are found in the 462 *county of Harrison, associated with others in threats, and an intention to violate the peace on an individual, they might be described, with reasonable certainty, in the terms of this warrant; and when this is combined with the fact, that the persons so arrested not only answered this description, but, "on examination," were found to be the persons really complained of, I think the warrant sufficiently certain and special as to them. No description, even by name, is absolutely certain, as there may be others of the same name; its sufficiency, too, may frequently depend on matter aliunde. A warrant to take the printers and publishers of the North Briton, that being a secret transaction, was uncertain; whereas a warrant to take the printers and publishers of the Virginia Argus and Enquirer might not. It may, perhaps, be too strict, where a description is given, to test its sufficiency by any abstract rule, where it also appears that the officer, without difficulty, made the arrest of the real parties complained of, and answering to the description given of them in the warrant. Better evidence, that they were well described, could hardly be expected.

As to the associates, that term, to-day, when the parties are together, may be sufficiently certain; whereas, to-morrow, and when they are separated, it would no longer be so. This warrant was executed on the same day it was issued; and these persons, "on examination," also answered to that description, and were found to be the parties really complained of. As to this point, therefore, (though I have greater doubts than as to the first,) I incline to think the warrant may have been sufficiently certain; but were this otherwise, and I am correct as to the first, 3dly. Would this uncertainty vitiate the whole warrant?

All the persons concerned in the same offence cannot, at all times, be named, or fully described; although some of them may. If, therefore, a warrant issues, naming, or sufficiently describing, 463 some of the persons accused, "but which, as to others, is too uncertain to direct the officer, and which part it would be his duty, therefore, not to proceed to execute; I think he would, nevertheless, be bound to execute it on those sufficiently named, or described, and that it would be a justification, as to them, for such act of arrest.

But if a person is really guilty of a felony, or breach of the peace, (c) and cannot be, or is not, sufficiently described in the warrant issued to arrest him, inasmuch that the officer would be justified in not proceeding to execute it on any one; yet if he knows the person to be guilty, or, from other information, proceeds to execute it at his peril, and in fact executes it on the guilty party; I incline to think it will not lie in his mouth to say that he is not sufficiently described, when the warrant is to apprehend the person guilty of that offence,

(a) 2 Wilson, 47. Burslem v. Fern.

(b) 3 Burr. 1744, Money, &c. v. Leach.

(c) 8 Burr. 1761, Ibid. 1765.

and he is that person. My impressions are, from the arguments, both of the bar and bench, in the case of *Money v. Leach*, that if the latter had really been the printer and publisher of the *North Briton*, the warrant would have been considered a justification of his arrest. In this case, these persons, when brought before the magistrate, "on examination," were committed as the persons against whom sureties of the peace were required.

If, therefore, we had jurisdiction of the case, and the first objection to the warrant had not existed, as at present advised, I should be for affirming the judgment.

JUDGE CABELL. I concur in the opinion, that this appeal was improvidently granted, and ought to be dismissed.

Considering the case, therefore, as not being properly before us, I should have declined expressing any opinion on the merits. But, as the other judges think it may be useful to the parties to be informed of the views of the Court, I have no objection to declaring, as my present opinion, that the warrant, in the proceedings mentioned, was rendered illegal and void,

464 as against all the persons *on whom it was served, in consequence of its having been executed, neither by a sworn officer, nor the person to whom it was directed by the magistrate, but by an individual selected by the prosecutor, who erased the name of the person appointed by the magistrate, and substituted that of the person selected by himself. But although the warrant, thus nullified, could no longer be relied upon as a justification, it might well be given in evidence in mitigation of damages.

Had it not been for this objection to the execution of the warrant, I should have thought it, under the circumstances of this case, sufficiently certain, and, therefore, legal, as against Wallas and Wells of Brooke county; but void as to all those who were embraced by the term "associates."

JUDGE BROOKE. For the reasons that have been stated, I am of opinion the appeal ought to be dismissed; and I concur, also, in the idea, that the warrant on which the defendants founded their justification, is not, on the face of it, a general warrant, either within the meaning of the tenth section of the bill of rights, or at the common law, as settled in the case in 3 Burr., *Money v. Leach*. The plaintiff, under the circumstances of the case, was as well described as was possible, for all that appears to the contrary: indeed, it is inferable, from the facts in the record, that, when brought before the magistrate, he would not give up his christian name. He is described also as of Brooke county, to distinguish him from others, and to leave as little as possible to the discretion of the officer. The objection that the name of Jackson, one of the persons authorized to execute the warrant, was stricken out, and the name of Black, one of the defendants, inserted, has more force; and my present impression is, that that circumstance put an end to the authority of the warrant. In that view, it was certainly not a justification, but might have been given

in evidence in mitigation of the damages, as it appears the defendants were ignorant of the alteration. *Nor am I of opinion that the word "associates," in the warrant, is so general as to vitiate the whole of it, and to convert what otherwise was a special warrant into a general one: many cases may be supposed in which that expression, in addition to a more precise description of persons not included in it, would be considered as sufficient. Lord Mansfield, in the case referred to, threw out of it that part of the warrant which related to the signing of the papers, because it was unexecuted: on that ground, also, the word "associates," in the warrant, in the present case, is unimportant, as is not pretended that the plaintiff was apprehended under that description.

JUDGE ROANE. This an action of trespass, assault and battery, and false imprisonment, brought by William Wells against Hedgman Triplet, John Black, and nine others, for seizing and imprisoning him on the 31st of January, 1801, and keeping him imprisoned for ten days then next ensuing, without cause, and committing other outrages upon him. In September term, 1802, a nolle prosequi was entered by the plaintiff, as to Triplet, (the magistrate who granted the warrant herein after mentioned,) and all the rest, except Black, having appeared by their counsel, the office judgment was set aside as to them, by consent of parties, and they pleaded not guilty, on which an issue was joined, with liberty to give in evidence, on the trial, a certain supposed warrant said to have been issued by Triplet, a justice, against — Wallas and — Wells, and their associates, and dated January 31st, 1801, together with the proceedings had under the same, subject to the opinion of the Court, whether the same, if specially pleaded, would amount to a justification, and liable to the same objections, both of law and evidence, as if they had been pleaded and demurred to, or were offered in evidence on the trial of the issue, &c. There was also another plea of son assault mesme, on which issue was

466 *The jury found, and only found, that the defendants were not guilty; on which, judgment was entered against the plaintiff.

At the trial, the plaintiff filed a bill of exceptions, which stated that, on the trial of these issues, the plaintiff gave evidence of the imprisonment in the declaration mentioned; to justify which, the defendants gave in evidence the warrant herein after more particularly mentioned, and which is made a part of the bill of exceptions; that the same came to the hands of the defendant, John Black, under which he, with the other defendants, arrested the plaintiff, and brought him before Triplet, who, after examination, made the commitment, also more particularly mentioned, and made a part of the bill of exceptions, and gave testimony that Black was not a peace officer; that the warrant, when issued by Triplet, was directed to the constable, or Major John Jackson, to execute, but that the name of John Jackson was stricken out by Colonel E. Jackson, who obtained

the warrant, and that of Black inserted, before it was delivered to him; and that the same was executed and returned by Black. It was further proved, by the defendants, that Colonel Edward Jackson mentioned this alteration to Triplet after the arrest, and that he had made it, and that Triplet said it would do as well; that no peace officer was present at the arrest; and that the plaintiff was not arrested in the commission of any breach of the peace. To this evidence the plaintiff objected, and prayed the Court to reject the same under the second^a issue; but the Court declared its opinion to be, that the evidence aforesaid constituted "a justification of the arrest aforesaid, provided the defendants were unacquainted with the alteration aforesaid; and that the defendants were not obliged to know whether the same was formal, or to whom it had been originally directed, and that as to the same defendants the warrant was not void."

467 "Under the influence of this opinion, and instruction of the Court, a general verdict was found, on both issues, for the defendants.

Although it is readily admitted that an officer, acting under a regular and legal warrant, in a matter of which the justice has jurisdiction, may justify the arrest of the person named therein, although such person be not guilty of the offence alleged against him, it is a great aggravation of the offence of acting under an illegal warrant, that the person arrested is, in fact, innocent.

In the case before us, it is not shown, on the part of the appellees, that the plaintiff was not an innocent man; it is not shown that he had perpetrated or meditated the offence complained of. Admitting, for the present, that he was the person contemplated by the warrant, it is not shown, by legal evidence, in this action, that he had committed or meditated the act alleged against him. The contrary may, perhaps, in some degree, be inferred from its being admitted that he was not arrested in the commission of any breach of the peace. While the plaintiff rested on the general ground of his having been imprisoned, and of the general right of all our citizens to their liberty, the defendants, on the contrary, for any thing appearing in this action, did not mean to take the special ground that the plaintiff had committed or meditated the offence complained of. They rested upon the ground of acting in obedience to a warrant, which being, in their opinion, legal, made it quite unimportant to their defence, whether the party arrested was, in fact, innocent or not. Certain it is, that the guilt of the plaintiff, in relation to the offence charged against him, is neither averred nor put in issue by the defendants. It is also certain, that the verdict of the jury is justified, without any allegation to that effect having been made or proved to them on the trial. It is justified on the ground that (under the direction of the Court) the warrant was held to be legal, and, being so held, that the party executing it should be acquitted, al-

468 though the party arrested were, *in fact, innocent. The guilt of the plaintiff by no means follows as a necessary consequence of the verdict. That guilt is not only neither averred by the defendant, nor found by the jury, but is also far from being proved by the testimony. There is no proof whatever to that effect, unless you admit the ex parte oath of Edward Jackson, on which the warrant was granted; (which is reprobated by all the rules of evidence as proof in this cause to establish the point in question;) and, unless you also take for granted, that the very plaintiff now before the Court was the person against whom he complained, and to whom the justice's warrant was intended to apply. In considering this case, therefore, we are to throw out of our view every idea that the plaintiff is a guilty person; although even guilty persons are entitled to the benefit of the laws and constitution. We are to consider it as a question which (through the appellant) may, in its consequences, affect all the good people of the commonwealth.

It is not for the purpose of establishing the principle, but for that of showing it more clearly, that I rely on the innocence of the plaintiff, in the present instance. That is a circumstance entirely unimportant, when the warrant stands condemned by the force of great principles. It can never be the true understanding of those principles, that a general warranty is void where the party arrested is innocent, and valid if he be guilty. If such warrants are void, they are so under all circumstances, and as to all persons whatsoever. I repeat, however, that there is no evidence in this cause showing that the plaintiff had done or meditated the injury complained of. The oath of Edward Jackson, showing that the plaintiff was guilty, (which, also, is not introduced into the bill of exceptions,) was taken entirely in his absence, and without the possibility of his cross-examination; and if it be said that his guilt is inferable from his contumacy in not mentioning his name, or denying

469 that the warrant *applied to him, when brought before the magistrate for commitment, I answer, that it was not necessary for him, at that stage, to have done any thing; it was not incumbent on him to have pursued a course which would have released to the defendants his cause of action against them; or, at least, would have lessened his claim to damages. The innocence of the plaintiff is, however, wholly unimportant as aforesaid, in the view I have taken of the subject, and I only mention it to show, a fortiori, the strength of those conclusions which would, nevertheless, equally follow if he were ever shown to have been guilty.

The warrant, in obedience to which the defendants acted, is liable to several objections; as, 1st. That it was released and altered as aforesaid, after it was issued by the magistrate, and before it came to the hands of Black. 2dly. In authorizing the constable, or Black, to arrest the "associates of — Wallas and — Wells;" and, 3dly. On account of the uncertainty of what Wallas and what Wells were contem-

^aSo in the exception, but should it not be first issue?—Note in Original Edition.

plated in the warrant. I will briefly consider each of these objections in their order:

And, as to the first; it is held, that all imprisonment, without proper authority, is a false imprisonment, and the proper subject of an action. (a) The imprisonment, in question, has been made under colour of a warrant, which, *ex vi termini*, means only an authority. (b) As to an authority, it would seem, on general principles, that it could be executed only to the extent to which, and by the persons to whom, it was directed. Conforming to these general principles, it is held that the person having the authority must execute it himself, and cannot transfer it to another; for it being a trust and confidence reposed in the party, cannot be assigned to a stranger whose ability and integrity were not so well thought of by him for whom the act was to be done. (c) The imperiousness of this rule is admitted by a case in the same book, (d) in which,

where the king directed the deputy 470 and council of Ireland to appoint a bishop to be installed, and the deputy was changed, it was held that his successor and council might do it; it was so held, only on the ground that it was, in fact, the same grantee (the official deputy) who still continued, though the person was changed who filled the office. In this case, the exception, and the reason of that exception, proves the rule. It is also held, (e) that if a warrant be directed to a sheriff, he may make a warrant to his bailiff to execute it; but it is also held that a constable cannot substitute another in his room. (f) While this authority, in relation to the sheriff, establishes the doctrine contended for, on the principle that the exception proves the rule, that part which relates to the constable comes in aid of that construction; and the argument, in relation to him, holds a fortiori as to a private person. Every argument going against the transfer of this power by the grantee himself, who may have some knowledge of the sentiments of the principal in this particular, holds a fortiori in relation to a stranger. If that grantee cannot judge of the ability and integrity of the person to be substituted, neither can a stranger, who is still less acquainted with the views and wishes of his principal. If neither Major John Jackson, nor even the constable, in the case before us, could judge in this behalf, and delegate to another the authority delegated to them, still less could Colonel Edward Jackson, who is under the additional objection of being a party; a party who would abuse the discretion existing in the magistrate to appoint fit and proper agents, and substitute those who would oppress his enemy. In fact, he usurped the place of the magistrate in this particular, violated the principles of the common law, in relation to the nature of an authority, and established a precedent which, if sanctioned, would lead to the greatest oppression and injustice.

This act deprived the plaintiff of the shield provided for him by the constitution, in the discretion of upright magistrates; a discretion not less important as to the person, (when not a peace officer) who 471 is to execute the warrant, than as to the substance of the warrant itself.

This view of the subject is in exclusion of the circumstance that this transfer of power was made by means of an erasure. In *Piggott's case*, (g) it is held, that although a deed contains divers and distinct covenants, yet if any of the covenants are altered by erasure, or addition, or interlineation, this avoids the whole deed; for that it is but one deed, though it contains distinct covenants. So, in this case, the warrant is but one warrant, even if we consider that the part which constitutes the person to whom it was directed was distinct from the body thereof. Every argument applying to the case of a common deed, in this particular, applies with tenfold force to a warrant, which is only an authority. and to that part of the warrant (designating the person by whom it is to be executed) which lays the liberties and persons of the people open to the greatest oppression and abuses.

It is essential to an authority that it should have the assent of the principal, at the time of exercising it. (h) This was not the case of the warrant before us, in relation to the material and important point of the person by whom it was to be executed. As to that person, Black was the agent and trustee of Edward Jackson, but not of the magistrate; the magistrate had not assented to his executing the warrant. In 1 Hale, 577, it is held, that a warrant granted with a blank, and sealed, and afterwards filled up with the name of the party to be taken, is void in law. So, in 1 Bac. 690, it is held, that an unlawful arrest, without a warrant, is not justified by a warrant afterwards taken out. The principle of this doctrine is precisely in point to show, that the arrest in this case, being unlawful at the time, by reason of the erasure aforesaid, which avoided the warrant, was not made good by the subsequent consent of the magistrate. The act complained of is to be tested by the defendant's authority, as at the time it was committed, 472 which was not then justifiable.

Then it was that the plaintiff's cause of action arose.

I readily admit that it would be hard to punish officers for acting under a warrant appearing to be regular, and with no knowledge that it had been altered. This, however, is a matter which must go in mitigation only, and can always be safely intrusted to a jury. While a contrary opinion would lead to alarming consequences, it is no hardship to impose it on officers who are paid for their services, to know that the precepts that they execute are genuine. This is but one of the perils of which there are many analogous instances in the law. If it be an evil, it is better that it should be endured, than that the citizens should be liable to be harassed by the abuses of parties

(a) Buller's N. P. p. 22.

(b) *Ibid.* p. 83.

(c) 1 Bac. Abr. 380.

(d) *Ibid.* 819.

(e) 1 Hale, 681.

(f) *Ibid.*

(g) 11 Co. Rep. 28.

(h) 1 Bac. 314.

intervening between them and the magistrate, and depriving the citizen of that security which he derives from being only amenable to the proper acts of the magistrate. It is better that officers should act at their peril, in the case in question, (by the scale of which peril, too, their emoluments were probably graduated,) than that the citizens should be deprived of this shield of protection afforded them by the laws. So, in relation to private persons, to whom warrants may be directed, it is held that they are not bound to execute them. (a) Such persons are, therefore, mere volunteers in relation to the service in question; and there is no hardship in holding them to the consequences of an office which they may either accept or decline.

On this ground alone, I should think that the officers acted under a void authority, and that the arrest could not, consequently, be justified.

As to the warrant, considered in itself, it is to arrest ——— Wallas, of Brooke county, lawyer, and ——— Wells, of said county, yeoman, and their associates. It is liable to the objection, that while the last part thereof, relative to the associates, is a general, as well as uncertain, the first part must also be considered as an uncertain, warrant.

473 *As to the part which relates to the associates, nothing can be more general. It is equally as general as a warrant against the publishers of a certain paper, or the murderers of a certain man. It is, indeed, more so; for, while it is general as to who may be those associates, it is also uncertain as to the persons of whom they are to be considered as the associates. It is, therefore, much more objectionable than a warrant to arrest the publishers of a paper, which paper, however, is certainly described. There is no description, in this part of the warrant, of any person, but only of the offence. In the case of *Money v. Leach*, (b) it was decided by Lord Mansfield, on a warrant to take up the publishers of a certain described paper, that it was not fit that the judging who were the publishers should be left to the officer, but it should be decided by the magistrate, who should give certain directions to the officer. That warrant would have been much more objectionable, if, in addition to the latitude given to the officer in deciding who was the publisher, a similar latitude had been given him (as in this case) as to the identity of the paper published. Lord Mansfield adds, that this doctrine is founded on reason and convenience; that Lord Hale, and all the others, had held such uncertain warrants to be void; that there was no case in the books to the contrary; and that the strength of the principles in the case was such, that the usage proved, from the revolution downwards, of similar warrants having issued from the department of state, could not overcome those principles, and legalize the warrant: and all the judges concurred with him, that the warrant was illegal and void.

This authority is conclusive, beyond the possibility of doubt, as to the illegality of

general warrants. It is conclusive, at least, as to so much of this warrant as relates to the associates of Wells and Wallas. The principle of the decision is made a part of our constitution, by the tenth article of the bill of rights. That article is in these

words: "That general warrants, 474 whereby an officer or *messenger may be commanded to search suspected places, without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted." So, by the 6th article of the amendments to the constitution of the United States, it is provided, "That the right of the people to be secure, in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, or the persons or things to be seized."

These articles not only reprobate general warrants as being (if I may so express myself) more than void; as being grievous, oppressive, and unconstitutional, but also reprobate uncertain warrants, as being incompatible with the necessary security of the people. These founders of our liberty were not satisfied with reprobating such as were wholly and entirely uncertain, by being general; they also reprobated all such as were within the same mischief; all such as left the officer to judge, instead of the magistrate, who was the person intended to be thereby arrested. It would have been doing little, if they had only embraced extreme cases; if they had established the principle, without extending it to embrace all cases within the same mischief. They, however, have not been wanting on their part; and it only requires the co-operation of the judiciary to guaranty the safety of the people.

Applying the tenth article of the bill of rights to the case before us, as relative to — Wallas and — Wells, it is a *sine qua non* of that article, that they should be named, or their identity be ascertained, by describing the offence committed. That branch of the clause which requires the "offence to be particularly described", does not, in terms, apply to this case, of a mere preventive remedy, in which no offence has been in fact committed.

475 *As the reference, however, to a fact already committed, is only for ascertaining the person meant in the warrant, the reason of the clause (*cæteris paribus*) will equally apply, with the same view, to an offence meditated or intended. In both cases, it is only to ascertain the person, in defect of knowing his name, that this criterion is resorted to; and it will be sufficient in all cases, in which it will certainly answer the purpose intended. On the same principle, the 6th article of the amendments to the constitution of the United States, admits it to be enough, that the person should be "particularly described." The principle, and great desideratum, in all cases, and so declared to be by that article, is, that the people should be

(a) 1 Hale. 581; 2 Hale. 110.

(b) 8 Burr. 1742.

secure against unreasonable and oppressive seizures; and all the constructions on the subject should keep this end in view. Whatever name or description is so certain and unerring, as to leave no doubt who is the person intended, will attain this security; and nothing short of it.

I presume that in a case deeply affecting the liberty and security of our citizens, one which attracted the attention of the founders of both governments in an especial manner, and involves a most summary and rigorous jurisdiction, we ought, at least, to require as much certainty as to the name or description of the person intended, as the common law requires in the case of grants. This is certainly no great boon to ask in relation to a summary proceeding, affecting the security of every citizen of the commonwealth. We should dishonour the principles of our forefathers, if we were to allow a greater latitude in the former case than in the latter.

Taking that for the criterion, then, which is conceding a good deal—for we are told (6 Co. Rep. 65, Sir Moyle Finch's Case) that greater certainty is required even in writs than in deeds—let us examine the present question.

It is said, in Doctor Ayray's Case, (11 Co. Rep. 20,) that "*nomen est quasi rei notamen*;" that "*nomina sunt notae rerum*;" that names were invented to make a distinction between person and person; 476 and that if the person *be so described that he may be certainly known from other persons, the misprision or omission of the name of baptism does not avoid the grant. As, if it be, *omnibus filiis I. S., or primogenito filio I. S., or uxori de I. S., or filiae I. S.*, when there is but one: in all those cases the grant is good; for the grantee is ascertained beyond a possibility of mistake. So it is said that, whereas the name of the abbot of W. was Richerus, and he, by the name of Richardus, abbot of W., made a grant, the grant was held good, though the christian name was mistaken; because his addition of Abbot of W. described the person beyond a doubt; there being but one Abbot of W. So it is held, that if I grant to I. S. and Margareta uxori suo, when her name is Margeria, yet the grant is good, because the terms *uxori suo* make the description of the person certain. So it is held, in 6 Co. Rep. 65, (Sir Moyle Finch's Case,) that a grant made to a bastard, by the name of him who begot him, is good, if he be known by such name; and so is a grant to Richardo filio Richardi Marwood, though a bastard, if he be known by that name. In these cases, also, these last-mentioned facts, being universally known, ascertain the identity of the person intended, beyond the possibility of doubt.

I cannot find that, even in the case of grants, any thing short of this has been admitted by the principles of the common law. Certainly only is the object; and whatever will attain it, and nothing less, will suffice.

In the warrant before us, the only description given, of the Wells intended, is, that of "— Wells, of the county of

Brooke, yeoman." It is not shown, in and by the warrant, as a further description, that he was then tarrying in the county of Harrison; much less that he was at any particular place in that county. And even if it be inferred that the Wells intended was in the county of Harrison at the time, from the circumstance that he was brought before the magistrate on the day of the date of the warrant, it may be answered, 1st. That this appears only by matter dehors the warrant; id est, by the 477 *mittimus; whereas the warrant should contain sufficient certainty in itself; and, 2dly. That it is not a remote probability (as is shown to have been the fact in this case) that there might be two or more yeomen, of the same surname and county, abiding in an adjacent county at the same time. As to any aid to be derived to the warrant, from the complaint on which the warrant is grounded, while that is no part of the evidence in this cause, it is liable to the first objection just made to the mittimus: but, if this were otherwise, that complaint contains nothing particular and specific; nothing which is not common to all instruments of the kind, except the names of the parties as aforesaid. The warrant, then, contains nothing in it (if I may so express myself) to locate it upon any Wells in particular. It contains no indicia in itself, leading to even a reasonable degree of certainty, as to the parties intended. The warrant, in itself, must steer clear of the objection of being a general or uncertain warrant. On its own face, it must stand the test of scrutiny: it cannot be helped by proofs, or matters aliunde. It is not so probable, as to amount to any thing like a certainty, that there is only one yeoman of the name of Wells in the county of Brooke. I have known many yeomen of the same name, of the same county, and even being together in another county at the same time; to any of whom a description like the present would equally apply.

This warrant, then, at most, is like a grant to one of the daughters of I. S., without distinguishing which; and which is (as before said) clearly void, for the uncertainty, in the case of a grant. It does not come within the principles of any of the before-mentioned cases, in which, although the name was defective, or omitted, the person was certainly identified, by additions or descriptions, leaving no possible doubt who was the person intended. In respect of any thing leading to perfect certainty, the warrant before us is entirely defective; there is nothing in it competent to "distinguish between person and person," or to describe the person "so 478 as that he may be *certainly known,"

to use the language of the judges in Doctor Ayray's Case. There is nothing to prevent the officer from oppressing any man at his own mere pleasure, as being an associate of Wells and Wallas; or any man of the surname of Wells, to whom the description of his occupation and county would apply.

But it is said, that if the name were entirely set out, yet some degree of uncertainty would exist, as there might be two or

more of the same christian and surname. While this is admitted, it is nevertheless true, that the probability thereof is remote; and that, in such case, the magistrate has done all in his power to ascertain the person.

Again, it is said, that this latitude ought to be allowed, in respect of the urgency of the transaction, the suddenness of the case, and the ignorance of the party of the names of strangers. To this I answer, that he should be then more particular in his description of the offence or circumstances, so as to put the matter beyond a doubt. I answer, also, that, while all this is admitted, and these circumstances would be highly proper to go in mitigation of damages, the principle would equally go to justify cases in which no such urgency or mitigating circumstances existed. There can be but one principle in this respect, as applicable to all warrants, under whatever circumstances. There is but one boundary line, between circumstances going to justify, and to mitigate, in the case before us.

On this ground of ignorance and urgency, while I forbear to go into the cases in which a person, without a warrant, may arrest those attempting or perpetrating a crime, it does not authorize a departure from the requisite certainty, where a warrant is actually granted. In *1 Hale, 587*, after laying it down, as a general principle, that a justice cannot grant a warrant to apprehend "all persons suspected," but must name their names, it is said that an exception has been made thereto, in favour of the Court of king's bench, who, in the case of a riot by persons unknown and disguised by visors, made an
479 *order on the sheriff to bring them into Court, to be examined touching the same: but the author adds, that that which was permitted to be done by the highest Court of justice, should not be a pattern for justices, of inferior jurisdictions. This exception from the general rule, in this case, is a complete answer to the plea of urgency, as relative to the jurisdiction of justices of the peace.

It is admitted that an officer cannot justify under a warrant for an offence, whereof the justice has no jurisdiction, or which is committed out of his jurisdiction; though he may under an erroneous warrant, in cases in which the magistrate has jurisdiction. (a) The reason of this distinction is given in *10 Co. Rep. 76*, (Case of *Marshalsea*,) and is, that, in the former case, the whole is *coram non iudice*, and the officer is not bound to obey him who is not a judge; that is, a judge for the purpose expressed in the warrant. This principle entirely applies in the case before us. No man is a judge for the purpose of granting a general warrant. This which was decided, on common law principles, in the case of *Money v. Leach*, is rendered more clear by the express provisions of the bill of rights. Such a warrant, on the principles of the English law, (b) is held to be void, and no warrant; and a fortiori in this country; and no man can justify arresting

another on the authority of such a blank piece of paper.

This requisite degree of certainty in all warrants, is not only necessary for the security of the citizens, against the mistakes, oppression, or misjudgment of subordinate officers, but is also necessary in behalf of those officers themselves. They are justified if they act in obedience to the warrant, where the magistrate has competent jurisdiction; that is, where they take up the person against whom the warrant issued: but how can they know who this person is, if the magistrate has given them no certain indicium to go by? This, indeed, is a minor ground; but it is equally
480 necessary for the safety of the "officer; and (which proves it to be no warrant) without a sufficient degree of certainty, he is not bound to execute it.

It is, I believe, conceded on all hands, that this warrant, so far as it related to the associates of — Wells and — Wallas, was a general warrant, and unconstitutional and void; but it is doubted whether it is not good as to the other part, under which the present defendants are supposed to have acted, which relates to Wells and Wallas themselves, and which is by some supposed to be sufficiently certain. Being entirely of opinion that this last part is also uncertain and void, it is not necessary for me to solve this doubt. There is no part of this warrant which is not equally liable to objection. It is not necessary for me to say, whether the interdiction, in the constitution, of general or uncertain warrants, will not, equally with an erasure, nullify the warrant in toto; or, whether the officer, resting upon the sound part of the warrant, can justify himself, in a case in which the warrant itself is reprobated by great principles, and which he might, consequently, have refused to execute. I leave these questions open for future decision.

But those gentlemen who hold that part of the warrant to be general and void, which relates to the associates, would do well to recollect that it is far from being shown, in this case, that the plaintiff was not arrested under it. It is not only very probable that there might be a — Wells, an associate, as well as — Wells, a principal, but this is shown to have been the fact, in this case, by the mittimus. That mittimus shows that a — Wells was arrested as a principal, and a — Wells (together with Gappin) was arrested as an associate; both of the county of Brooke; and it is not shown that the former is the present appellant, and not the latter. For any thing appearing in this case, the very person arrested as an associate, and under that part of the warrant which is, on all hands, admitted to be void, may be the present appellant. My private opinion and
481 belief is, *indeed, otherwise; but that is no sufficient foundation whereon this Court can take the fact for granted.

On these grounds, I am of opinion, that the warrant in question is illegal and void, upon the principles of the common law; on those great principles which are essential to the security of all living under a government of laws, and enjoying the blessings of freedom; principles, without which,

(a) 2 Hawk. 81.

(b) 4 Bl. Com. 290.

freedom, or security from oppression, would be but an empty name. I am of opinion that it is unconstitutional, as well as illegal and void, by the very letter, as well as spirit, of our constitutions. It is illegal, unconstitutional, and void because it leaves to the discretion and judgment of the officer, not only to say who the associates of — Wallas and — Wells are, but also to say of which Wallas and Wells the said associates were intended. It is illegal, unconstitutional, and void, in relation to — Wallas and — Wells, themselves, because it neither mentions their christian names, nor supplies any satisfactory data, from which their identity can be certainly inferred.

I am, also, of opinion, that this warrant, if originally good, was rendered null and void, by the erasure and interlineation, as to the name of the person by whom it was to be executed; that, without reference to the consequences of such a measure, it became thereby no warrant, at the time it was executed; and that the person who executed it acted without the authority of the magistrate.

On all these grounds, I am of opinion, that the instruction of the district Court, that this warrant amounted to a justification of the defendant executing it, was clearly and palpably erroneous; and that the judgment rendered under the influence thereof, ought not to stand. I should, therefore, be for reversing the judgment, and awarding a new trial, on which no such instruction should be given; but for the necessity (as it, for the present, appears to the Court) of sending the cause back, because the appeal was prematurely prayed, the cause not having been then determined as to all the defendants.

482 *Appeal dismissed, as having been improvidently granted.

JUDGE FLEMING. I consider this a very important case, as the liberty, quiet, and safety of all our citizens may be eventually affected by the decision.

It appears to me, that the appellant, and others, mentioned in the record, were arrested, and imprisoned, under a warrant illegal in itself, and executed by a person not legally appointed for that purpose; and to deprive a citizen of his liberty, under colour of law, is oppression and tyranny in the extreme.

By our Bill of Rights, article 10th, it is declared, that general warrants, whereby an officer, or messenger, may be commanded to search suspected places, without evidence of a fact committed, or to seize any person, or persons, not named, or whose offence is not particularly described, and supported by evidence, are grievous and oppressive, and ought not to be granted.

The warrant now under consideration appears, clearly, to me, to be of that description; "commanding the constable, or Major John Jackson, to arrest, and bring before the justice who issued the same, — Wallas, of Brooke county, lawyer, and — Wells, of said county, yeoman, and their associates," (not named therein.) The name of John Jackson, one of the persons to whom this extraordinary warrant was directed to be executed, was erased,

and the name of John Black (perhaps one of the prosecutor's defendants and associates, for it seems to have been a party business) was substituted in his place, by the prosecutor himself, without any authority for so doing.

In the famous case of Money et al. v. Leach, in the Court of king's bench, reported in 3 Burr. 1742, the whole Court were of opinion that the warrant, under which the defendant in error was arrested, was illegal and void, on two grounds; first, that Lord Halifax, then secretary of state, who issued the warrant, was not competent *to do so; and, secondly, for its uncertainty; it having required the apprehending and seizing the authors, printers, and publishers, of (what was called) a seditious libel, contained in a paper, styled The North Briton, No. 45, without naming any person whatever as author, printer, or publisher, of the said paper.

Although, in England, the penal laws lean much towards prerogative, and the liberty of the press is not held so sacred as it is, and ought to be, with us, it is laid down by Blackstone, in his Commentaries, "that a justice of the peace hath power to issue a warrant to apprehend a person accused of felony, though not yet indicted; and he may also issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays the warrant; because he is a competent judge of the probability offered to him of such suspicion. But, in both cases, it is fitting to examine, upon oath, the party requiring a warrant, as well to ascertain that there is a felony, or other crime, actually committed, without which no warrant should be granted, as, also, to prove the cause of probability of suspecting the party against whom the warrant is prayed." 2 Bl. Com. 290, and 2 Hale's History of the Pleas of the Crown, 580, cited.

In the case before us, it was not stated that a felony, breach of the peace, or other crime, had been committed; but that Edward Jackson made oath that he was afraid that — Wallas, of Brooke county, lawyer, and — Wells, of said county, yeoman, and their associates, would beat him, &c. Under this extraordinary, defective, and illegal warrant, — Wallas, William Wells, Stephen Gappin, and — Wells, were arrested, and committed to jail, the two latter said (I suppose by the prosecutor) to be associates of — Wallas and — Wells; and, although they are not before this Court, for reasons that do not appear, yet the proceedings serve to show the evil consequences that might result to the community at large, or to a great portion of our citizens, should they be sanctioned, or countenanced by this Court.

484 *I am clearly of opinion, upon the whole, that the warrant under consideration is illegal in its origin, and was illegally executed; and that the instruction given to the jury by the Court below, was erroneous. But it appears, by the record, that there was a writ of inquiry against the defendant, Black, which seems not to

have been acted upon; the judgment was, therefore, incomplete, and the appeal improvidently granted, and must, consequently, be dismissed.

M'Cormack's Administrator v. Obannon's Executor and Devisees.

Monday, Nov. 25th, 1811.

Equitable Relief—Contribution of Sureties.—A Court of equity will not compel a security in a bond to contribute to the relief of his co-security who has been forced to pay the debt, unless it appear that due diligence was used, without effect, to obtain reimbursement from the principal obligor, or that he was insolvent.

This was a suit, in the superior Court of chancery for the Staunton district, by the appellant against the appellees. M'Cormack, the plaintiff's intestate, had been co-security with Obannon, for a certain Richard Boucher, in a bond to Henry Whiting, on which judgment was obtained by the creditor, and execution being issued, was satisfied by M'Cormack alone, whose administrator, therefore, sued the representatives of Obannon, for contribution. The following opinion and decree was pronounced in the cause by Chancellor Brown, the 24th of July, 1808.

"The Court is satisfied, from the evidence in this cause, that the plaintiff's intestate, and the testator of the defendant, were co-securities of Richard Boucher; that the plaintiff's intestate, on the 1st day of October, 1793, discharged the whole debt; and there is no evidence to prove that he ever received, either from Boucher or Obannon, any payment or indemnity. Obannon was dead before judgment was had on the bond, and it is not pretended that any payment was made by him. Boucher, it appears, remained in Berkeley county for about
485 ten years after the judgment against him and his securities, and about two years after payment by M'Cormack; during which time, or the greater part of it, he was possessed of both real and personal property, of which the debt might, by possibility, have been made. He is not made a defendant, although it is possible he might have proved a payment, or satisfaction, to M'Cormack or Whiting. This omission, with the length of time between the payment by M'Cormack, (who, it appears, lived about nine months after the payment,) and the institution of this suit, might raise a presumption of payment by Boucher; although it must be admitted that the presumption arising from these circumstances in the cause—"[†]

"The cause of action commenced 1st October, 1793; suit is instituted the 16th day of August, 1805, nearly twelve years after; and the statute of limitations is relied on by the defendants. This, it is contended, does not apply to the present case; 1st. Because co-securities are trustees for each other; 2dly. The payment, by M'Cormack,

must relate back to the date of the bond; and, 3dly. M'Cormack is to be considered a bond creditor."

"1st. In whatever light Courts of chancery might formerly have viewed co-securities, in order to bring them within their control, and to do whatever was considered just and equitable between them, when, perhaps, no other tribunal had cognizance of their case, I cannot, since our act of Assembly has given them relief against each other at law, see why their undertaking should be considered such a trust as would bar the statute of limitations, which is equally respected by Courts of chancery and of law, except in cases exclusively within the jurisdiction of the former."

"2d. If the payment by M'Cormack, in 1793, can be considered as relating
486 back to the date of the bond, in 1783, so as to make it a debt of Obannon's to that date; and if the will of Obannon can be construed into an acknowledgment of that debt, and an assumpsit to pay it whenever it should be demandable by M'Cormack as his co-security, although this did not happen until nine years after his death; this is placing M'Cormack only where our act of Assembly has placed him. But if it is supposed that the devise in Obannon's will, viz. "I desire that all my just debts be paid," imposes a duty upon the representatives of Obannon against the defendant, of which the statute affords no bar; this supposition is believed not to be correct whenever the duty (as here) is demandable at law. The devise, in such case, it would seem, ought to have no greater or other effect than a promise of payment by the testator in his lifetime; viz. to revive the right of action; and not to create such a trust as would prevent the executor, after the lapse of five years from his qualification, from pleading the statute in bar. For one ground of the statute is the presumption of payment arising from the length of time," &c.

"In this case, the cause of action, which, under our act of Assembly, was purely legal, arose nearly twelve years before the commencement of this suit; and I cannot see why it should not be barred by the statute, unless the plaintiff is to be considered a bond creditor of the defendants."

"3d. If the plaintiff was now coming in with other creditors, for a distribution of the estate of Boucher, he would be considered as standing in the shoes of Whiting, the obligee, or, rather, Whiting, the judgment creditor; and this upon the general rule adopted for the marshalling of assets."

"This is the doctrine laid down in the cases of *Eppes v. Randolph*, (2 Call, 125,) and *Tinsley v. Anderson*, (3 Call, 329). But this doctrine is not applicable, it is believed, in this case, where one innocent

security is seeking contribution from
487 another innocent security. It is unnecessary to say how far this Court would have interfered, if M'Cormack had obtained an assignment of the bond after payment; that has not been done."

"The case of *Parsons & Cole v. Prudock*, 2 Vernon, 608, was a case between the securities in the bond, and the special bail who was considered, by the Court, as

***Equitable Relief—Contribution of Sureties.**—Equity will not compel a surety to contribute, unless it appear that due diligence had been used without effect, to obtain reimbursement from the principal debtor, or that he is insolvent. *McMahon v. Fawcett*, 2 Rand. 581, citing the principal case. The principal case is also cited in *Galt v. Calland*, 7 Leigh, 608.

[†]The sentence here is not finished. The record seems to be incomplete.—Note in Original Edition.

the obligor himself, and on that ground decreed to pay the amount of the judgment to the securities, without contribution on their part. It is, therefore, adjudged, ordered, and decreed, that the bill of the plaintiff be dismissed, but without costs; this being a claim which the administrator might well conceive it his duty to prosecute."

From this decree the plaintiff appealed.

Williams, for the appellant.

No counsel for the appellees.

Thursday, January 7, 1813, the president pronounced the opinion of the Court; "that (not deciding any other point in this cause) the Court is of opinion that it does not appear that due diligence was used to obtain the sum claimed of the principal obligor, Richard Boucher, nor that he was insolvent; and that there is no error in the said decree, which is, therefore, affirmed."

Quarles v. Buford.

Saturday, Dec. 19, 1812.

Office Judgment—Record—Bail Bond.—A clerk's entering and confirming a judgment, at rules, against a defendant, and another person, as "security for his appearance," is not sufficient to make such person liable as appearance bail; but a copy of the bail bond should be inserted in the transcript of the record; for want of which, the judgment should be reversed.

In an action of debt, on a bond, in behalf of John Buford, assignee of John H. Pate & Co., against William Hawes, a judgment was entered, and confirmed, in the clerk's office of Bedford county, against the defendant, "and William Quarles, the security for his appearance," who, thereupon, appealed to the district Court, and, the judgment being there affirmed, again appealed to this Court. The writ was not inserted in the transcript of the record; and it did not appear whether any bail bond was taken.

Tuesday, December 22, the president pronounced the Court's opinion, that both judgments be reversed, "because it does not appear, by the record, that the appellant was bail for the defendant, Hawes; there being no bail bond, (1) nor a copy thereof, which the law requires should be returned with the writ, and filed with the same in the clerk's office."

Roberts v. Jordans.

Thursday, Jan. 7, 1818.

1. **Injunctions.**—The pendency of a bill in equity, in a county Court, after dissolution of an injunction, is no bar to the complainant's obtaining another injunction from the superior Court of chancery.
2. **Same—Judgment at Law—Chancery Practice.**—On a bill of injunction, to stay proceedings on a judgment at law, if it appear from a commissioner's report, not excepted to by the defendant,

***Office Judgment—Record—Bail Bond.**—The judgment was by default for want of appearance, and consequently the writ and bail bond are parts of the record. *Ming v. Gwalkin*, 6 Rand. 551, citing the principal case.

+*See Payne and Fairfax v. Grim*, 2 Munf. 297, and *Hill v. Harvey*, 2 Munf. 525, 526.

†*See Rev. Code*, vol. 1, p. 78, sect. 26; p. 87, sect. 20; and *Rev. Code*, vol. 2, p. 17.

§**Injunctions.**—*See monographic note* on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

¶**Chancery Practice—Decree between Codefendants.**—On this subject the principal case is cited in *foot-note* to *Ould v. Myers*, 23 Gratt. 884; *Blair v. Thompson*,

that the complainant is entitled to a credit which the defendant failed to give, the Court ought not to set aside the order for account, and dismiss the bill, on the ground that the complainant had neglected to carry into effect a previous order referring, by consent of parties, the accounts between them to a different commissioner; but the last order having been made on the defendant's motion, the report being excepted to for want of notice, to the complainant, of the time and place of taking the account, and such exception appearing well founded, a new account ought to be directed to be taken.

3. **Same—Against Assignee of Bond—Dissolution—Decree.**—A Court of equity, having dissolved an injunction against the assignee of a bond, because the payments, for which credits are claimed by the complainant, were made to the obligee after notice of the assignment, ought farther to decree, that the obligee (being a defendant to the bill) do repay the sum so received by him, so soon as the complainant shall have paid the amount of the judgment to the assignee.

The appellant, Joseph Roberts, filed his bill, in the superior Court of chancery, 489 for the Richmond district, "against Reuben Jordan and Benjamin Jordan, for an injunction to stay proceedings on a judgment obtained by Benjamin Jordan, assignee of Reuben Jordan, against him, as surety for a certain Abner Witt, in a bond for 9,000 pounds of tobacco, dated the 13th of January, 1780. The bond was assigned the 20th of September, 1782; and had a credit indorsed of 2,500 pounds of tobacco, received by the assignee the 7th of April, 1784. The credits claimed in the bill, were "for 3,600 pounds of tobacco, received by the said Jordan, on the 8th of August, 1786; for 2,500 pounds of tobacco received by Thomas Millar, attorney at law, September 5, 1785, by virtue of a judgment obtained by one Samuel Ferguson, against the said Witt, upon an order accepted by him, on account of the slave, for the price whereof the bond was given; which order was drawn by the said Jordan; for a hog-head of tobacco, paid by the said Witt to Joseph Tucker; for 1,500 pounds of tobacco, paid by the said Witt to David Shelton, by the direction of the said Jordan; and for 2,500 pounds of tobacco, paid Benjamin Jordan, the 7th of April, 1784."

The answer of Reuben Jordan denied that any payment had been made on account of the said debt, except the quantity of 3,600 pounds of tobacco, settled for, and accounted for, by Benjamin Jordan.

John Jordan, administrator of Benjamin, filed an answer, stating, that he had no knowledge of the allegations in the bill; that the complainant had filed, in the county Court of Amherst, a bill of injunction, to stay proceedings on the judgment now in question; in which bill he stated nearly the same grounds of equity as those stated in the present bill; that the said Benjamin Jordan regularly defended that bill; and that the same was dismissed by the Court of Amherst, after hearing the parties. The respondent relied on the answer filed, by his intestate, to the bill in Amherst Court; and farther set forth, that he always understood, and believed, his intestate was not personally interested in the

11 Gratt. 447; *foot-note* to *Dade v. Madison*, 5 Leigh 401; *monographic note* on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

§**Same—Costs.**—The principal case is cited with approval in *Drake v. Lyons*, 9 Gratt. 57.

¶*See generally, monographic note* on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

collection of the bond, which
490 *was assigned to him merely for the purpose of collecting it more conveniently, as Reuben Jordan (the obligee) did not reside in Virginia; and that the amount, when collected, was to be applied to the payment of a debt due from the said Reuben to the estate of Charles Irving, for which the said Benjamin was agent. "This belief was founded on conversations which the respondent had with his intestate."

A transcript of the proceedings in Amherst county Court was an exhibit, from which it appeared that Reuben Jordan's answer to the bill there filed, was, in substance, the same with his answer in the present case. The answer of Benjamin Jordan stated, that he gave a valuable consideration for the bond before it became due; that, after it became due, he presented it to Abner Witt, "who acknowledged it, and promised payment, and accordingly paid three hogsheads of tobacco, for which credit was given;" and, if he had paid Reuben Jordan any thing, it must have been paid since he knew of the assignment." It did not appear that the bill was dismissed by the county Court; but that, on the 25th of May, 1798, the injunction was there dissolved, a decree rendered for costs, and a motion of the complainant, for an appeal, overruled.

The bill in the superior Court of chancery, was filed in August, 1798, and a new injunction granted.

In October, 1804, by consent of parties, the Court referred the accounts, between them, to one William Crawford. In March, 1805, John Jordan caused the suit to be set for hearing. In March, 1806, on the defendant's motion, the accounts were referred to a commissioner of the Court, who made his report the 6th of October following; on the face of which it appeared, that when a notice, requiring the attendance of the parties, had been issued, but not returned, the commissioner proceeded
491 to *examine and state the accounts, at the instance of the counsel for the defendants. In addition to the credit endorsed on the bond, he allowed the complainant a credit, on the 11th of March, 1783, for 2,100 pounds of tobacco, for which an order was drawn by Benjamin Jordan on Abner Witt, bearing that date, and accepted by him; but rejected the other credits claimed in the bill. To this report the complainant excepted, "because no notice had been given of the time of executing it; or, at least, none appears to have been delivered; and because the credits, to which the evidence entitled him, had not been given." The cause was heard, by Chancellor Taylor, the day after the report came in; though the plaintiff objected, and moved a recommitment; but the hearing appears to have been "on the bill, answers, replication, and exhibits;" (without regarding the report;) whereupon, the chancellor, "setting aside the order for account made in this cause," dismissed the bill, with costs: from which decree an ap-

peal was granted, and writ of supersedeas awarded, by a judge of this Court.

The cause was submitted without argument; and the following opinion of this Court was pronounced by Judge Roane, on Thursday, the 7th of January, 1813.

"The Court is of opinion that the pendency of the suit in the county Court of Amherst, referred to in the answer of the appellee, John Jordan, was no bar to the relief prayed for in the Court of chancery; and that the said decree is erroneous in dismissing the bill; both because there was no notice given to the appellant of the time and place of taking the account, and because it appears, by a report, not excepted to by the appellees, that the appellant was entitled to a credit for 2,100 pounds of tobacco."

Decree reversed, and the cause remanded to the Court of chancery, "with directions to that Court to have an account taken between the parties, on due notice; and if, upon such account; it shall appear
492 that the representatives *of Charles Irving, deceased, have no claim to the debt in controversy, that the injunction be made perpetual as to all payments made either to Reuben or Benjamin Jordan; otherwise, only as to such sum, or sums, as it shall appear had been paid to Reuben Jordan before notice of assignment, or to Benjamin Jordan after, and which have not been credited on the bond, and dissolve the injunction for the balance; and in this latter event, also, to decree, that Reuben Jordan do pay to the appellant any sums received by him after notice of the assignment, so soon as the appellant shall have paid the amount of the judgment at law, or such part thereof as he shall be awarded to pay."

Bowers and Others, Justices of Southampton, v. Millar.

Monday, January 4th, 1818.

Sheriffs—Appointment—Case at Bar.—If two of the persons nominated to the governor by a county Court, have successively been commissioned to execute the office of sheriff in such county, and each has failed to give bond within the time prescribed by law,† the governor, with advice of council, cannot thereupon commission the person who was commissioned in the first instance.

A conditional writ of mandamus, was awarded by the superior Court of Southampton, commanding the members of the county Court to admit James Millar to qualify to his commission, as sheriff of said county, or to show cause wherefore they refused to admit him. The return on the writ was in the following words: "We, Carr Bowers, Jeremiah Cobb, Benjamin Cobb, and Jones Jones, justices of the peace within mentioned, to the honourable the judge of the superior Court of law, for the county of Southampton, do most humbly certify, that it appears to us, from the records of July Court, 1811, that James Millar, Samuel Blunt, and Jacob Darden, gentlemen, were, by that Court, recommended as fit persons to execute the office of Sheriff of Southampton county, for the ensuing year, and that
493 that recommendation *was forwarded to the executive; and it also appears to the Court, from the testimony of Samuel

*Note. This allegation appears to have been incorrect: the only credit given on the bond being for 2,500 pounds of tobacco.—Note in Original Edition.

†See Rev. Code. vol. 1, ch. 80, sect. 3, 4, p. 120.

Kello, clerk of this Court, that, some time in the month of October, 1811, as he believes, he received an envelope, directed to him, covering a commission appointing the said James Millar sheriff, which he put and placed in his office, and was there kept in a conspicuous place for two months, from the date of the said commission; that some time in December, two months having elapsed from the date of the said James Millar's commission, he certified to the executive, the failure of the said James Millar to give bond and security according to law; that some time in the same month, December, he, the said Samuel Kello, received another envelope, directed to him, covering a commission appointing Samuel Blunt to be sheriff of this county, which said commission was dated the 23d day of December, 1811; that that commission was also kept in the office, in a conspicuous place, until the 17th of February, 1812, when James Rochelle, the deputy of the said Samuel Kello, informed him that James Millar had inquired if there was a commission appointing Samuel Blunt to be sheriff; and the said Samuel Kello directed him, the said James Rochelle, to deliver the said commission to him, the said Samuel Blunt; that on the 24th of the month of February, 1812, the said Samuel Kello certified the failure of him, the said Samuel Blunt, to give bond and security according to law; that it also appears to the Court, from the testimony of James Rochelle, deputy clerk of this county, that, on or about the 8th day of March, last past, James Millar handed to him, the said James Rochelle, an envelope, directed to the clerk of Southampton county Court, covering a second commission appointing him, the said James Millar, sheriff of this county, which commission was dated the 19th day of February, 1812; which said commission, the said James Rochelle, handed to the said James Millar. The Court, after hearing the foregoing testimony, and all the circumstances of the case, are of opinion, *that

the second commission, appointing James Millar to be sheriff of this county, had been illegally and improvidently issued, and it is, therefore, void; and for the reasons foregoing, we have refused to admit the said James Millar to qualify as sheriff of this county, under the said second commission," &c.

The superior Court of law adjudged the return insufficient, and awarded a peremptory mandamus; whereupon, the said justices, and Jacob Darden, the competitor for the sheriffalty, (who had appeared in Court, and acknowledged service of the conditional writ,) prayed an appeal to this Court.

Thursday, the 7th of January, 1813, the president pronounced the Court's opinion, "that the sheriff's commission to the appellee, now the subject of controversy, was improvidently issued, and, therefore, void; and, consequently, the mandamus aforesaid, was erroneously awarded."

Judgment reversed, and the mandamus quashed.

495 *Fall v. The Overseers of the Poor of Augusta County.

October, 1811.

1. **Bastardy Proceedings—When Father Liable for Support of Bastard.**—Under the 18th section of the act of 1793, "providing for the poor," &c. a person is not to be bound to support a bastard child, unless it appear that such child has either actually been or is likely to be, chargeable to the parish. And, where the bastard child has never been placed on the parish list, but has been supported without any engagement of the Overseers of the Poor respecting it, the Court is not authorized to enter a retrospective judgment, compelling its alleged father to pay for its previous maintenance.

2. **Same—Evidence—Criminal Intercourse with Other Men.**—If a single woman, having been delivered of a bastard child, on her oath, charge a certain man with being its father, and aver that there is no possibility of her being mistaken; it is competent for the person accused to invalidate her testimony by proving that, about nine months before its birth, she was guilty of criminal intercourse with other men. But if the defendant admit that he, also, had criminal intercourse with her about the same time, such proof may be rejected, and he may be confined to proof of the general character of the mother.

On the 14th of November, 1797, Daniel Fall, of the county of Augusta, was charged, before Jacob Swoope, a justice of the peace for the said county, by Catharine Thyrey, an unmarried woman, with being the father of a bastard child which she had borne. The justice recognised him to appear at the next county Court, and to perform such order as they should then make. The recital of the charge, in the recognisance, was, "Whereas, Catharine Thyrey, of said county, single woman, hath, by her examination, on oath, before me, declared, that on the 15th of January, 1796, last, she was delivered of a bastard child, in the county aforesaid, which is likely to become chargeable to the said county, and hath charged the above-bound Daniel Fall with having gotten her with child; now, if the said Daniel Fall," &c. The defendant appeared accordingly, and the recognisance was continued from term to term until the August Court, 1798, when his counsel filed a plea in bar, setting forth that he had appeared on the 17th of August, and 18th of October, 1796, in pursuance of recognisances successively obtained against him, at the instance of the same woman, and for the same offence, and in each instance had been discharged by the Court. The counsel for the Overseers of the Poor, filed a replication, stating that the defendant was not, in either case, discharged on hearing, or on the merits of the cause, but, in the first instance, for irregularity in the recognisance, and, in the second, for want of prosecution, which he averred was no legal discharge. The Court overruled the plea, and continued the cause.

496 *At November term, 1798, the defendant filed another plea, that Cath-

***Bastardy Proceedings—When Father Liable for Support of Bastard.**—A person accused of being the father of a bastard child, cannot lawfully be bound to support such child without a written charge before the magistrate by its mother; nor unless it appears that the warrant was issued by the magistrate upon the application of the overseers of the poor, or one of them or that they, or one of them, were parties to the cause in court, making the order against such person. *Mann v. Com.*, 6 Munf. 452, citing the principal case. See further, monographic note on "Parent and Child" appended to *Armstrong v. Stone*, 9 Gratt. 102.

arine Thyrey had lately intermarried with a certain John Wikle, "who is fully able to maintain her, and her said child, so that the said child is neither likely, nor is, or ever hath been, chargeable to said county," &c. To this plea the Overseers, by their counsel, demurred; but, on argument, the Court overruled the demurrer, and, adjudging the plea good, discharged the defendant. Upon an appeal to the district Court of Staunton, at September term, 1800, the decision of the county Court was reversed, and their proceedings annulled, as far back as the continuance in October, 1798; and the cause was remanded for further proceedings. The trial came on in February, 1802, "when, it appearing to the county Court that the said Fall was guilty of the charge alleged against him, in his recognisance, it was ordered that he be bound in a recognisance, with security, for the payment of three hundred dollars, according to law, to wit, thirty-three dollars and thirty-three cents and a third, annually, from the 15th day of January, 1796, (that being the time of the birth of Hannah Thyrey, the child referred to in the said recognisance,) until she shall arrive at the age of nine years; and it appearing to the said Court that six years of the time had already elapsed, it was ordered that he pay the instalments then due on the first of June ensuing, and the other three, in order, as they should respectively become due; provided that future expenses should be necessarily incurred." The defendant had offered evidence "to prove that the mother of the bastard child, in and about nine months before its birth, was guilty of criminal commerce with other men, as well to prove that he was not the father, as to invalidate the evidence of the mother, who was the only witness to prove him to be the father, and who swore that there was no possibility of her being mistaken that he was really the father; to which evidence, the attorney for the Overseers of the Poor, objected, alleging that such examination

might criminate persons not before the Court, and *that no particular facts ought to be proved; whereupon the Court rejected that evidence; but determined that the defendant might examine witnesses to prove her general character as to virtue or truth, and, also, might prove any conversation that she had made use of, wherein she contradicted herself; but that no particular facts of criminal commerce should be proved." To this opinion of the Court the defendant excepted, and, also, objected to the judgment above mentioned, because, in his opinion, it was too unlimited, and because it put it in the power of the Overseers of the Poor to draw from him the sum of 200 dollars for the time which had elapsed since the birth of the child, during which, it was acknowledged, it had never been taken on the parish list, but had been supported by the father of its mother, without any engagement, being proved to the Court, of the Overseers to pay him therefor. But the Court overruled the objection, being of opinion that the Overseers had a right to make a reasonable compensation for the maintenance of the child heretofore, al-

though not taken on the parish list, and to call upon the said Fall therefore, out of the first instalments, payable in June as aforesaid. The defendant again excepted, and appealed from the judgment to the district Court, which, in April, 1803, affirmed it, and remanded the cause, with directions, that a recognisance should be taken agreeably thereto.

The recognisance was accordingly taken, but the defendant refused to pay any of the instalments. Whereupon a notice was given, and motion made, by William Patrick, president of the Overseers, in October, 1804, for a judgment against him for the sum of 266 dollars and 66 cents, with interest from the time each payment ought to have been made, until paid; that being the amount of eight years maintenance of the child, at the rate of 33 dollars and 33½ cents per annum. At the hearing of the motion, the plaintiff withdrew it as to two instalments, and insisted only for the sum due for the first six years, which had been ordered to be paid on the 1st day of June, 1802, and to leave the balance subject to a future investigation. The Court gave judgment for 200 dollars, with interest thereon, to be computed after the rate of five per centum per annum, from the 1st day of June, 1802, until payment, and costs. The defendant appealed to the district Court, which, in April, 1805, reversed the judgment, on the ground that interest ought not to have been charged against him; but entered another for the principal sum of 200 dollars, and the costs expended in the county Court. The appellant filed a bill of exceptions to the opinion of the district Court, setting forth that his counsel moved the said Court to send the cause back to the county Court, there to be further proceeded in, "alleging that he wished to defend the motion by showing that neither the parish of Augusta, nor the Overseers of that county, on their behalf, had ever incurred one cent of cost, for the maintenance of said child, from its birth until the present time; and that it was proper for such a defence to be made and inquired into before the county Court alone; but that, if the district Court thought the case, after reversal, could be retained for a trial and hearing on the merits, he offered evidence to the said Court, to wit, the clerk of the board of Overseers of the Poor of Augusta, and the books and records of the proceedings of that body, to show that the said child never had been a parish charge, and that neither the parish of Augusta, nor the Overseers of the Poor of that parish, or county, ever had incurred a cent of charge for the maintenance of said child from its birth until this day; but the Court (without deciding whether the Court could hear evidence of the above kind, or could retain the cause for that purpose) rejected the application to send the cause back to the county Court, or to hear the evidence aforesaid, being of opinion that the question was closed by the decision of the county Court of the 23d day of February, 1802, recognising the appellant; which decision had been affirmed in the said district Court on the 12th day of April, 1803, and that,

499 therefore, "such evidence would be improper either before the county Court, or the said district Court."

The appellant obtained a writ of supersedeas, on the 1st of July, 1807, from a judge of this Court, to both the judgments.

Chapman Johnson, for the plaintiff in error, assigned, in the petition for the supersedeas, the following reasons for reversing the judgments:

The first affirmance in the district Court was wrong; because the proceedings affirmed were erroneous in three things:

1st. It was error in the county Court to overrule a plea, to which there was a replication, on which no issue was taken, and on which no jury had passed. If the plea were improper, they ought to have rejected it; if insufficient, there should have been a demurrer; but being admitted proper and sufficient by the replication, that replication should have been tried in legal form. It will be remarked, that the district Court, in their first reversal, have left these pleadings untouched; so that they now constitute a part of the proceedings on which the second judgment of the county Court is founded.

2dly. It was error to reject the testimony offered by Fall. Though it is admitted to be true, as a general rule, that you must impeach a witness's credit by evidence of general reputation, yet it is as certainly true that you may impeach it by contradicting any particular fact stated, on oath, in the testimony of the witness. Now, is not evidence of carnal intercourse with other men, about the time of conception, conclusive to show that the witness has not sworn correctly, when she says that it is impossible for any other man to have been the father of her child?

And, 3dly. It was error to bind the defendant to pay 200 dollars to the overseers of the poor, when the parish had not encountered, and were not legally bound to encounter, a farthing of expense. The

500 act of Assembly, on "this subject, is intended solely for the indemnification of the parish, and is entirely prospective. That this law is intended entirely for the indemnification of the parish, is seen from many circumstances. The act in which the law is contained, is, "an act providing for the poor, and declaring who shall be deemed vagrants." The overseers of the poor are solely entrusted with its execution; they are authorized to act only when a child is "chargeable, or likely to become chargeable, to the county." The Court are only authorized to bind the father for maintenance, when they shall adjudge the child "likely to become chargeable to the county, and for such time as such child is likely to become chargeable to the county, and no longer." All these quotations from the law, and its title, show, most conclusively, that the indemnity of the parish is the only object of the law. A part of them shows, too, the law is only prospective, and that the Court have only a power to provide for future expenses. Whether future or past, though, is immaterial here, because there had been none previous to the judgment. If, then, the indemnity of the parish be the only

object of the law, it is surely a prostitution of it to use it for the purpose of enriching the overseers, or a prostitution of the overseers, to use them as the mere vehicle to retribute or revenge the mother of the child, or her father.

Another objection might be made to this part of the proceedings of the county Court, if another were necessary. By the recognisance, it does not appear that your petitioner was charged with being the father of this child: and the Court only adjudge him guilty of the charge alleged against him in the recognisance.

The last judgment of the district Court is erroneous, because, after reversing the judgment of the county Court, they had no evidence whatever on which to render their judgment, except the evidence of the recognisance, and the refusal to pay the instalments. Now, we say that it is competent for a Court, on motion for payment of the instalments, to hear evidence that there is no occasion for

501 "the use of these instalments. On a motion, the Court will hear equitable as well as legal proof. This recognisance, being taken for the indemnity of the parish, ought not to be used but for that purpose. If the parish have expended nothing, contracted for nothing, can they want an indemnity? Suppose the child had died, immediately after the judgment of the Court, would not this have been proper evidence on a motion for future instalments? and would the Court have ordered payment, after hearing this evidence? The only effect of this evidence is, to show that the parish do not want the money. Then, why shall not the same thing be shown by other evidence, on a motion for other instalments? It is said that the former judgment of the Court had decided that point. The former judgment could not have decided it, because that judgment does expressly admit that no expense has been incurred, but makes the appropriation of money upon the hypothesis, that overseers were at liberty yet to incur expense for former maintenance. Then, ought it not to have been shown that they had incurred this expense before they demanded the money? Suppose they had recovered the money first, and then refused to make any compensation for former maintenance; who could have maintained a suit against them?

But if the first affirmance of the district Court was wrong, their last judgment, which is founded on it, must be wrong also, and both must be reversed together.

November 23d, 1813, the judges pronounced their opinions.

JUDGE BROOKE. It is unnecessary to notice all the points that were made in this case. The judgment of the district Court, rendered on the 12th day of April, 1803, as well as the succeeding one, rendered in 1805, are both within the time limited by law for granting writs of error and supersedeas, and, of consequence, are regular before the Court. The validity 502 of the first "judgment depends on the correctness of the judgment of the county Court, which it affirms. I admit that judgments of the county Courts, upon

summary proceedings, ought to be construed liberally; and I am willing, by fair inference from what is expressed therein, to make such deductions as will make them conform to the particular statute upon which they are rendered. Yet I think there is error in the judgment now in question, in this, that it is not expressly, nor by inference, adjudged by the Court that the bastard child was likely to become chargeable to the parish; which appears to me to be, by the act of Assembly on which the prosecution is founded, a preliminary step to any farther proceedings against the defendant, on the charge exhibited against him. A second objection to that judgment is founded on its retrospective character, by which it is made to comprehend several years preceding the commencement of the prosecution, which, (though, under some circumstances, it might be correct, as to which I shall not now give any opinion,) under the circumstances disclosed in the second bill of exceptions, I think entirely inadmissible. It is there admitted that the bastard child had never been placed on the parish lists, but, on the contrary, had been supported by the father of its mother, without any engagement of the Overseers of the Poor respecting it. The evidence offered by the defendant, and which is stated in the first bill of exceptions, (though, according to the view I have taken, it is not material to notice,) I am inclined to think was rightfully rejected by the county Court; for, though proof that the mother of the bastard child had had criminal intercourse with other men, nine months preceding its birth, might weaken the evidence of the mother, who swore that the defendant was the father of the bastard child, by rendering it possible that she was mistaken; and though, generally, such evidence, according to the decision in the case of *Da Costa v. Jones*, reported in *Cowper*, (that indecent evidence affecting the feelings of third persons,) may be resorted to in cases in 503 which a civil or a criminal right is to be tried; yet, as it seems to be admitted, by the terms of the bill of exceptions, that the defendant, also, had had criminal intercourse with her about the same time, it was correct to confine the defendant to proof of the general character of the mother.

The judgment of the district Court, first mentioned, I am of opinion, for the reasons stated, ought to be reversed, and the second judgment, being founded on that, and partaking of some of its errors, ought also to be reversed, and judgment entered for the defendant.

JUDGE ROANE. The judgment of the district Court, of the 12th of April, 1803, being embraced by the supersedeas now before us, which issued within five years from the time of the rendition thereof, and that judgment having affirmed the judgment of the county Court, of February 22d, 1802, the affirmed judgment is also subjected to the power of this Court; although, otherwise, it would have been exempted, by reason of its antiquity. If that judgment shall be found to be erroneous, and be reversed, it will be unnecessary to inquire

into the legality of the subsequent proceedings, which will consequently fall to the ground.

That judgment is compounded of two parts; the first relating to the past time, and the second in relation to the future instalments of the charge supposed necessary for the support of the bastard.

As to the first part of that judgment, while it was conceded by the Court that the bastard had not, in fact, been supported by the county, and that no binding engagements had been entered into for that purpose, the Court deemed itself at liberty to impose the charge by way of retrospect, and to coerce the money from the appellant, when, for any thing appearing in the cause, the overseers were not compellable to pay it over for the support of the child. This appears to me to be a misconstruction of the act. That act relates only to cases in which the bastard is

chargeable, *to the county, and not to cases in which the child is neither actually sustained by the county, nor has any contract been incurred by it for that purpose. The power of the Court is only coeval with the commencement of the charge, and does not precede it. On this ground, then, the judgment is erroneous, and must be reversed; and it appearing, from the case exhibited, that no judgment ought to be rendered for the appellees, as to the previous time, the case would end here, were it not for that part of the judgment which relates to the future instalments, as to which the power of the Court not being precluded by any statement of facts proved or agreed in the case, the cause, on reversal, either for the vice of the first part of the judgment just noticed, or for error in the judgment of the Court, in the proceedings, to the injury of the appellant, will go back to be proceeded in as to such future instalments. It is here to be remarked, that, although, in the subsequent motion on the recognisance, made in the county Court, October 25th, 1804, a judgment for the future instalments is waived as at the time, yet the right to move therefore, in future, is expressly reserved. There is, consequently, a subsisting judgment as to them, which it is necessary for this Court to act upon: and this brings us to the case made by the first bill of exceptions.

It appears from that bill that, in a case in which the appellees charge, and put in issue, the fact of the appellant's being the father of the bastard, and in which this fact was proved by the oath of the mother only, who also swore that there was no possibility of her being mistaken in that particular, the appellant was prohibited from proving that, about nine months previous to the birth of the child, she had carnal connexion with other men. This decision of the Court was founded on the principle (as I infer from the bill) that that evidence might criminate persons not before the Court, and that no particular facts ought to be proved against the witness.

As to the last of these principles, 505 it is, undoubtedly, a *general rule of

evidence, that you can examine only as to the general character of a witness, and not to particular facts; on the ground that every one is supposed capable of supporting the one, but it is not likely that he is prepared to answer the other without notice. (a) It is an exception to this rule, however, that in all cases in which the general character or behaviour is put in issue, evidence of particular facts may be admitted; for whatever is material to the issue, each party must come prepared to prove, or to deny. (b) Thus, in actions of crim. con., the defendant may give evidence of particular facts of the wife's adultery with others; for, by bringing the action, the husband puts her general character in issue. (c) In the case where the character is put in issue, that character is not incidentally and collaterally brought in question, as is generally the case with respect to witnesses; and, therefore, there is no incompetency supposed to exist to repel the charges which may be brought against it.

In the case before us, the general character of the witness, the mother of the child, is emphatically put in issue. The appellees affirm that she had no commerce with another man, so as that that other man might have been the father; and the appellant ought not to suffer, if another man was, or might have been, the father of the child. You, therefore, prevent his disproving the averment of the appellees, and condemn him unheard, unless you permit him to show that another man was, or might have been, the father. The very point in issue, and the only point, was, whether he, or another, was the father of the child: and the appellant had no means of falsifying the charge brought against him, but by exhibiting the testimony which the Court rejected. As it is, in most cases, impossible for the party charged to prove, negatively, that he was not the father of the child, the rejection of the evidence, in question, would operate in all cases to promote injustice: it would be to put a charge in issue against a man, and deprive him of the only possible

506 means of "showing its falsity. Besides, that evidence seems legalized, if not called for, by the allegation of the witness, that it was impossible for any other person than the appellant to have been the father of the child.

Whatever protection the law allows a party in repelling particular charges against the character of his witnesses, when only collaterally brought in question, there is no rule of evidence which prohibits a party from showing the falsity of a fact, stated on oath by a witness, and tending to operate to his injury.

The other ground of the opinion of the Court, rejecting the testimony in question, was, that it is unjust and improper to criminate third persons by the introduction of such testimony; meaning (I presume) the persons alleged to have had carnal connexion with the mother. It is true that the characters or feelings of third persons

are neither to be sported with in a Court of justice, nor shall indecent evidence be introduced without necessity; but, where either the one or the other becomes necessary to effectuate the purposes of justice, it must be submitted to, as the lesser of evils. This doctrine, in all its parts, is explicitly and forcibly laid down by the English Court of king's bench, in the case of *Da Costa v. Jones*, Cowp. 729.

But it is supposed that this judgment, even in relation to the future instalments, is not sustainable; because the act requires, as a preliminary, that the Court should be satisfied that the party charged is the father of the bastard, and that such bastard is likely to become chargeable to the county; which last fact, it is also supposed, is not stated as the ground and foundation of this judgment. I conceive this to be incorrect. The judgment of the Court is based upon the averment, that "it appeared to the Court that the appellant is guilty of the charge alleged against him in the recognisance;" and that charge, when the recognisance is inspected, is found to be, that the appellant got the party complaining with child, "which

507 child is likely to become chargeable to the county." *Unless the charge be thus conjunctly considered, it amounts to nothing but a charge of getting her with child, which, standing singly, might be incompetent to give cognizance to the Court. Admit, however, that we were at liberty to separate and garble this charge, it ought not to be done; as every construction should be adopted to support, rather than reverse, the judgments of the Courts below. The judgment, in this case, therefore, affirms all those facts, (by referring to the recognisance,) which are necessary to give the county Court complete jurisdiction: and, therefore, the question does not arise, in this case, whether such an affirmation in the judgment be absolutely necessary. Without going at all into that question, at present, the case of *Preston v. The Auditor*, 1 Call, 475, is a conclusive authority that a general averment, that the necessary facts appeared to the Court, is sufficient. While this general averment in the case before us is afterwards annihilated, and done away, in relation to the previous instalments, by the particular facts, inconsistent therewith, agreed between the parties, it remains in full force as to the subsequent instalments. There is not, therefore, a vice, in this part of the judgment, which should extinguish and destroy it altogether.

My opinion, therefore, is, that the Court erred in giving judgment at all in relation to the previous instalments, for the reasons stated, and erred, to the appellant's injury, in disallowing the rejected testimony: and that the judgment be reversed, and the cause remanded, to be proceeded in, in relation to the future instalments; in which future proceeding, the rejected evidence ought to be admitted.

JUDGE FLEMING. Deeming it unnecessary, in this case, to consider whether evidence tending to criminate a person, not before the Court, be admissible

(a) Esp. N. P. 790.

(b) Ibid. 788, 790.

(c) Ibid. 788.

or not, my opinion is formed on other grounds.

It is an uncontroverted principle of law, that, in all prosecutions on penal statutes, the strict letter of the law
508 *must be pursued, and nothing admitted by inference, or implication; the proceedings in the prosecution before us, then, are erroneous from their foundation.

In an act "providing for the poor," &c. passed the 26th of December, 1792, sect. 18, it is enacted, that "if any single woman, not being a servant or slave, shall be delivered of a bastard child, which shall be chargeable, or likely to become chargeable, to any county, and shall, upon examination before any justice of the peace, of the county, to be taken in writing, upon oath, charge any person, not being a servant, with being the father of such bastard child, it shall and may be lawful for any justice of the peace of the 'county,' wherein the person so charged shall be a resident, or inhabitant, upon application made to him, by the Overseers of the Poor, or any one of them, of the county wherein such child shall be born, to issue his warrant for the immediate apprehending of the person so charged as aforesaid," (to wit, with being the father of such bastard child,) "and for bringing him before such justice, or before any other justice of the county," &c. &c.

It appears from the record, that the recognisance, under which the present prosecution is carried on, is the third he has been compelled to enter into for the same cause; the first of which was dismissed on the 17th of August, 1796, the Court being of opinion that the recognisance was improperly taken. On a second prosecution, for the same alleged offence, the said appellant, Fall, appeared in Augusta county Court, on the 18th of October, 1796, "in discharge of his recognisance, entered into at the instance of the Overseers of the Poor; and no person appearing to prosecute, the said Fall is discharged." Thus the matter rested, until the month of November, 1797, when he was carried before Mr. Justice Swoope, and compelled to enter into a third recognisance, in which the justice states, "that Catharine Thyrey, of the said county, single woman, hath, by her examination, on oath, before me, declared, that on the 15th day of January, *1796, last, she was delivered of
509 a bastard child, in the county aforesaid, which is likely to become chargeable to the said county, and hath charged the above-bound Daniel Fall, with having gotten her with child; now, if," &c.: which he might have done a dozen times, and not have been liable to this prosecution; inasmuch as it is not stated that the woman ever charged him with being the father of the child aforesaid, born on the 15th of January, 1796, which the law expressly requires, to authorize a prosecution, by the Overseers of the Poor, on that statute; and, in my apprehension, no subsequent proceedings have cured, or can cure, this radical defect in the prosecution. It is a well-settled rule of law, and has been often decided by this Court, that, in

common civil suits, the plaintiff must show, by averment in the declaration, a just cause of action, or it will be error, even after verdict and judgment. (a) How much more forcibly does the rule apply, in criminal prosecutions, under a penal statute? The law being explicit in requiring a direct charge, upon oath, that the delinquent is the father of such bastard child, before a prosecution can be legally commenced; and there being no such charge in the whole record, I am clearly of opinion, that the judgments in both Courts are erroneous, and ought to be reversed, and the whole proceedings quashed, and judgment entered for the defendant.

510 *Coleman and Wife v. Holladay.

Monday, Dec. 7th, 1812.

Trust Deed—Construction—Case at Bar.—A tract of land was conveyed, in trust, "to I. L., his heirs and assigns forever, to the use of the grantor during her natural life, and, after her death, to the use of her son, L. L., and his heirs and assigns forever; but her said son to possess, as soon as he should arrive at full age, a certain part thereof; her intended husband to have the use of the remaining part during his life, or until he should marry, after her death, and no longer; and if the said L. L. should die before he arrived at the age of twenty-one years, or if he should die without child, or children, the said trustee, his heirs and assigns, to hold the said lands to the use of the grantor's daughter, M. L., and her heirs and assigns forever." It was decided, that L. L., the son, was seised in fee, of the lands conveyed by the deed, from the date thereof, (subject to the reservations and exceptions in favour of the grantor and her intended husband,) with a right to take possession of part, on attaining the age of twenty-one years; which estate in fee was subject to be defeated by his dying under age, and without a child; but that the concurrence of both these contingencies was necessary to defeat that estate; and, therefore, it appearing that L. L. did attain the age of twenty-one years, though he afterwards died without any child, that no right accrued to the daughter, under the deed.

This was an appeal from a judgment of the district Court of Fredericksburg, in an action of ejectment; upon a special verdict, finding "that Betty Littlepage, now Betty Holladay, the now wife of Lewis Holladay, the defendant, was, on the 14th of March, 1774, seised in her demesne, as of fee, in the lands and premises in the declaration mentioned, and being so seised, did, on the same day and year, by her certain indenture of trust, convey the same to John Lewis, his heirs and assigns, for certain uses and trusts therein mentioned; whereupon the said John Lewis entered into the said lands and premises, and was thereof seised and possessed as the law requireth, which indenture was admitted to record in the general Court the 9th of December, 1783; that the said Lewis Holladay had notice thereof on the day when it was executed; that soon after the execution of the said indenture, a marriage took effect between the said Lewis Holladay and Betty Littlepage, who was living at the time of finding this special verdict; that Mary Littlepage, (the daughter mentioned in the said indenture of trust,) one of the lessors of the plaintiff, intermarried with Robert S. Coleman, the

(a) See Moore's administrator v. Dawney, 3 H. & M. 137, Lomax v. Hord, *ibid.* 271; Gordon and others v. Browne's executor, *ibid.* 219, and many other cases.

other lessor of the plaintiff, prior to the institution of this suit; that Lewis Littlepage (the son in the same indenture mentioned) having attained the age of twenty-one years, died, without ever having had a child; that John Lewis, the trustee, departed this life prior to the institution of this suit; *that the defendant,

511 Lewis Holladay, and Betty, his wife, by their certain indenture of bargain and sale, bearing date the 15th of June, 1778, conveyed the land in question to Joseph Holladay, (who was a subscribing witness to the said indenture of trust, and had full notice thereof,) to him, his heirs and assigns forever; that Joseph Holladay departed this life, having first duly made and published his last will and testament in writing, whereby he directed the lands in question to be sold by his executors; that the defendant, Lewis Holladay, one of the executors therein mentioned, alone proved the same, and took upon himself the burthen of the execution thereof; that he, as 'executor' of Joseph Holladay, by indenture of bargain and sale, dated the 1st of May, 1798, conveyed the said land to Benjamin Holladay, who was one of the devisees under the said will; and the said Benjamin Holladay, by his indenture of bargain and sale, dated the 28th of November, 1799, conveyed the same to the said Lewis Holladay, the defendant."

The deeds and wills above mentioned were found, by the jury, in hæc verba. The deed of trust from Betty Holladay to John Lewis, (after reciting that the said Betty had two children, to wit, a son named Lewis, and a daughter named Mary, for whom she intended to make some provision, and that a marriage was shortly to be solemnized between the said Betty and Lewis Holladay,) witnessed that, "for, and in consideration of the premises, &c. she conveyed the land, &c. to the said John Lewis, his heirs and assigns forever, to the use of the said Betty during her natural life, and after her death to the use of her son, Lewis Littlepage, and his heirs and assigns forever; but her said son to possess, as soon as he arrived of full age, that part of the said land that lies on the east side of East North East River; her said intended husband to have the use of the remaining part of her said land, during his life, or till he should marry, after her death, and no longer: and if

512 the said Lewis Littlepage *should die before he arrived to the age of twenty-one years, or if he should die without child or children, the said John Lewis, his heirs and assigns, were to hold the said lands to the use of the said Mary Littlepage, and her heirs and assigns forever."

The district Court, on this verdict, entered judgment for the defendant.

Warden and Williams, for the appellants.
Call and Wickham, for the appellee.

On the part of the appellants, it was contended, that Mary Littlepage was entitled to the land, under the limitations in the deed of trust; Lewis Littlepage having died without any child, though after attaining the age of twenty-one years.

Saturday, March 6th, 1813, the president

pronounced the following opinion of the Court.

The Court is of opinion that Lewis Littlepage, in the special verdict mentioned, was seized in fee of the land conveyed in and by the deed of trust therein contained, from and after the time of the execution thereof, subject, nevertheless, to the reservations and exceptions therein contained, in favour of Betty Littlepage, the grantor, and Lewis Holladay, her then intended husband; and that, upon the said Lewis Littlepage's attaining his age of twenty-one years, he was also entitled to the possession of a part thereof; but that the said estate was subject to be defeated, in favour of the female appellant, by the said Lewis Littlepage's dying under the age of twenty-one years, and without a child, or children, which not being the case, as he is found to have attained the said age, the Court is further of opinion, that no right accrued to the appellants under the deed aforesaid; and that the judgment of the district Court is correct,

and should be affirmed; but this decision is not to affect any right *which the said appellants, or either of them, may have to the land in controversy, in case they can show themselves entitled thereto as heir, or devisee, of the said Lewis Littlepage; which are facts, not sufficiently appearing in this case, in which the appellants profess to claim only under the limitations of the deed aforesaid.

Bowden, Executor of Moore, v. Taggart.

Argued, Nov. 28th, 1811.

Administrator—Action of Debt.—An administrator may declare in the debt and detinet on a bond executed to himself as such, and his executor, or administrator, has a right to bring an action upon it.

William Bowden, executor of Robert Moore, who was administrator of John M'Murray, brought an action of debt in the county Court of Prince Edward, against John Taggart, on a bond which was stated in the declaration to have been executed "to the said Robert Moore, as administrator of John M'Murray." The defendant pleaded payment, but, a verdict being found against him, moved in arrest of judgment on the ground that the plaintiff, as executor, had no right to recover a debt which was due to his testator, in his character of administrator. The county Court was of opinion that the law was for the defendant, and their judgment was affirmed by the superior Court of law; whereupon the plaintiff obtained a writ of supersedeas from a judge of this Court.

George K. Taylor, for the plaintiff.

There can be no doubt that the judgment is erroneous. The bond having been executed to Robert Moore, there can be no

***Administrator—Action of Debt.**—See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

Same—Bond for Sale of Personalty—Effect.—When an administrator sells personal property of his intestate, and takes bonds therefor, this is a conversion of the assets of the estate and he becomes liable as administrator to account for the amount of sales, the bonds become his individual property, and pass to his administrators on his death. Estlin v. McClintic, 1 W. Va. 409, citing principal case and Wernick v. McMurdo, 5 Rand. 81.

doubt that his executor was entitled to sue upon it. (a) The circumstance that it was given to him as an administrator, makes no difference, for the bond was his own property, and he was responsible to the estate of his intestate. Besides, the consideration of the *bond was mere surplusage, being not necessary to be stated in the declaration. (b)

No counsel appeared for the defendant.

Saturday, January 9th, 1813, the president pronounced the opinion of the Court, that the obligation, on which this suit was brought, not appearing to be an original credit of the intestate, John M'Murray, but taken and made payable to the testator of the plaintiff, and on which he could have maintained an action, in the debt and detinet, as for his own credit, that right of action, therefore, devolved on the plaintiff, as his executor, who was, therefore, competent to maintain this suit. The judgments of both the Courts below were, therefore, reversed, and judgment entered for the plaintiff upon the bond.

Foster and Wife, and Others v. Crenshaw's Executors.

Argued Nov. 23d. 1810, and reargued
Sept. 20th. 1811.

1. **Debts of Decedent—Liability for—Lands Devised.***—Lands devised (without any specific charge by will or deed) ought not to be charged in equity to satisfy a bond debt of the devisor, until the personal estate is exhausted, including a remainder in slaves, expectant upon an estate for the life of the testator's widow.

2. **Joint Bond—Judgment against One Obligor—Charging Other Obligor in Equity—Parties.**—A judgment at law being obtained against one of two obligors, in a joint and several bond, and no proceedings to enforce it appearing, a Court of equity ought not to charge the lands of the other obligor, in possession of his devisees, without having made the obligor, against whom the judgment was rendered, or his representatives, parties to the suit.

(a) 1 Esp. N. P. 217.

(b) 1 Wash. 260. Peter v. Cocke.

***Debts of Decedent—Personalty Primarily Liable.**—It is a well-settled rule of equity courts almost universally recognized that the personal estate of the deceased is the natural and primary fund for the payment of the debts; and the lands will not be charged without first taking an account of such personal estate and directing it to be applied to that object: thus, it is error for the court to charge the proceeds of the sale of land with the debts of the intestate, without first taking an account of the entire personal estate which comes to the hands of the administrator, and directing its application to the discharge of such debts. Elliott v. George, 28 Gratt. 788, citing the principal case as authority. For further information on this point, see monographic notes on "Debts of Decedents" appended to Shores v. Wares, 1 Rob. 1, and "Marshaling Assets" appended to Carrington v. Didier, 8 Gratt. 260.

Judgment against Personal Representative—Heirs Not Parties—Effect.—A judgment (by default at least) against a personal representative in a suit to which the heirs or devisees of the decedent are not parties, it is not evidence against such heirs or devisees in a suit or proceeding by the creditor to subject the real estate, descended or devised, to the payment of the debt; and the reason assigned is, that there is no privity between the representative and such heirs or devisees. It was so held by this court at an early day (1810) in Mason v. Peter, 1 Munf. 437, and the decision has been since repeatedly recognized as authority. Brewis v. Lawson, 76 Va. 40, citing among others, the principal case. To the point that a judgment against a personal representative is no evidence against the heirs or devisees of the real estate—because there is no privity between the personal representative and the party to whom the real estate has descended or been devised—the principal case is also cited in Laidley v. Kline, 8 W. Va. 280; Bank v. Good, 21 W. Va. 462; foot-note to Mason v. Peter, 1 Munf. 437; foot-note to Robertson v. Wright, 17 Gratt. 586.

3. **Chancery Practice—Debts of Decedent—Apportionment of Burden.**—When lands, held by several devisees in the same will, are charged in equity to satisfy a bond debt of the devisor, the decree should be against the lands of all the devisees, (or the money received, or claimed, in lieu thereof,) in ratable proportions, and not against the land of one only, with liberty to that one to sue the others for contribution.

The appellees filed their bill in the late high Court of chancery, against the executors and devisees of John Shelton, deceased; (praying, also, that the representatives of John Pendleton, deceased, 515 "if it should appear *necessary," should be made defendants;) setting forth that on the 25th day of November, 1782, John Shelton and John Pendleton, bound themselves and their heirs, to Charles Crenshaw, in the penal sum of 2,000l. in gold or silver, conditioned for the delivery of certain negro slaves; that a suit being instituted thereon in the district of Henrico, against the said Shelton and Pendleton, judgment was rendered against the said Pendleton, at the September term, in the year 1799, for 659l. 1s. 6d., by way of damages; that the said suit abated as to the said Shelton, who departed this life some time in the year 1798, having, by his last will, devised and bequeathed a considerable real and personal estate to Anne Shelton, his widow, and to his children and co-heirs, Walter, John, Alexander, Turner, Harriet, and Edwin, Shelton, and appointed the said Anne Shelton his executrix, and Henry Toller, James Parker, and Edward Winston, executors; "that all, or some, of the said executors, but especially the said Anne Shelton, have taken possession of the personal estate of the said John Shelton, deceased, and pretend that there is not a sufficiency thereof for the discharge of the bond aforesaid; that they are endeavouring to throw the burden of the said bond on the estate of the said John Pendleton, who is, also, dead, and whose property is greatly embarrassed; that the said Anne Shelton has wilfully sold the property of her said testator at an under value, and caused it to be purchased for the benefit of herself, or of her children; and that there are several tracts of land belonging to the devisees aforesaid, under the last will aforesaid, which are liable to the bond aforesaid; it being, in truth, immaterial, as to the satisfaction thereof, whether the personal estate be, or be not, sufficient." The prayer of the bill, therefore, was, that the executors of John Shelton be compelled to discharge the bond out of the assets in their hands, or account for the same, so as not to obstruct or delay the direct remedy against the lands; that a statement be rendered, by the 516 devisees, of the various *tracts or parcels of land devised to them; and that the said lands be sold for the satisfaction of the bond aforesaid.

†**Chancery Practice—Debts of Decedent—Apportionment of Burden in First Instance.**—To the point that the lands of all the devisees should bear their ratable portion of the debts of the decedent in the first instance, instead of decreeing against one, and turning him around upon the others for contribution, the principal case is cited in Ryan v. McLeod, 83 Gratt. 374. See further monographic note on "Marshaling Assets" appended to Carrington v. Didier, 8 Gratt. 260. The principal case is also cited in Whitlock v. Gordon, 1 Va. Dec. 249.

Anne Shelton, (who afterwards became the wife of the appellant, Foster,) by her answer, averred, that she had never qualified as executrix; that no part of the personal estate of the testator ever came to her hands, except a small quantity of household furniture, and some few plantation utensils, (among which was a wheat fan,) and a stock of 30 or 40 hogs, all of which (except the wheat fan, which she sold for eight dollars, and the furniture, which remained in her possession) were sold since the death of the testator, under executions against his property. She further stated, that a number of negroes, belonging to the said John Shelton, were sold during his lifetime, under execution, and purchased, on the 20th of September, 1797, for her benefit, and paid for by Stephen Southall, with money which he held as her trustee under the will of her father, Turner Southall; that, at the same time, the said Stephen purchased for her six beds and furniture, which were sold to satisfy taxes and fees due from the said John Shelton; that, in his lifetime, the said John Shelton conveyed to a trustee, for her benefit, during her life, certain negroes, (some of whom were part of those before mentioned,) with their future increase, in consideration of her relinquishing her right of dower in certain tracts of land, as mentioned in the conveyance, which was exhibited; that, on the 3d of November, 1798, (after his death,) a negro woman was sold to satisfy an execution in favour of Nathaniel Pope, and sundry other specified articles were sold to satisfy an execution in favour of Cochran's executors, which executions were issued and levied during his life; that the property so sold was purchased by James and John Parkers, who suffered this defendant to take it, upon her advancing, out of her own funds, the money they had given for it; that the only real property which this defendant held under the

517 will of the said John Shelton, "was a tract of land in Hanover county, devised to her for life, 'on her paying her son, Walter Shelton, fifteen pounds annually, to the amount of 210l.;' which sum she has fully paid, except about 40l., and she considered it unjust that this tract of land should be sold, and herself deprived of a provision made for her by the will of her husband.

Henry Toller and Edward Winston, by their answers, denied that they had ever qualified as executors, or intermeddled with the estate. No answer was filed by James Parker, and no proceedings against him appear in the record, except a decree nisi, which does not appear to have been served.

The separate answer of Walter Shelton described the lands devised to him by the will of John Shelton, as consisting of the reversion in the plantation devised to Mrs. Shelton for life, and one hundred acres in Goochland county, both of which he had sold (the reversion to Mrs. Shelton, and the land in Goochland to Matthew Anderson) before the institution of this suit, and before he knew that the claim of the complainants existed.

The plaintiffs replied, generally, to the answer filed, and sundry depositions were

taken, which, in substance, confirmed the statements in the answers. In June, 1801, the cause was set for hearing, "as to the defendants, Anne Shelton and Henry Toller, on the plaintiffs' motion."

In October, 1803, Parke Street, on motion by counsel, was admitted a party complainant in the cause, and filed his bill, praying that satisfaction might be decreed to him out of the estate of John Shelton, in the hands of the defendants, for three bonds, conditioned each for the payment of twenty-five pounds, assigned to him by John Trevillian, the 24th of May, 1800; but without stating whether the heirs were bound in those bonds, or not; and no copies of them were inserted in the record.

To this bill an answer was filed by Mrs. Foster, late Mrs. Shelton, stating several circumstances which induced her to believe that those bonds were discharged

518 "before their assignment. On this subject no depositions were taken on either side, and no replication to this answer appears in the record.

On the 3d of June, 1805, the cause (which abated as to James Parker, by his death) came on to be "partly" heard on the bills, answers, exhibits, and examinations of witnesses; and Chancellor Wythe decreed, "that, towards satisfaction of the plaintiffs' demand, the defendant, Anne Shelton, pay eight dollars, admitted by her to have been received by herself for a wheat fan belonging to the said John Shelton's goods; that so much of the land, called ———, in the county of Hanover, as may be sufficient to satisfy the plaintiffs, Crenshaw and wife, one hundred and sixty pounds,* with interest thereon, at the rate of five per centum, from the 25th day of February, 1783, be sold at public auction, subject to the defendant, Anne Shelton's, right of dower in the premises, after the expiration of one hundred and fifty days from this time, and advertising the day and place of the sale, for three weeks, in some Richmond newspaper, for ready money, to be deposited in the bank of Virginia until the further order of the Court; and ——— were appointed commissioners for that purpose, who, or any two of whom, might act, and report their proceedings to the Court; liberty being reserved to the plaintiff, Parke Street, to resort to the Court for a just dividend of the money so to be raised, if it shall be found necessary; and to the defendant, Anne Shelton, and to the defendants, devisees of the said John Shelton, to require of the

519 "defendant Walter Shelton, who sold the land in Goochland, the proportion which he ought to pay of the plaintiffs' demands; and also the plaintiffs, if they shall think proper,

*Note. Two affidavits, bearing date the 21st of May, 1805, are inserted in the transcript of the record, from which it appears that Foster and wife claimed a considerable credit against the sum recovered at law by Crenshaw's Executors: but in what manner it became reduced to 180l. does not appear. The bond executed by Shelton and Pendleton was joint and several, and conditioned to be discharged by payment by Shelton. It was, therefore, contended, in the argument, that, as Shelton was the principal, and Pendleton only the security, a Court of equity ought to give relief against the estate of the former, without the necessity of making the representatives of the latter parties to the suit.—Note in Original Edition.

to institute an inquiry into the liability of the slaves, in the answer of the said Anne Shelton mentioned, or any of them, to the claims of the plaintiffs."

From this decree the defendants, Foster and wife, appealed.

Nicholas, for the appellants.

Peyton Randolph and Wickham, for the appellees.

The — day of January, 1813, the following opinion of this Court was pronounced.

"The Court not deciding, at present, upon a principle of such general importance, as that under which the land in the proceedings mentioned was decreed to be sold, to discharge the claim of the appellees, (a principle deserving great consideration, and which, in event, may not be necessary to be decided in this cause,) is of opinion that the decree in question is erroneous, in the following particulars: 1st. In proceeding to sell or charge the land now in question, without having directed an account to be taken of all the goods, chattels, rights, and credits of John Shelton, deceased, including the remainder in the slaves conveyed in trust, for the use of his wife for life, by the deed among the exhibits; all of which should be first applied to pay the claim in controversy, before the lands of the said John Shelton should be charged therewith; liberty being reserved to the appellees, or to any of the devisees, other than the female appellant, to institute an inquiry into her title to the slaves claimed in and by her answer in the proceedings contained." "2dly. In so decreeing, without having proceeded against the executor of James Parker, if he left any, or shown that the said James Parker never qualified as the executor of John Shelton, deceased. 3dly. In

520 having proceeded so to decree, *without having made the representatives of John Pendleton parties to the suit, and regularly proceeded against them, who, or the said John Pendleton, in his lifetime, may have already paid the debt in question, or a part thereof; and whose assistance is, consequently, necessary, to prevent the appellants, possibly, from being compelled to pay the said debt a second time. 4thly. In having charged the appellants, as devisees aforesaid, on the ground only of a judgment obtained against the said John Pendleton; whereas, according to the decision in the case of Mason's devisees v. Peter's administrators, (a) a judgment, even against the executors of the said John Shelton, would not have been sufficient for that purpose. 5thly. In having charged the lands of the appellee, Mrs. Foster, solely; whereas, according to the decision last mentioned, the lands of all the devisees, or the money received or claimed in lieu thereof, ought to have borne their ratable proportion of the debt claimed; and that by a direct decree in the first instance, instead of turning the appellants round to seek a contribution by another suit; and in not holding (if any decree at all were to be made affecting the devisees) the said William Shelton ratably liable, as aforesaid, on account of the

money received for the Goochland lands, and for the annuity upon, and one sixth part of the reversionary interest in, the Hanover land, in discharge of all the said lands, and the interest acquired therein, by the respective purchasers; (Mrs. Foster included;) and who, as to the same, having purchased them bona fide, and before the institution of this suit, should not be affected, in relation to the same, by any decree. 6thly. In proceeding so to decree before the infant devisees of the said John Shelton were before the Court, to defend their interests, or had answered and disclosed to the Court, whether any, and what proportion, of their father's estate had come to their hands. 7thly. In admitting the plaintiff, Parke Street, to the participation in the money to be raised by virtue of the decree aforesaid, before

521 he had shown that *the bonds or notes, in his bill mentioned, were such as bound the lands of John Shelton; and in proceeding to decree in his favour, without giving the appellants, or the other devisees of John Shelton, an opportunity to show, by the proper proceedings, that the said bonds or notes were paid off to, or otherwise discharged in equity as to, John Trevillian, from whom the said Street derived them; on the grounds stated in the answer of the female appellant."

"The decree is, therefore, reversed, so far as it is in conflict with the foregoing principle, and affirmed as to the residue; and the cause is remanded to the Court of chancery to be finally proceeded in."

Wright v. Hencock & Company, and Others.

Argued Dec. 3d, 1812.

1. **Fraud—When Sufficient to Avoid Deed of Trust.**—What circumstances of collusion and combination, between a debtor and one of his creditors, to injure and defraud the rest, are sufficient to prevent such creditor from being entitled to any prior lien by virtue of a deed of trust executed for his benefit by the debtor.
2. **Same—Badges of Fraud—Case at Bar.**—The badges of fraud, in this case, were, that the deed was executed on the eve of the debtor's departure from the state, and shortly after the receipt of intelligence materially affecting his credit; that the value of the property conveyed by it was more than double the amount of the debt intended to be secured; that a bill of lading, for part of the property, was antedated by the grantee, for the purpose of overreaching another creditor, who had previously obtained a bill of lading for the same; that the grantee, on applying for an injunction, to prevent a sale at the instance of a third creditor, refused to accede to just and reasonable terms offered him by the Court; and, finally, that he permitted the grantor to take, use, and sell the property, contrary to the tenor of the deed, or connived at his doing so.

***Fraudulent Conveyances—Conveyance from Debtor to Creditor.**—If a creditor takes from his debtor a conveyance to secure a debt, and mix with this object that of delaying, hindering, or defrauding other creditors, the conveyance will be void. *Goshorn v. Snodgrass*, 17 W. Va. 717, citing the principal case. For although a deed may be made for a valuable and adequate consideration, yet, if the intent with which the grantor made it be fraudulent, the deed will be void, if the grantee had notice of such intent. *Livesay v. Beard*, 22 W. Va. 594, citing principal case; *Lockhard v. Beckley*, 10 W. Va. 87; *Hunter v. Hunter*, 10 W. Va. 321; *Rose v. Brown*, 11 W. Va. 134; *Martin v. Rexroad*, 15 W. Va. 512; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Harden v. Wagner*, 22 W. Va. 356; *Clafin v. Foley*, 22 W. Va. 434; *Hudgins v. Kemp*, 20 How. 45; *Briscoe v. Clarke*, 1 Rand. 213; *Spence v. Bagwell*, 6 Gratt. 444. See further, monographic note on "Fraudulent and

(a) 1 Munf. 497.

3. Evidence.—Copy of Bill of Exchange.—A copy of a bill of exchange and notarial protest, with an affidavit of the payee that the original is lost or mislaid, is not legal evidence to charge the drawer.

Upon a petition of appeal, and writs of superadeas issued thereupon, to stay proceedings, in part, on a decree of the superior Court of chancery for the Richmond district, pronounced in six suits, which were all heard together.

The first was an attachment in chancery, in the Hustings *Court of Petersburg, in behalf of John Wright, against Joseph H. Pope, an absent debtor, and Andrew Benard, Michael W. Hencock, and Robert Stewart, charged with having effects in their hands belonging to the said Pope. The second was an attachment in chancery, in the county Court of Dinwiddie, in behalf of William Fenwick, against the same Joseph H. Pope, Michael W. Hencock & Company, and Andrew Benard. The third was a bill of injunction, exhibited by Michael W. Hencock & Company, in the superior Court of chancery, to stay proceedings on certain orders which had been entered by the respective Courts in the two suits aforesaid; both of which were afterwards removed into the same superior Court, by a certiorari, at the instance of William Fenwick. The fourth was a cross bill, filed in the superior Court of chancery, by John Wright against William Fenwick, Michael W. Hencock, and Joseph H. Pope, for the purpose (inter alia) of restraining the said Pope (who had returned to the commonwealth) from continuing to collect his debts on his books, and that he might be decreed to deliver them up. The sixth and seventh were bills of injunction, filed in the superior Court of chancery, by Michael W. Hencock against John Leslie, and by John Leslie against Michael W. Hencock & Company, for the purpose of enjoining judgments, at law, obtained by each against the other.

The material circumstances, disclosed by the records of the proceedings in these six suits, may briefly be stated as follows:

On the 2d day of August, 1804, a deed of trust was executed by Joseph H. Pope, a merchant of the town of Petersburg, (who had recently heard of the failure of Lemuel Pope, his partner in Boston, and was about to depart for that place,) conveying to John Page "his books and papers appertaining and relating to his store in Petersburg, with all the debts due thereon, also the stock of goods on hand, with every species of property, or debts due to him, in the state of Virginia," in trust: "that the said goods should, until the 1st

of October ensuing, be sold at retail under the direction of the said John Page, and such goods as were then unsold, should be exposed to public sale, and the proceeds of the intermediate, as well as public sales, should then be applied by the said Page to the discharge of several bills of exchange (amount not mentioned) which had been drawn on Lemuel Pope, in favour of Michael W. Hencock & Company, and had been, and would be, returned protested; empowering the said trustee to collect all the moneys and debts due to the said Joseph H. Pope, on his books, or otherwise, and to apply the proceeds, also, towards the discharge of the said protested bills of exchange.

A short time before the execution of this deed, Joseph H. Pope had bought of John Leslie 83 kegs of manufactured tobacco, and of William Fenwick 325 barrels of flour, on credit, and shipped those articles on board the schooner *Evelina*, for Boston. On the morning of the 30th of July, the tobacco having then been shipped, Leslie was informed that Pope was in very doubtful circumstances; that his brother, at Boston, had failed; that Michael W. Hencock held protested bills of his to a considerable amount; and that, if he had not then stopped payment, it was highly probable he would stop in a few days. On receiving this intelligence, Leslie determined to save himself from losing the price of the tobacco, (for which no payment had been made, or note given,) by taking the bill of lading for it in his own name. Accordingly, he obtained a bill of lading from the captain of the vessel, (which then had the tobacco on board,) bearing date the 30th of July, 1804. Having no correspondent at Boston, and being in habits of intimacy with Michael W. Hencock, who had dealings at that place, he applied to him on the next day to recommend him to some person there to whom he could safely consign the said 83 kegs of tobacco, and, at the same time, related to him all the circumstances of the case. Hencock (as Leslie swore, in answer to his bill of injunction)

524 *recommended to him Messrs. Davidson & Tucker, merchants at Boston, as fit persons, to whom he might safely consign the tobacco, which he accordingly did. Nevertheless, afterwards, Hencock obtained of the captain of the vessel, with the assent of Pope, bills of lading for the tobacco as well as the flour, and procured that for the tobacco to be ante dated, as of July 28th, 1804. The cargo was, therefore, delivered at Boston to Davidson & Tucker consignees of Michael W. Hencock & Company; and Leslie's bill of lading being presented, no tobacco could be had. He afterwards brought an action of trover, in the Hustings Court of Richmond, against Michael W. Hencock, for the value of the tobacco, and obtained a verdict and judgment for 1,510 dollars 64 cents damages, besides his costs; and Leslie being indebted to Hencock & Co. in the sum of 1,033 dollars 19 cents, for a quantity of rum purchased at auction, they sued him in the same Court, and obtained judgment against him at the same

Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

Sale of Personality.—Retention of Possession by Vendor.—Fraud.—Where property conveyed by an absolute bill of sale is permitted to remain in the possession of the vendor, without any reason why it should have so remained, the statute of frauds and perjuries and the principles of the common law, of which the statute is declaratory, utterly condemn and avoid the conveyance as infected with fraud. *Williamson v. Goodwyn*, 9 Gratt. 506, citing the principal case: *Garland v. Rives*, 4 Rand. 282; *Lang v. Lee*, 3 Rand. 410; *Shields v. Anderson*, 3 Leigh 729; *Davis v. Turner*, 4 Gratt. 422; *Forkner v. Stuart*, 6 Gratt. 197. See further, *Foot-note* to *Davis v. Turner*, 4 Gratt. 422.

*Bill of Exchange.—See monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622.

term in which the judgment in his favour, against Hencock, was rendered.

About the 4th or 5th of August, Pope set out for Boston, publicly, having previously informed his acquaintances generally, and particularly John Wright, one of his creditors, of his intention to go to that place on important business. Before his departure, Wright, being his creditor for the sum of 557l. 17s. 3d., by bond, payable the 19th of September, was very urgent to get payment, or security for the debt, and did obtain an assignment of a note for 250 dollars, in part payment. The 6th of August, Wright's subpoena of attachment, in chancery, was issued, and, on the same day, he presented his bill to the Hastings Court of Petersburg, then sitting, in which he charged Hencock with being a debtor to Pope for flour sold, not appearing to be apprized of the existence of the deed of trust. The Court, on motion, made an order that the sergeant of the town, with three merchants, who were named, do inventory and appraise so many of the goods of the defendant, Pope, as
525 would *satisfy the plaintiff's claim and costs, and deliver the same to the plaintiff for safe custody, on his executing bond and approved security to the said defendant, in the penalty of 1,115l. 14s. 6d., with condition to return the same, to such persons, and in such manner, as the Court should direct, at a future day.

An entry was made on the record, that the defendant, Hencock, by his counsel, opposed the motion, "because the subpoena, in the cause, was returnable to September Court, and the defendant had not the legal term to appear and answer," which objection was overruled, "because the goods of the defendant, Pope, were in his store, liable to be removed by him, or his agents, out of the jurisdiction of the Court, and of the commonwealth, before September Court." The next day, Hencock, through his attorney, offered a bill of injunction to stay, or reverse, the order; alleging, in that bill, "that the goods in question were not the property of Joseph H. Pope, but regularly and legally conveyed to himself, for certain valuable considerations, among which were sundry bills of exchange, drawn on Lemuel Pope, of Boston, which he had just grounds to believe would be returned to him protested, having been well informed that the said Lemuel Pope had failed, or stopped payment." The Court agreed that his bill of injunction should be filed, and that they would direct the attached effects to be deposited in his hands, upon his entering into bond to account for the nett proceeds, after paying himself all debts and damages to which he might ultimately appear to be entitled against the said Joseph H. Pope, and render an account thereof to the said Court. To this proposal he refused to accede, and withdrew his bill of injunction. After this, the bill of injunction above mentioned, in behalf of Michael W. Hencock & Co. and John Page, was exhibited to the superior Court of chancery; in which bill (among other allegations) it was said, that two of the bills of exchange were already protested, and the remaining two would

526 unquestionably be returned protested; that they amounted *to more than three thousand dollars, exclusive of interest, damages, and charges of protest; that "immediately on the delivery of the deed of trust to the plaintiff, John Page, all the goods, books, &c. thereby transferred and assigned to him, were delivered to him, and put into his possession, together with the house which contained them, being the store occupied by the said Joseph H. Pope." In Wright's answer to this bill, it was stated, and confirmed by testimony, that Pope himself, and his store-keeper, remained in the said store until his departure above stated, and continued to sell the goods, and otherwise to act, as if no such deed had been executed. The injunction prayed for was awarded by the chancellor, upon the plaintiffs giving security in the penalty of two hundred dollars. To this bill, answers were filed by Joseph H. Pope (who returned from Boston early in September) and John Wright. The 4th of October following, on the motion of William Fenwick, who claimed the money due him for the flour, which never had been paid, and presented a bill for the purpose, the chancellor awarded writs of certiorari, to remove into the superior Court of chancery Fenwick's own attachment, pending in the county Court of Dinwiddie, and that in behalf of Wright, in the Hastings Court of Petersburg, and ordered that the sergeant of the town do make sale of the goods mentioned in the order of the last-mentioned Court, and, after deducting the expenses attending such sale, pay one moiety of the purchase money to the defendant, John Wright, and the other moiety to the defendant, William Fenwick, upon their severally giving bond, with sufficient security, to be approved by the said Hastings Court, conditioned to have the money, which they might receive in virtue of this order, forthcoming, and subject to the future decree of the said superior Court of chancery.

On the 8th of November, 1804; the cross bill above mentioned was filed by John Wright, in which he declared himself satisfied with the principle of the order
527 *made by the chancellor. It was equality among equally meritorious creditors. But of the application of that principle, in the present instance, he thought he had just cause to complain; because, in Hencock's bill of injunction, it was explicitly stated to have been agreed between Pope and himself, that the proceeds of the flour and tobacco, after satisfying Hencock, should be applied to the discharge of Fenwick's debt. Both those articles, it was almost absolutely certain, must have been sold before this time, and their prices known. If the sale of the flour exceeded Hencock's demand, he either had applied, or would apply, the surplus of that sale to the satisfaction of Fenwick's debt. The above observation applied to the tobacco, if Hencock received an honest assignment of it; Leslie's claim thereto notwithstanding. Ought, then, Fenwick to stand upon equal grounds with Wright, as to the goods delivered to the latter by

order of Petersburg Court, until he should, together with Hancock and Pope, show whether he had received, or was about to receive, any thing, and how much, on account of the flour and tobacco? In the second place, a great many other goods, remaining after those allotted to Wright had been laid off to him, were subject to Hancock's deed of trust and Fenwick's attachment. Was it just that Wright should give up half of what had been appropriated for his indemnification, unless Fenwick should be ordered to give up half of what might come to him? The object of this cross bill, however, was not to stop the sale of the goods, but that the sergeant should be enjoined from paying any part of the money arising therefrom, either to the complainant, or Fenwick, until a full account be rendered of the debt due to Hancock;—how it had been discharged, if not still due; what were the prices of the flour and tobacco; how they had been, or would be, applied; what was the surplus of goods remaining, after those ordered for Wright's indemnification were delivered to him; how many of Pope's goods Hancock had sold before such delivery; how many after; *and what was, and is, the amount of debts due to Pope; and what part or proportion of them Hancock had received.

It was further stated in the cross bill, that since Pope's return from Boston, Hancock, to whom his debts were assigned, as well as his goods, had delivered him up his books, and that Pope had already collected large sums, and was now collecting more, the several orders of Court to the contrary notwithstanding.

All the suits being set for hearing, an order of account was made by the superior Court of chancery, September 30th, 1806. The commissioner made a report, February 27th, 1807, from which it appeared, that the bills drawn by Joseph H. Pope on Lemuel Pope, of Boston, in favour of Michael W. Hancock & Co., and returned protested for nonpayment, "were stated to be," one bill, due July 24th, 1804, for 849 dollars and 11 cents; another for 674 dollars and 52 cents;* a third, due the 9th of August, 1804, for 849 dollars and 11 cents; and a fourth, due the 4th of October, 1804, for 650 dollars; amounting in all, including charges of protest, to 3,032 dollars and 6 cents. The documents, from which this statement was made, were the protest for the first bill of 849 dollars and 11 cents, "but not accompanied by the original bill," letters from Davidson & Tucker, of Boston, stating the amount and time of payment for the second and third bills, and that they were protested, and the original bill for the last 650 dollars, which appeared, from endorsements to have been in the hands of a notary; but the protest was not exhibited. "These documents were not satisfactory to the commissioner. In claims of this nature, it is generally considered

necessary that the protests, accompanied by the original bills, should be produced, or satisfactory evidence to show why they are not. Such evidence (the 529 *commissioner said) it will be incumbent on Michael W. Hancock to produce, before he is entitled to the credit." The proceeds of the flour and tobacco were stated as follows:

Nett proceeds of 300 barrels and	
50 half barrels of flour, in Boston, 1st September, 1804,	\$2,315 41
83 kegs manufactured tobacco, do. 12th September,	1,250 92
	<hr/> 3,566 33
Deduct for insurance, paid in Norfolk,	104 00
	<hr/> \$3,462 33

It was stated by the said Hancock, that the proceeds of the flour only had been applied in discharge of the protested bills of exchange; that, in consequence of the suit brought against him by John Leslie for the tobacco, the proceeds thereof were not passed to his credit in Boston until some time in the summer of 1806; and that the amount was now held by him, as a separate fund, to be applied to the judgment obtained by Leslie, or to the credit of Joseph H. Pope, with Hancock & Co., as the Court might direct.

The commissioner farther stated, (from sundry depositions annexed to his report,) that there were goods left in the store of Joseph H. Pope, and debts due to him, which had not been accounted for; and although Michael W. Hancock held a deed of trust for every description of property the said Pope was possessed of, and made use of that deed as an instrument to prevent other creditors from recovering their claim, yet no measures were adopted by himself, or the trustee, to get possession of, or secure, any of the property remaining, or the debts due to the said Pope, who was left at liberty to dispose of the property and debts without control; except that Hancock received, through Donald M'Kenzie & Co., of which house he was a partner, the sum of 612 dollars and 26

530 *cents, on the 8th of August, 1804, by virtue of an order on John and Theodore Hart; out of which a debt of 340 dollars and 29 cents, from Joseph H. Pope to D. M'Kenzie & Co., had been paid, of which debt (as Hancock alleged) he assumed the payment before the deed of trust was taken. Hancock also alleged, before the commissioner, that the books of Joseph H. Pope were never in his possession; that he once demanded them, when Pope refused to give them up; and, therefore, he knew not what other debts were due to the said Pope; and whether any had been collected; or by whom.

According to the commissioner's report, (if Hancock should produce proper evidence in support of his statement of the protested bills,) the balance due from Joseph H. Pope to M. W. Hancock & Co., (throwing the tobacco out of the account,) appeared to be 559 dollars 73 cents, with interest from the 8th of October, 1804; the balance due to John Wright was 542l. 17s. 3d. with inter-

*Note. According to the copies of the bills of exchange and protests, appearing in the record, this bill, for 674 dollars and 52 cents, was not drawn by Joseph H. Pope, but by Michael W. Hancock & Company.—Note in Original Edition.

est from the 19th of March, 1804, the bond having been conditioned to bear interest from the date in the event of the principal not being punctually paid; and that to William Fenwick was 612l. 10s., payable October 31st, 1804. The goods taken under John Wright's attachment were sold for 442l. 3s. 9d., which sum remained in the hands of Robert Lanier, sergeant of the town of Petersburg.

On the 26th of February, 1808, the present chancellor (Taylor) pronounced his opinion and decree as follows: "The Court is of opinion, that the said Michael W. Hencock having stated, on oath, that the original bills, as protested, are by him either lost or mislaid, or that they have been either lost or mislaid in the Court of chancery, where he thinks he filed them; and John Wright, by his answer, in one of the suits, having admitted that two of them were returned protested, and that the other two might be so returned, the said Michael W. Hencock & Co. should be entitled to a credit for the same with the said Joseph H. Pope; that the deed of trust, in the proceedings mentioned, bearing date the 2d day 531 of August, *1804, and recorded within the time prescribed by law, gave to the said Michael W. Hencock & Co. a lien, in preference to the other creditors of the said Joseph H. Pope, upon the property thereby conveyed, which cannot be discharged but upon the payment of the bills, with interest and charges of protest; that it does not appear to this Court, that, at the time the other creditors sued forth their attachments, Michael W. Hencock & Co. were in possession of the books, goods, and effects conveyed to them by the deed aforesaid, or had been at any time previous thereto, or that Michael W. Hencock, at any time, unfairly aided the said Joseph H. Pope to go away with his books, and remaining property, to the prejudice of other creditors; and, therefore, Michael W. Hencock & Co. should not be made answerable for any injury the creditors may have sustained on that account; that John Leslie having recovered the value of 83 kegs of manufactured tobacco, in an action at law against the said Michael W. Hencock & Co., the same should stand opposed to their recovery against the said John Leslie, and be adjusted between them, and not allowed to the said Joseph H. Pope as a credit with the said Michael W. Hencock & Co., who will then be the creditors of the said Joseph H. Pope 559 dollars and 73 cents, on the 4th day of October, 1804, which John Wright must pay, with interest from that time, being part of the proceeds of sale of goods of the said Joseph H. Pope, under the order of this Court, made the 4th day of October, 1804; and one moiety of the balance of the proceeds in his hands he must also pay, with interest from the time he enjoined William Fenwick, to him. The Court doth, therefore, adjudge, order, and decree, that the said Joseph H. Pope pay to the said John Wright 542l. 17s. 3d. with interest thereupon, at the rate of 6 per centum per annum, from the 19th day of March, 1804, until payment, and the costs by him expended in prosecuting his suit against the said Joseph H. Pope, Andrew Benard,

and others; that he pay to William Fenwick 612l. 10s., with interest, to be 532 computed *after the like rate, from the 31st day of October, in the same year, until payment, and the costs by him, the said Fenwick, expended in the prosecution of his suit; that the said John Wright pay to the said Michael W. Hencock & Co., the aforesaid 559 dollars and 73 cents, with interest thereupon, after the like rate, from the 4th day of October, in the same year, until payment, and the costs by them expended in prosecuting their suit against the said John Wright and others; that the bill of the said John Wright, against William Fenwick, Michael W. Hencock, and Joseph H. Pope, be dismissed, and that he pay to the said William Fenwick the costs by him expended in defending that suit; that the said John Wright, towards satisfaction of the money hereby decreed to be paid by Joseph H. Pope to William Fenwick, after satisfying Michael W. Hencock & Co.'s recovery aforesaid, pay the said William Fenwick one moiety of what shall remain in his hands of the proceeds of the said sale, with interest thereon from the 9th day of November, 1804, and the balance of the said moiety retain towards satisfaction of his recovery against the said Joseph H. Pope; that the injunction awarded John Leslie, to stay execution of a judgment recovered against him by Michael W. Hencock & Co., and Thomas Taylor & Co., in the Hustings Court of the city of Richmond, be perpetual; that the injunction awarded the said Michael W. Hencock to stay execution of a judgment recovered against him by the said John Leslie, in the same Court, be perpetual as to 1,292 dollars and 91 cents, part of the money recovered by the said judgment; that the bill in that suit, so far as it seeks farther relief against the said judgment, be dismissed, and that the said Michael W. Hencock & Co. pay to the said John Leslie the costs by him expended, both in prosecuting and in defending the said injunctions; and that the several bills, as to the defendants, not noticed by this decree, be dismissed, the plaintiffs not farther prosecuting."

From this decree John Wright (who 533 was not present *when it was pronounced) prayed an appeal, which was allowed by the Court of appeals.

Saturday, January 16th, 1813, JUDGE ROANE pronounced the following opinion of this Court:

"The Court is of opinion, that the deed of trust, in the proceedings mentioned, made by Joseph H. Pope to John Page, for the benefit of Michael W. Hencock & Co., having conveyed all the goods, property, and credits of the said Pope whatsoever, in Virginia, for the purpose, as is alleged, of securing to the said Michael W. Hencock & Co. the payment of certain bills of exchange, which were said to be protested, and expected to be protested, but which, for any thing certainly appearing to the Court, may have been paid, or otherwise secured to be paid, by the drawee or drawer thereof, having been entered into by the said Pope, on the eve of his departure from Virginia, and within two or three

days after intelligence had been received of the supposed failure of Lemuel Pope, the mercantile correspondent of the said Joseph H. Pope, in Boston, which circumstance created a general belief that the credit of the said Joseph H. Pope would be materially affected thereby; and the probable value of the goods thereby conveyed, (exclusive of credits of the said Joseph H. Pope,) when added to that of a quantity of tobacco and flour, the bills of lading for which the said Michael W. Hancock procured to be made, or assigned to him, at or about the same time, (and which must therefore be considered as a part of the same transaction,) being more than double the amount which the said Joseph H. Pope could, in any event, be indebted to the said Michael W. Hancock & Co., for and on account of the bills of exchange aforesaid; the said deed being also made in favour of a grantee who was so little scrupulous of the means by which he served the said Joseph H. Pope, or himself, to the injury of the said Pope's other creditors, that he procured the bills of lading, made to

534 him for the "tobacco before mentioned, to be antedated, thereby endeavouring to overreach John Lealie, who had previously obtained bills of lading for the same tobacco, which had been sold by him to the said Joseph H. Pope, but not paid for; (all which was known to the said Michael W. Hancock at the time;) a grantee, too, who by refusing to accede to the just and reasonable terms on which the Court of Hustings of Petersburg offered to allow his injunctions, (intended to stay the effect of an order made in favour of the appellant,) evinced that his object was not solely to procure a payment and indemnity for himself and company, in relation to his claims against the said Joseph H. Pope; and the said grantee having also permitted the said Joseph H. Pope to take, use, sell, and collect the debts and property by the said deed of trust conveyed, or connived at his so doing, the same ought to be taken, as to the appellant, and appellee, Fenwick, just and vigilant creditors of the said Joseph H. Pope, as a collusive combination to injure and defraud them, and as giving to the said Michael W. Hancock & Co. no prior lien upon the property aforesaid."

"The Court is further of opinion, that the appellees, Michael W. Hancock & Co., have not legally entitled themselves as creditors to the amount claimed by them; both because the bills of exchange, in the said deed and proceedings mentioned, may have been paid, or may yet be paid as aforesaid, for any thing appearing to the contrary by proper and legal evidence; and because one of those bills, for six hundred and seventy-four dollars and fifty two cents, having been drawn by Michael W. Hancock & Co. and not by Joseph H. Pope, is not a bill to which the terms of the deed of trust aforesaid, or the prayer of the said Michael W. Hancock & Co.'s bill of injunction, would properly apply."

"On these grounds, the Court is of opinion, that not only so much of the decree as establishes a lien in favour of the appellees, Michael W. Hancock & Co., under the

deed of trust aforesaid, but also so much thereof as has ascertained the amount of the debt due by Joseph H. Pope to them, on account of the bills of exchange, as also so much of the said decree as postpones the appellant and the appellee, William Fenwick, to the appellees, Michael W. Hancock & Co., in relation to the trust property, is erroneous; therefore, it is decreed and ordered, that so much of the said decree as is before mentioned to be erroneous, be reversed and annulled; that the residue thereof be affirmed; and that the appellees, Michael W. Hancock & Co., pay to the appellant his costs, by him expended in the prosecution of his appeal aforesaid here; and it is further decreed and ordered, that the said Joseph H. Pope do pay to the appellant the sum of five hundred and forty-two pounds, seventeen shillings and three pence, with interest thereon from the 19th day of March, 1804; and to the appellee, William Fenwick, the sum of six hundred and twelve pounds, ten shillings, with interest thereon from the 31st day of October 1804, till paid; provided, that the sum of four hundred and forty-two pounds, three shillings and nine pence, now in the hands of the sergeant of the town of Petersburg, (as appears from the proceedings,) be immediately paid by him, and the sum of two thousand two hundred and eleven dollars and forty-one cents, now in the hands of the appellees, Michael W. Hancock & Co., (being the proceeds of the flour, in the proceedings also mentioned, after deducting the insurance thereon,) and six hundred and twelve dollars and twenty-six cents, collected from John & Theodore Hart, by virtue of an order from Joseph H. Pope, in favour of Michael W. Hancock & Co., under the deed of trust aforesaid, with interest on the former sum from the 1st day of September, 1804, and on the latter, from the 8th day of August, 1804, till paid, be also immediately paid by the said Michael W. Hancock & Co., to discharge the debts aforesaid, or, in case of their being insufficient to pay the whole, to pay the same in equal proportions. And it is ordered that the causes be remanded to the said Court of chancery, to be

536 proceeded *in pursuant to the principles now declared; with liberty to the appellees, Michael W. Hancock & Co., to proceed, under the direction of the Court of chancery, to ascertain, by evidence, other than the oath of the appellee, Michael W. Hancock, the said amount, and to recover the same from the said Joseph H. Pope or his effects; subject nevertheless to the provisions of this decree in favour of the appellant, and the appellee, William Fenwick."

Birthright, Lessee of Hall, v. Hall.

Argued March 2d, 1812.

1. *Wills—Construction*—Reversion.*—A testator, who died in the year 1764, devised a tract of land to his sons, Joseph and Thomas, "during their natural life, and no longer, and then to each of their eldest sons and their heirs forever; and, if no male issue to each of their eldest daughters, and their heirs forever" Joseph and Thomas entered, and

**Wills—Construction.*—See monographic note on "Wills" appended to *Hughes v. Hughes*, 2 Munf. 309.

made partition; and in the year 1797, Joseph died, without having had any son or daughter. It was adjudged that his share of the land reverted to the testator's heir at law. See *Ginger v. White*, Willes, 348.

2. *Deed of Bargain and Sale—Effect Where Third Person in Adverse Possession.*—A deed of bargain and sale from a person who (having the right to enter) has formally and peaceably entered on the land thereby conveyed, is good to pass his title notwithstanding another person was in actual and adverse possession of the same land at the time of such entry and conveyance.

A special verdict was found in ejectment, setting forth that a grant issued to William Hall, the elder, for the land in the declaration mentioned; that he duly made and published his last will and testament, in writing, bearing date the 21st day of October, 1764, which was set forth in *hæc verba*, and among other devises and bequests, contained the following clause: "Item, I give or let to my sons, Thomas Hall and Joseph Hall, my new dwelling, plantation, and the mill thereon, during their natural life, and no longer; and then I will and bequeath the same to each of their eldest sons, and their heirs forever; and, if no male issue, to each of their eldest daughters, and their heirs forever:—that the said William Hall, the elder, died on the 10th day of November, 1764, leaving seven sons; viz. William, (his eldest son, and heir at law,) James, Richard, John, Anthony, Thomas and Joseph; and four daughters; viz. Elizabeth, Ruth, Hannah, and Sarah, that Joseph Hall, aforesaid, died on the first day of January, 1797, leaving no child, and never having had any; having first made his last will and testament, (which was also found in *hæc verba*,) devising to his wife, Mary Hall, the tract of land on which he resided, containing 396 acres, during her life, with remainder in fee to Elizabeth North, wife of George North, and John Hall, son of his brother, John Hall, deceased, to be equally divided between them: that Mary Hall, widow of the said Joseph, before the 1st of September, 1797, entered upon the lands in the declaration mentioned, by virtue of the said devise to her, and continued possessed thereof ever since her said entry, until the month of October, 1799: that the lands devised to the said Joseph and Thomas Holt, by the will of the aforesaid William Hall, (being the lands in the declaration mentioned,) were divided by the said Thomas and Joseph, soon after the death of the said William Hall, the elder; that they, and those claiming under them, had held the parts severally allotted to them, separately; that the said Thomas Hall, by deed, bearing date the 20th of February, 1792, conveyed the part assigned to him to John Potts: that neither the said Joseph nor Thomas were married, or had any child, at the time of William Hall's making his will, or at the time of his death: that William Hall, the heir at law of the said William Hall, the elder, after the decease of the said Joseph Hall, to wit, on the 12th day of September, 1797, entered into and upon the land in the declaration men-

tioned, formally and peaceably, and then and there, in the presence of two good and lawful witnesses, took possession of the said land, and all things thereunto belonging or appertaining, claiming the said land as heir at law, and eldest son, of William Hall, the elder, deceased; and that, after making the said entry, to wit, on the 17th of October, 1797, he conveyed the said land by deed of bargain and sale, to the lessor of the plaintiff: that Mary Hall, devisee, as aforesaid, of Joseph, was in actual and adverse possession at the time of the said entry, and so continued until the month of October, 1799; that the said *Thomas Hall was still living, and had a legitimate son by the name of Thomas, who was living at the date of this verdict, and was the first son he ever had.

The jury found the lease, entry, and ouster, &c.; and if the law was for the plaintiff, they found for him the land in the declaration mentioned, &c. in the usual form.

By consent of parties, George North, the defendant in the cause, was withdrawn, and Thomas Hall was admitted defendant in his room; and thereupon, the plaintiff released all the land in the special verdict mentioned and found for him, except the land of which Joseph Hall was possessed in his lifetime, being the moiety assigned to the said Joseph Hall, upon the division of the land devised to the said Thomas and Joseph, by the will of William Hall, the elder.

The Superior Court of law entered judgment for the defendant; whereupon the plaintiff appealed to this Court.

Williams, for the appellant.

Peyton Randolph, for the appellee.

January 25th, 1813, the judges pronounced their opinions.

JUDGE COALTER. The first question arising in this case is, whether, admitting William Hall, the son and heir at law of William, the testator, to have the reversion in fee, after the death of Joseph without issue, the deed of bargain and sale, of the 17th of October, 1797, made by him to the lessor of the plaintiff, passed the estate?

When this case was formerly before the Court, on the first ejectment, (a) it was determined that the defendant held by intrusion, and that, as it did not appear that any entry had been made on the land by the grantor before executing the deed, it passed nothing; and on that ground the judgment was reversed.

539 "On this second ejectment, which is brought on this same deed, the question again occurs, but with this difference: it is found in the special verdict, that William Hall, the grantor, on the 12th day of September, 1797, entered into and upon the land in the declaration mentioned, formally and peaceably, and then and there, in the presence of two good and lawful witnesses, took possession of the said land, and all things thereto belonging and appertaining, claiming the said land as heir at law, and eldest son, of William Hall, the elder, deceased; that, after making the said entry, he made the deed in ques-

†Adverse Possession—Inference by Court.—The principal case was cited in *Pownall v. Taylor*, 10 Leigh 184, to the point that, though the jury does not find adverse possession, the court may infer it.

(a) 3 Call, 488.

tion, to wit, on the day of its date; and which deed is found in hæc verba. It describes the grantor as an inhabitant of Newberry county, in South Carolina, and is acknowledged by him on the same day, before the Court of that county.

The jury also find, that Mary Hall, widow and devisee of Joseph Hall, was in actual possession of said land at the time the entry above found was made, and that said possession of said Mary was, at the time of said entry, adverse to that of the said William Hall; and that the said Mary was so actually in possession at the time the said entry was made, and, notwithstanding the said entry, remained so in possession, and continued in such actual and adverse possession thereof, until the month of October, 1799.

This special verdict presents this question, whether, supposing William, the grantor, to be the reversioner after the death of tenant for life, will his entry upon the intruder enable him, a month or two after such entry, to convey by bargain and sale; the intruder being actually in adverse possession, and on the land, at the time of such entry, and continuing such adverse possession at the time, and until after the execution of such deed?

The cases of *M'Lean v. Copper*, (a) *Duval v. Bibb*, (b) *Tabb v. Baird*, (c) and *Hall v. Hall*, (d) which cases are to be found in 3 Call, and all of which were decided on the ground that there must be possession in the grantor *at the time of the deed made, or livery of seisin, actually found, in order to pass the estate, have created considerable difficulty in my mind on this subject.

Here a grantor, residing in South Carolina, makes a conveyance of land of which another, at the time, is in actual adverse possession, and, therefore, to a mind not conversant either in the practice or the theory of the ancient feudal investiture, this case would seem to be similar to those above referred to. To prove, therefore, that this grantor was in possession, notwithstanding another was living on the land, we must resort to technical reasoning, arising from the nature of feudal tenures and investitures, in opposition to that evidence of the senses, arising from the facts found in the special verdict.

An intrusion (e) is the entry of a stranger, after a particular estate of freehold is determined, before him, in remainder or reversion. The reversioner, or remainderman, by this act, is ousted, (if I may use the expression,) and the intruder becomes tenant to the lord. The reversioner or remainderman, however, may purge this intrusion by summary proceeding, without suit, to wit, by a formal and peaceable entry, (f) such as is found in this verdict; which notorious act of ownership is equivalent to a feudal investiture by the lord, and gives him that hath right of entry a seisin; making him complete owner, and capable

of conveying from himself either by descent or purchase. This is called his right of entry; and if he lies by until the death of the intruder, when the land descends to his heir, then his right of entry is tolled or taken away, and he has only a right of action. The maxim of the common law, then, which is, "that a right of entry or chose in action cannot be granted or transferred to a stranger," (g) or, as Blackstone has it, that "a party in possession may convey, but, if he has only the right of possession, or of property, he cannot," must be considered as applying to these rights, before they are exercised so as to gain possession, by entry in the first case, or suit in the second.

541 "The grantor, here, before his entry, had only a right of entry, or right of possession: this right he could not convey: by his entry, which is equal to a feudal investiture, he became tenant of the freehold—in England, tenant to the lord. He holds, then, not a bare right of entry, or of possession: he, by this open and notorious act, has done away this wrongful intrusion, and is seised and may convey: the party on the land no longer holds by intrusion, and would be no longer considered tenant to the lord: another is now seised of the fee, and would be considered such tenant. Had he made a conveyance, when thus on the ground, I apprehend it would have been good; for it is not necessary, in order to purge the intrusion, to turn the intruder out. This might require violence; and, indeed, if the remainderman cannot enter through fear, he may make claim near the land, and this has the same effect with the entry. A person then may be in possession of the fee, when another is on the land; and this fee he may convey. He may be deprived of his freehold again, though by disseisin; what that is, perhaps, at this day, is a nice question, and the doctrine will not now be much considered: it will suffice, at present, to say, that every possession of another's land, even by a person claiming adverse, I apprehend, is not a disseisin, which, when effectual, ousts the party of his freehold, and makes the disseisor tenant thereof, and answerable to the lord. When the freehold becomes thus wrongfully in possession of another, then the party is put again to his right of entry, and cannot convey, and may even lose this right of entry by a descent cast. But this continued possession, in *Mary Hall*, is neither found to be a disseisin, by the verdict, nor are such facts found, as, according to my present impressions, would enable the Court to adjudge in a disseisin. It is true the jury do not find that the party being seised conveyed, but having found an entry, which gave him seisin, (h) and not finding a disseisin, the maxim, "that what appears not is to be taken as not having existed," must apply; and we must consider the grantor, if he had a right of entry,

542 as *having reduced his right to possession; and that at the time the deed was made, he was seised of the freehold, and could convey.

(a) 3 Call. 367.

(b) *Ibid.* 363.

(c) *Ibid.* 475.

(d) *Ibid.* 433.

(e) 8 Bl. 168.

(f) *Ibid.* 174, 175.

(g) Co. Litt. 214, 266.

(h) 1 Wash. 37.

This brings us to the second question, to wit, whether he had such right of entry?

This will depend on the construction of the will of William Hall, the elder, made in the year 1764, and in which is this clause relative to this land:—

"Item, I give or let to my sons, Thomas Hall and Joseph Hall, my new dwelling plantation, and the mill thereon, during their natural life, and no longer, and then I will and bequeath the same to each of their eldest sons, and their heirs forever; and, if no male issue, to each of their eldest daughters, and their heirs forever."

Partition between Thomas and Joseph was made. Thomas aliened his moiety, has had a son, and both he and his son are found to be alive. Joseph never had issue, male or female, but has departed this life, having devised his moiety to his wife.

The testator had several other sons, as also other tracts of land, which, when an entire tract was devised to two, and the proper division between them was known, was devised to them severally, by metes and bounds, &c. This circumstance; the improbability that the testator intended the survivor to take in exclusion of the eldest son of the deceased, if he had left one, and the use of the words, "to each of their eldest sons," induced me to suppose, it probable, that a tenancy in common was intended as to them; in the same manner as if the will had been "to my sons, Thomas and Joseph, and each of them, &c. and to each of their eldest sons, &c." This point, however, is perhaps immaterial, as partition has been made, and in which case, if it was a joint tenancy for life, and no more, each would, on partition, take an estate for his own life in his moiety, which, on his death, would go to him in remainder or reversion.

The great doubt in my mind is, whether an estate tail was not created in Joseph and Thomas, which, by the *act
543 of Assembly, was turned into a fee? If land be given to two brothers, A. and B., and the heirs of their bodies; as they cannot have the same heirs of their bodies, they take a joint estate for life, and several inheritances. (a) The question is, whether these brothers did not take such estates in this case? or, in other words, whether they did not take as tenants in common, or joint tenants, for life, with several remainders in tail-male, remainder to each of their eldest daughters in fee?

I incline to think they did take such estates as last described, although I advance the opinion with very great diffidence and distrust, not only because of the contrary opinion expressed by one of the Court before, when this cause was formerly heard, but because, on a further and patient examination, that judge adheres to his former opinion, in which he is also joined by the presiding judge. Considering, however, that the case is open for decision, it becomes my duty to give my opinion.

This case arising on the construction of a will, the great object is to find out the intention of the testator. To do this, the Court must not only put themselves in his place, but suppose the things to have

happened, which he expected to happen. It is found, by the verdict, that neither Thomas nor Joseph were married, nor had children, at the time of making the will, or death of the testator; but it is evident he expected them to marry, and to have both sons and daughters, and under this expectation makes a provision for them and their issue. The intention of the testator must govern; and, where he has two intentions, a general and a particular intention, the latter must yield to the former, if they are in conflict with each other, and both cannot stand.

If the object of the testator was, that the male issue of Joseph, which he should leave at his death, whether that should be his eldest son, or the son of his eldest son, or the second or other son in succession, in case of the death of the elder without male issue, should take, before the eldest daughter; and if this could not be effected

544 *without enlarging the estate of Joseph to a fee tail-male, then it must be so enlarged.

"The word 'issue' is used in the statute de donis promiscuously with the word heirs; and, which is a strong reason for the technical sense which it has obtained, it comprehends the whole generation, as well as the word heirs, and is therefore more properly, in its natural signification, a word of limitation than of purchase.

This doctrine is laid down by one of the judges, in the case of Smith and wife v. Chapman, 1 H. & M. 291, as extracted from the opinion of Justice Gould, in 2 Wilson, 324. The word children, on the other hand, is generally considered a term of purchase.

At the time of making this will, and at the death of the testator, the law of primogeniture prevailed. I will then suppose that Joseph had had issue, first a daughter and then a son, and that this son had instantly died, and that he had afterwards had another son, and then died, leaving this daughter, his first-born child, and this second son; would the fee, in this case, have vested in the eldest son, and, on his death, in his sister, who was then his heir at law? If this was an estate for life in the father, remainder to the eldest son unborn in fee, the remainder would vest in him when born, and, on his death, would pass to his heir at law, to wit, his sister; and, consequently, the eldest daughter of Joseph would take this estate, although he did not die without male issue, but left a son.

But it will be said that this estate was not to vest on the birth of a son, but on the death of Joseph, and in his eldest son then alive, (who is the person described in the will,) and if no such person, in his eldest daughter. I will then suppose that Joseph had had a son and daughter; that his son died in his lifetime, leaving a son, and that his daughter survived him; that this estate would not go to the grandson, but to the daughter, as it must go to the eldest son of Joseph then alive, and, if none alive, to his daughter, although it was evidently
545 the intention of *the testator to

(a) Bac. Abr. Title Estate Tail C.

prefer the male children, at least, of the eldest son, to this daughter, and which cannot be effected, except by its going to him as the issue male of Joseph; he not being capable to take under the descriptio personæ of the male child of Joseph then alive. So such son of the eldest son would succeed (as it was intended he should) in preference to a second son of Joseph, who might be alive at the death of his father.

I had doubts once, whether this might not be considered a devise in strict settlement, to wit, to the father for life, and to the first and every other son, in succession, in tail-male, remainder to the eldest daughter in fee. But, to effect this, we must supply the words, "and if no male issue, to the eldest son," and must also supply the words, "and every other son successively;" and apply these words also to them; whereas the plain reading of the will is, that on the death of Thomas and Joseph, without male issue, &c.; and as giving them estates in fee tail-male would have nearly the same effect as the settlement above supposed, I cannot do such violence to the words, at the same time that I think the great object of the will would be defeated without giving the one construction, or the other. The words "and if no male issue," are important, and cannot be rejected, which would be the case were we to give the eldest son a fee at his birth. If we say they mean, eldest son alive at the death of Joseph, then a second son will take in exclusion of the heir male of the eldest son, and this will exclude the words, "and their heirs for ever," which, if they cannot, consistent with the other words, create a fee in the eldest son, on his birth, had certainly some object. If we consider the word "heirs" synonymous with issue, and this again restrained by the terms issue male of Joseph, which his grandson would be, then every word has a meaning compatible with, and tending to promote, the great object of the testator, which seems to me to be, to perpetuate the estate in the male line of his family, and, in default thereof, to give it to his eldest

546 *grand-daughter, in exclusion of any great grand-daughter.

JUDGE ROANE. In considering the devise before us to have created a joint tenancy for life, in the land in controversy, in favour of Thomas and Joseph Hall, with a remainder, in severalty, to the eldest son of each, and their heirs, and not as conferring an estate tail upon the said Joseph and Thomas Hall, I must refer, in general, to my opinion, delivered in the case of Smith and wife v. Chapman, (a) in which this subject was fully considered.

According to the principles of that decision, the terms, "eldest son and his heirs," would be taken as a word of purchase, and not of limitation, and, consequently, the estate previously granted would be considered only as a life estate. I understand that this construction would be readily acceded to by the judge who has just given his opinion, but for the words, "if no male issue," used after the devise

to the eldest son and his heirs for ever; which he supposes converts the estate of Joseph into an estate tail. In considering those words as not having that effect, but as being only a varied form of expression, conveying the meaning that, if the devisee for life should not have a son, or an eldest son, then the estate should go to the daughter, I am supported, among many other considerations, by the construction put upon those words by the testator himself, in at least two several clauses of his will, in a manner not to be mistaken or resisted. The testator has come into this construction, 1st. In his devise of lands to his son, William Hall, for life, and no longer, and then to the eldest son of William Hall, and his heirs: after which, the testator adds, that in case there be no son of William Hall to heir the same, (not male issue, a phrase used in the other devises,) then the estate should go to the eldest daughter; and, 2dly. In the clause devising a tract of land to James Hall, for life, and no longer, and then to the "eldest son" of said James, omitting to add, "and his heirs;" after which is in-

547 terposed "the usual words, "and if no male issue," &c.; and then the testator immediately adds, "but if a son, to him and his heirs for ever." In the first devise, the testator uses the phrase, "and if no son of William Hall," indifferently for the phrase now in question; and in the devise last mentioned, notwithstanding the existence of the words supposed to convert the estate of Joseph into an estate tail, the testator emphatically reprobates that construction, by using words immediately afterwards, expressly giving a fee to the eldest son. It is evident to me, therefore, that the testator has himself expounded the terms, "if no male issue," in a sense synonymous with the terms, "if no son;" a sense consistent with the remainder in fee to the eldest son, and incompatible with the idea of an estate tail existing in the first devise; and I am for letting this construction run through the whole will; a will in which it cannot be doubted but that the same intention existed towards all his sons, in relation to the present question.

With respect to the question of adverse possession, I was, at first, inclined to consider the verdict uncertain, if not contradictory: but inasmuch as, although it is found that Mary Hall was in actual and adverse possession at the time of the entry of William Hall, the grantor, and so remained in such actual and adverse possession until the month of October, 1799, it is also found that the said William Hall, the grantor, entered formally and peaceably into the premises, and "took possession thereof," and all things thereunto belonging or appertaining, and that the grantee, the lessor of the plaintiff, entered upon the land, and was seised thereof, the verdict must be reconciled, by intending the jury to have considered that as an actual and adverse possession in Mary Hall, which was, nevertheless, a vacant possession at the time of the entry of William Hall, the grantor, and the acquisition of seisin by William Hall, the

(a) 1 H. & M. 294.

grantee; an idea countenanced, as not being inconsistent and incompatible, by 548 the decision of *this Court in the case of *M'Lean v. Copper*; (a) and if such be the meaning of the jury as to an adverse possession, as at the time of the entry, it may be taken to be the same as to all the future time, and to justify the grant to the lessor of the plaintiff; especially as no posterior ouster is found, on behalf of the appellees, as to the premises in question.

On these grounds, and because the joint estate of Thomas and Joseph Hall was severed in their lifetime, either by the division and the alienation by Thomas, found by the verdict, or by the act of 1786, I am of opinion to reverse the decision of the Court below, and enter judgment for the appellant.

Judge Fleming was of the same opinion.

Judgment reversed, and entered for the appellant.

Meade and Others, Justices of Amelia County, v. Brooking.

Sept. 28th, 1811.

Administration Bond—Action on—What Necessary to Sustain.—After a judgment against an executor or administrator as such, a fieri facias and return of nulla bona, an action against him alone, on his administration bond, could always be maintained, without any previous suit suggesting a devastavit.

In this case the following statement and opinion were delivered by the president, September 28th, 1811.

This is an action of debt, brought by the justices of Amelia county for the benefit of Thomas Bolling Munford's executors, against Vivion Brooking, executor of Robert Munford, and Thomas Munford, his security, on the executor's bond; and the plaintiffs assigned for breaches, that the defendant, Brooking, had not performed the conditions of the bond, but had wasted the assets, and had not paid the plaintiff the amount of a judgment obtained against him, as executor aforesaid; on which an execution had issued, and 549 been returned nulla bona. *The plea "not guilty," and issue thereon. At

the trial of the cause, the plaintiffs filed a bill of exceptions, stating that the Court instructed the Jury, that, "unless the plaintiffs proved that they had instituted a suit against the defendant, executor," (the suit having been dismissed against the security,) "suggesting a devastavit, and recovered judgment therein against him, they ought to find for the defendant;" which they did accordingly; and a judgment was entered on the verdict; from which the plaintiffs appealed to this Court. The only question seems to be, whether the instruction given to the jury was correct, or erroneous?

It has been settled by a variety of decisions of this Court, that securities in an executor's or administration bond cannot

be charged for the misconduct or mal-administration of their principal, (even where he is made a party to the action,) before he be charged by a suit, and a devastavit established against him: but this Court has never gone so far as to make that a necessary previous step, where the principal alone is sued on an executor's or administration bond; because, in such an action, he has a fair opportunity of making a full defence, by pleading and proving, that he has fairly, and fully, administered the estate.

On these principles, had the security, Thomas Munford, remained a defendant in the suit now before us, the instruction given to the jury, as stated in the bill of exceptions, would, in my apprehension, have been correct and proper: but as the suit had been previously dismissed as to him, the principal, Vivion Brooking, executor of Robert Munford, stood on the same ground as if he had been the only original defendant: and as, on the issue of not guilty, he might well have given in evidence that he had duly and fully administered the estate to his testator, it seems to me that the instruction to the jury, stated in the bill of exceptions, was erroneous. I am, therefore, of opinion, that the judgment be reversed, and the cause remanded to the superior county 550 Court *of Amelia, for a new trial to be had therein; upon which trial, no such instruction is to be given to the jury.

The following was entered as the Court's opinion.

"The Court (without deciding whether the instruction would have been proper, had Thomas Munford, the security, remained the defendant in the cause) is of opinion, that the said judgment is erroneous, in this, that, on the trial of the cause, the said Court instructed the jury that, unless the appellants proved that they had instituted a suit against the said Vivion Brooking, suggesting a devastavit, and recovered judgment against him, they ought to find for the said Vivion."

Judgment reversed, and new trial awarded.

Hall v. Smith, Young, and Hyde.

Argued May 24, 1811.

1. Arrest of Judgment—When Errors May Be Filed.*—It seems, that a party, to whom a new trial is granted, may, at the next term, without claiming such trial, file errors in arrest of judgment.
2. Assumpsit—Assigned Bond—Declaration—Consideration.†—In assumpsit against the assignor of a bond a consideration for the assignment ought to be set forth in the declaration; and if it be omitted, judgment may be arrested.
3. Same—Declaration—Sum Left Blank.—A count for

*Arrest of Judgment—When Errors May Be Filed.—See monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

†Assumpsit—Declaration—Must Allege Consideration.—The plaintiff in assumpsit cannot recover without setting forth in his declaration, a consideration to support the promise. *Beverleys v. Holmes*, 4 Munf. 96, citing the principal case as its authority. To the same point, the principal case is cited in *Goff v. Miller*, 41 W. Va. 685, 24 S. E. Rep. 644. See further, monographic note on "Assumpsit" appended to *Kennard v. Jones*, 9 Gratt. 183.

Written Assignment—Does Not Necessarily Import Consideration.—The assignment of a chose in action, not assignable at common law, does not make the assignor liable without a valuable consideration for

(a) 3 Call. 307.

*See foot-note to *Gordon v. Justices of Frederick*, 1 Munf. 1.

†Note. See the sess. acts of 1813, p. 40, ch. 13; and *Gordon's administrators v. the Justices of Frederick*, 1 Munf. p. 1.

money had and received, adjudged good after verdict; although the sum received was left blank. See ante, Darby v. Henderson and Duncan, administrators of Drummond.

This was an action of assumpsit, in the late district Court of Fredericksburg, in behalf of the appellant, against the appellees, who were merchants and partners.

The declaration contained two counts. The first, being special, charged the defendants with having assigned a bond (the date, penalty, and condition, particularly set forth) to the plaintiffs; (but without stating any consideration for the assignment;) that suit was brought by the plaintiff thereupon, and judgment obtained; which judgment was afterwards perpetually enjoined by a decree of the county Court of Spottsylvania, by reason of equity which attached in taking the said bond; "in consequence whereof, the plaintiff was ever prevented from recovering the said debt from the said obligors; by reason *of all which premises, the said Smith, Young, and Hyde, became liable to pay to the said Elisha Hall, the said sum of 164l. 12s. 11d., the condition of said bond, together with interest on the same, and the costs of the said suit; and the said defendants being so indebted, in consideration thereof, undertook and promised that they would pay to the plaintiff the said sum with interest and costs, when they should thereunto be afterwards required."

The second was a general count for money had and received, but blanks were left for the sum. The damages were laid at one thousand dollars.

After a verdict for the plaintiff, on the general issue, the parties, by their attorneys, agreed that this suit should not abate by the death of any party; and a new trial was granted the defendants, on the payment of costs, and on condition that they should produce, at the next trial, the material evidence, or some of it, which was stated in a certain affidavit filed in the cause.

At the next term the defendants moved in arrest of judgment, 1st. Because it appeared, from the face of the declaration, that the plaintiff, after the bond in the declaration mentioned was assigned to him, did not use due legal diligence in pursuing the original obligors;* 2dly. Because it did not appear that there was any, or a sufficient consideration for the promise laid in the declaration; and, 3dly. For that the declaration was otherwise insufficient and erroneous.

The district Court arrested the judgment; whereupon the plaintiff appealed to this Court.

the assignment; and the assignment being in writing does not necessarily import that it was for valuable consideration. *Hopkins v. Richardson*, 9 Gratt. 422, citing the principal case. See further monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 408. The principal case is also cited in *Bank v. Clarke*, 4 Leigh 609.

*Note. It appeared, from the declaration, that the bond was assigned to the plaintiff March 17th, 1786; that, on the 14th of December, 1786, he assigned it to a certain John Lewis, who, on the 6th of May, 1787, assigned it to one John Reid; that it was afterwards returned by Reid to Lewis, and by Lewis to the plaintiff, who paid him the full value thereof, and afterwards put it in suit.—Note in Original Edition.

Botta, for the appellant. The judgment, in October, 1805, was final to every intent and purpose, except that

552 *of a new trial on certain conditions.

It stood final, unless the conditions were performed. The Court had no power over it, except upon performance of those conditions. If the judgment was not final, (the time allowed for performance not being limited,) yet the Court could not receive a motion in arrest of judgment at a subsequent term; for certainly that motion was, in itself, a waiver of the conditional right to a new trial; because a party cannot obtain a new trial after moving in arrest of judgment.†

But, admitting that the Court might go further back than the judgment in October, 1805, the errors alleged are not sufficient. The assignment being in writing, the plaintiff was not bound to set forth a consideration. (a) If there was none, the defendant should have made the

553 *objection by plea, or by testimony, on the general issue. (b) At all events, however, the count is good after verdict; it being only a good case defectively set forth, and not a defective case, for the evidence of a consideration is set forth, if not the consideration itself. (c)

2. If the first count be defective, the second is sufficient to maintain the action; (d) and this notwithstanding the blank. (e) The cases of *Smith v. Walker*, 1 Wash. 135, and

†Note. See Tidd's Practice, p. 831; 2 Salk. 647; 1 Burr. 334. The case of *Charles Smith's executors against The executors of Fielding Lewis*, was an action of assumpsit founded on a writing, signed by the testator of the defendants, but not under seal, in the following words: "I do hereby oblige myself, my heirs, executors, and administrators, to indemnify Mrs. Smith from any demand which Mr. Edward Dorsey, Mr. Hawkins, and Mr. Kirk may have against the estate of Captain Charles Smith, deceased, for the said Charles Smith's becoming security for my son, Fielding Lewis, for money due them, and for any other sum, or sums, the said Smith may be bound for my said son: provided the sum does not exceed two hundred pounds. Witness my hand, this 11th of September, 1779." The declaration contained one count only, setting forth the said writing specially; a bond, in which the testator of the plaintiffs became bound as security for the said Fielding Lewis, the younger, and a judgment thereupon, the amount whereof, with interest, damages, and costs, had been paid by the plaintiffs' executors as aforesaid; but stating no consideration for the undertaking of Fielding Lewis, the elder, except the aforesaid securityship of the said Charles Smith for Fielding Lewis, the younger. After a verdict for the plaintiffs, for 181l. 8s. damages, judgment was arrested by the district Court, and their judgment affirmed by the Court of appeals: three errors having been assigned by the counsel in the district Court; viz. 1st. That no sufficient consideration for the assumpsit laid in the declaration, was stated; 2d. That upon the face of the declaration, it did not appear that the said Fielding Lewis agreed to indemnify Mrs. Smith, against the bond and judgment in the said declaration mentioned; and, 3d. That the assumpsit laid in the declaration, and the note of Fielding Lewis, sen., was to Mrs. Smith, in her own right, and not as executrix. The second and third objections appear not to have been well founded: the judgment, therefore, was, probably, arrested, on the ground that the consideration for the assumpsit was not sufficient.—Note in Original Edition.

(a) *Lilly's Ent.* 54, Pleader's Assistant, 22, 24; *Kyd on Bills of Exchange*, 276.

(b) *Doug.* 2, 5, *Walker v. Witter*; 2 Wash. 220, 231, *Mackie's executor v. Davis*; 3 Burr. 1009, 1070, 1071, *Pillans, &c. v. Van Microop and Hopkins*.

(c) 1 Cal. 267, *Fulgham v. Lightfoot*; 2 H. Bl. 261, *Bolton v. The Bishop of Carlisle*.

(d) *Re v. Crutchfield*, 1 H. 861.

(e) *Craghill and others v. Page*, 3 H. & M. 448, pl. 4; *Stephen v. White*, 2 Wash. 208; *Diggs v. Norris*, 3 H. & M. 208.

Blane v. Sansum, 2 Call, 495, appear to be authorities against me; but, in those cases, the defects in the declaration were much greater than in this.

Williams, for the appellees. The motion, on arrest of judgment, was properly made, though at the next term after the verdict; for a new trial was granted on certain conditions, to be performed at a future term, and this was enough to prevent the judgment from being entered. It is like the case of the Court's continuing the cause after verdict found, thereby postponing the entry of the judgment. The party's not taking the new trial, when he thought the judgment ought to be arrested, was correct.

2. The declaration shows that due diligence was not used in bringing suit against the obligors.

In Mackie's executor v. Davis, (a) Judge Barrington says, that whether due diligence has been used is a question of fact, not of law; but this was a mere obiter dictum, not necessary for the decision of that case, in which the only point actually occurring, was, whether the assignor was liable on the ground of the privity of contract between him and the assignee. I am not precluded, then, from contending, that what constitutes due diligence is a question of law; if it was not, great uncertainty would arise. In Tindal v. Brown, 1 Term Rep. 167, and other modern cases, it is expressly decided that such is the rule.

If it be a question of law, it plainly appears, from this declaration, that the plaintiff had not made out a case of due diligence; and, therefore, a demurrer to the first count might have been sustained on that ground, as well as the other, that no consideration for the assignment is stated.

3. The assignment's being in writing does not imply a consideration. Hites, executors of Smith, v. Lewis's executors, (b) is a case in point to this effect. There is no consideration averred, and it cannot be intended that any was found by the jury. Rushton v. Aspinall, (c) shows that such a defect is not cured by verdict; the very gist of the action being omitted in the declaration.

4. The general count seems to me to have no ground to support it, being blank throughout. If it be good, no consideration is requisite to the validity of a promise; for it does not appear whether one penny, or one shilling, or what sum of money is alleged to have been received. There is no case in this Court in which a declaration, completely blank, has been supported.

Botts, in reply. Mr. Williams's observations concerning the case of Mackie's executor v. Davis, (considering his usual accuracy,) surprises me. In that case Judge Roane observed, "that due diligence was used by the appellees to recover the money from the obligor, is admitted by the verdict, and, therefore, this circumstance will be considered as forming a part of the case." How could this have been so, if due diligence was not matter of fact? Due diligence, in this country, is very different from what is so considered in England. Here, a variety of

circumstances always enter into the inquiry.* How, when, and where have those circumstances been announced, as matter of law, to the people of this country? The case might have been satisfactorily made out to the jury: it should, therefore, be presumed that it was.

The consideration of the assignment was not necessary to be set forth.

The uniform course of declaring, in England, is not to state the consideration.† Hundreds of instances may be shown of promissory notes not expressing on their face any consideration, and which are declared upon in like manner. The signature of the drawer to the note is considered enough. In Mackie's executor v. Davis, all the judges said, an assignment does, of itself, import a debt from assignor to assignee.

The second count is not altogether blank. It charges, that "the defendants, being indebted to the plaintiff in the sum of —, for so much money before that time received, &c., in consideration thereof, undertook and promised that they would pay to the plaintiff the sum of —, when they should afterwards be required." It alleges that some money was received, though it does not specify how much. It is clearly, therefore, only a good case defectively set out; for we could not have obtained a verdict without proving to the jury the sum received.

January 27th, 1813, the president pronounced the opinion of the Court; "that the first count in the declaration was faulty, in not having averred a consideration on which the assumpsit was charged; but that the second count was sufficient to support the action; and, therefore, the errors filed in arrest of judgment were insufficient."

Judgment for the appellant.

556

*M'CLELANAHAN v. Gwynn.

Argued Nov. 16th. 1811.

1. Lease—Assignment—Liability of Assignor.—A person assigning a lease, for value received, but without any special agreement to be responsible for the title, is not bound to restore the purchase-money, upon the eviction of the assignee, in consequence of a defect in the lessor's title; especially where the lessor has not been previously resorted to, or shown to be insolvent, and where the possibility of the eviction was in contemplation of both the parties at the time of the assignment.

2. Same—Same—Liability of Lessor to Assignee.—Where a lease is assigned, and the assignee is evicted, through a defect in the lessor's title, he may sue the lessor for compensation.

This was an action of assumpsit, instituted in the late district Court, holden at Haymarket, by Humphrey Gwynn against John M'CLELANAHAN.

The declaration contained three counts. The first set forth a general assignment to the plaintiff, by the defendant, (who was himself an assignee, the several assignments being stated,) of an unexpired term of a lease from Thomas Nelson, sen., to Richard Milton; which assignment was made to the plaintiff, on the 3d of January, 1797, in consideration of the sum of 1,208 dollars, then paid by him to the defendant, who was charged as having "sold the said lease, as one to which he had full and complete title, and as one assuring a term then unexpired, to

(a) 3 Wash. 231.

(b) MS. Order Book, October 20th, 1804, No. 5, p. 106.

(c) 2 Doug. 679.

*Note. See Goodall v. Stuart, 3 H. & M. 106-116.

†Note. See Chitty on Bills, p. 9. and 185; also 246-247.

which he, the said defendant, had right, and good authority to convey and assure; yet the defendant's title to convey and assure the same lease and term then unexpired was feigned and imperfect;" for, by a decree of the federal Court, foreclosing a mortgage given by a certain Lewis Burwell, of whom Thomas Nelson, the lessor, bought the land, (which suit was instituted before the assignment to the plaintiff as aforesaid, and to which decree neither the plaintiff nor defendant was a party,) the plaintiff was evicted, and lost the benefit of the lease.

The second count was the same in effect, adding the charge of a representation by the defendant that he was selling a good title. The third was for money had and received.

On the general issue, a special verdict found the lease; the several assignments thereof, including that to the plaintiff, which was in general terms, for value received; the sum given for it by the plaintiff; the

value of so much of the term as was yet to run when the plaintiff was evicted; the proceedings in the federal Court; and the plaintiff's surrender to the marshal of that Court, to avoid a forcible eviction. It was further found, "that the plaintiff was, prior to the time of his taking the said assignment, informed, in general terms, that the said demised premises had been mortgaged by the said Thomas Nelson, the lessor, subsequently to his said lease to Richard Milton, and that a sale of the same, under such supposed mortgage, would probably take place; that the general impression and belief of the public, in the vicinity, was that the same had been so mortgaged by the said lessor; but that the plaintiff was probably ignorant of the existence of the mortgage made as aforesaid by Lewis Burwell, and purchased the said assignment under the impression and belief that the full and quiet enjoyment of the demised premises, for the then unexpired residue of the said term, was secure to him, notwithstanding any mortgage; that it was known to the plaintiff that there was a mortgage on the premises, included with other lands, before he made the purchase of the lease; and that a sale of the said land was expected generally in the neighbourhood, before and after the said assignment to the plaintiff; that the last-mentioned general information the plaintiff had received in several companies in the neighbourhood, in which he was present; that the probability of the sale, which took place as aforesaid, of the said land, was particularly mentioned, immediately before the conclusion of the bargain between the defendant and plaintiff; that the defendant had sown about 80 bushels of wheat on the premises, and that the plaintiff reaped and enjoyed the crop." The verdict concluded with finding for the plaintiff (in the usual conditional manner) 913 dollars and 50 cents damages.

The district Court entered judgment for the plaintiff; whereupon the defendant appealed to this Court.

Williams and Wickham, for the appellant. Botts, for the appellee.

558 *January 30th, 1813, the following opinion of the Court was pronounced: "The Court (not deciding any other point occurring in this cause) is of opinion, that

the action did not lie against the present appellant; the principle being, that, in case of a mere assignment of a lease, the assignor is not liable to restore the purchase money, in case of eviction; and especially in this case, where the lessor's representatives have not been previously resorted to, or shown to be insolvent,* and in which, also, no special agreement for the assignor's responsibility has been entered into, although the liability of the land to eviction and sale seems, from the verdict, to have been in the contemplation of both the parties. On this ground, the judgment is to be reversed, and entered for the appellant."

559 *Wilson and Trent v. Butler and Others.

Argued Feb. 1st, 1813.

1. *Injunction—Against Sale under Execution.*—Although a person, whose property is taken in execution to satisfy the debt of another, may proceed to recover that property, or damages for the taking and detaining thereof, in a Court of law; and although the sheriff, having doubts as to the title to the property, may demand from the creditor an indemnifying bond; yet neither of these remedies is in exclusion of a bill of injunction to prevent the sale.

2. *Sale of Personality—Retention of Possession by Vendor;—Case at Bar.*—A suit on a bond was brought against the debtor in a county in which he did not reside: he confessed judgment on the return of the writ, and furnished the sheriff, having the execution, with a list of slaves, and other property of his, to be advertised to be sold at his own house: the property (without being seen by the sheriff until the day of sale) was advertised, and sold to the creditor, for a fair price, though no other person bid: the creditor, (whose claim was proved to be just and bona fide,) being a brother of the debtor's wife, permitted the property to remain in the debtor's possession, and within five years afterwards, conveyed the same, in trust, for the use of the wife and children of the debtor, by a deed recorded in a different county from that in which the property was. None of these circum-

*Note. That an action of covenant lies, at the common law, by the assignee of the lessee, against the lessor, or the grantee of the reversion, in respect of the privity of estate, see 5 Co. Rep. 17. a. Spencer's case. For the same reason, of privity of estate, the lessor may have debt or covenant, for rent, or for not repairing, &c. against the assignee of the term, at common law. 3 Co. Rep. 23 b. Walker's case. See, also, 1 Saunders, 241, notes (5) and (6); Holford v. Hatch, Doug. 182-186; Palmer v. Edwards, Ib. 186, note (50.) But if a term be assigned by way of mortgage, with a clause of redemption, the lessor cannot sue the mortgagee, as assignee of all the estate, right, title, interest, &c., of the mortgagor, even after the mortgage has been forfeited: unless the mortgagee has taken actual possession. Eaton v. Jaques, Doug. 454. And if the assignee of a term assign all his estate, right, &c., to another, without fraud, he is thereby discharged from all responsibility to the lessor: (Walker v. Reeves, Doug. 481, note (1); Chancellor v. Poole, Ibid. 764; Taylor v. Shum, 1 Bos. & Pull. 21.) If he show that the lessor had notice of the assignment, and that there was nothing due at the time of the assignment. 3 Salk. 48.—Note in Original Edition.

Injunctions—Against Executions.—This subject is discussed at some length in *foot-note* to Kelly v. Scott, 5 Gratt. 479; *foot-note* to Randolph v. Randolph, 8 Munf. 99; monographic note on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 118. The principal case was cited on the subject in Baker v. Rinehard, 11 W. Va. 241; Summers v. Bean, 13 Gratt. 415; Bowyer v. Creigh, 3 Rand. 81; Allen v. Freeland, 3 Rand. 173, 175. In these last two cases, the principal case was distinguished on the ground that the plaintiff in equity claimed the property, not as a security for money, but as belonging of right to himself and further that the property in question was slaves.

3*Sale of Personality—Retention of Possession by Vendor—Fraud.*—See *foot-note* to Wright v. Hencock, 3 Munf. 521, and notes there cited.

*Note. See Bullitt's executors v. Winstons, 1 Munf. 209.

*Note. See Clayborn v. Hill, 1 Wash. 177-186; 3 H. & M. 235, and 458.

stances were considered unfair; and the deed was adjudged to be good against other creditors.

Upon an appeal, allowed by a judge of this Court, from an order of the superior Court of chancery, of the Richmond district, dissolving an injunction. (a)

The bill was exhibited by James Wilson and Stephen W. Trent, trustees, named in two deeds of trust, for Anne Copland, wife of David Copland; and the said Anne Copland, by the said James Wilson, her next friend, stating that David Copland, being justly indebted to Benjamin Harrison, by bond, in the sum of 337l. 10s., with lawful interest thereon, from the 15th of May, 1809, and to Carter B. Harrison, by bond, in the sum of 554l. 8d., with interest from the same day, Benjamin Harrison, executor of the said Benjamin Harrison, deceased, and William A. Harrison, administrator of the said Carter B. Harrison, deceased, severally instituted actions of debt against the said David Copland, on his said bonds, in the county Court of Cumberland, on which judgments were obtained at July Court, 1809; that executions were severally issued thereupon, and levied, each, on sundry slaves, whose names were mentioned; that the slaves, 45 head of sheep, 19 head of cattle, and a mare, taken to satisfy the execution in favor of Benjamin Harrison, were bought by him of the sheriff, for the sum of 353l. 4s. 3d.; and the slaves, taken to satisfy William A. Harrison, were, in like manner, bought by him for the amount of his debt and costs; that,

560 afterwards, the said deeds of *trust were executed by the said Benjamin Harrison, administrator, de bonis non, of Benjamin Harrison, deceased, and William A. Harrison, administrator of Carter B. Harrison, respectively, on the 20th day of November, 1809, reciting that it was the intention of the said Benjamin Harrison and Carter B. Harrison, in their lifetime, (they being brothers of the said Anne Copland,) that she should have the benefit of the said debts during her life, for her separate use and support, &c., and therefore conveying the said slaves, and other personal estate, to the complainants, Wilson and Trent, in trust, for her benefit, &c.; that the said trustees, being so entitled to the said slaves and other personal estate, suffered a part of them, by her wishes and consent, to be worked upon the lands of the said David Copland, but entirely under their own control, for the purpose of raising bread, &c., for the support of the said Anne and her children; others were necessarily employed as house servants for her convenience, and the stocks kept on the land for the support of the establishment; that since the recording of the said deeds of trust, a judgment was obtained by John Butler & Co., in the county Court of Buckingham, against the said David Copland, for upwards of 280l., and a fieri facias thereon was levied on several of the slaves conveyed in trust as aforesaid. The object of the bill was, therefore, to prevent a sale of those slaves; the plaintiffs suggesting, that although they might, as trustees, perhaps, recover their value at law, yet that would defeat the very objects of the trust, as the hire of slaves greatly exceeds the interest of

the purchase money, which was one of the strongest motives of the donors for investing the money in the said slaves; that the subject of trusts, and the faithful execution thereof by the trustees, is the peculiar province of a Court of equity; and that the plaintiff, Anne Copland, could apply to that Court alone, for the purpose of having the fund preserved for her.

The answer of William M'Kenzie, acting partner of the firm of John Butler & 561 Co., (who considered himself *the only defendant beneficially interested in the defence of the suit,) alleged a number of circumstances, inducing him to believe that the deeds of trust were a fraudulent contrivance to cover the personal property of David Copland, for the benefit of his family, against the just demands of his creditors. "The bonds are said to be executed on the same day, May 15th, 1809; the obligees die; an executor is appointed for one, an administrator for the other; suits are brought, and judgments on the same day of July, 1809—incredible despatch, if all were fair! The suits are brought in Cumberland, where the defendant, Copland, did not reside; judgments must have been confessed at the return day, if the bonds were executed in May. Executions were taken out by Copland himself: he furnishes the sheriff of Buckingham with a list of the property, to be advertised to be sold at his own house. The sheriff never levied the executions, but attends and cries the property out to the bids of the plaintiffs, being not opposed by any other bona fide bidder: the property was never in the possession of the sheriff, and never out of the possession of Copland, until the sheriff, by virtue of the execution of John Butler & Co., for the benefit of this defendant, seized and removed some of it from his plantation. The grantors, in the deeds referred to, never had possession: the deeds are made and recorded in Charles City and Prince George Counties, while the property still remained in the county of Buckingham, in the possession of David Copland; and the trustees never had possession nor control of any part of it."

The answer of David Copland denied that any fraud or collusion existed in the transactions in question; averring, that the bonds were given, and judgments obtained, for the amount of cash and tobacco advanced by the brothers of his wife, for his use, and, for the most part, to relieve his estate from executions; "that, shortly after the death of the last of those friendly brothers, this respondent was called on by their sons and legal representatives, to secure the balances 562 due, and left it with them *to take any course which seemed to them best: they preferred the one stated in the bill, by suit, judgment, and sale under execution, which took place with no other intent but the payment of a just debt, as well of gratitude, as actual cash and tobacco advanced."

Sundry exhibits and affidavits (which, by consent of parties, were read as evidence) strongly supported the statement made in this answer. It also appeared, from the affidavit of Boaz Ford, the deputy sheriff, who sold the slaves and other property under the writs of fieri facias, in favour of the Harrisons, that, shortly after receiving those executions,

(a) See acts of 1800, ch. 11; sect. 2, Sup. to Rev. Code, p. 45, 46.

he met with David Copland, at Buckingham Court, who immediately expressed an uncommon degree of satisfaction at seeing him, and inquired if he had not the above executions: he answered in the affirmative: whereupon Mr. Copland drew out a list of slaves, &c., which he said he wished to be advertised to satisfy them; observing that the affiant might have no farther trouble about the business, than to name a day, at his house, for the sale, and that he would notify the plaintiffs, that the property might be undoubtedly sold. The sale, accordingly, took place (after advertising) at Mr. Copland's own house, where the property was produced, according to the list before furnished, and sold; at which sale William A. Harrison became the purchaser, not only for himself, but for Benjamin Harrison, for whom he acted; that no person but the said Harrison made a bid, except this affiant, who did so in order to start the sale of a piece of property; but that, considering the time and terms of sale, the sales were as good as could be expected; that it was very common for the sheriff to advertise and sell property by list, without any actual seizure; that if the debts were bona fide and just, there was, in his opinion, nothing in the manner of levy and sale to vitiate the transaction; that the property, so soon as it was bid out, was immediately ordered by Mr. Copland back into his service; that, at the sale, Mr. Copland expressed to the affiant some uneasiness, stating that there was room for

563 the Harrisons to *use considerable deception on his children, provided they did not convey the property purchased at said sale to his children, according to promise; and further stating, that the meaning and intent of the business was to secure the property to his wife's children.

The Court of chancery granted the injunction, June 13th, 1811, and, on the 17th day of the same month, dissolved it; upon a motion made to that effect, by consent of parties; "being of opinion, that if either the cestuy que trust, or cestuy que use, had supposed there was any combination between the trustees and the creditors of David Copland, and had asked for an injunction to stop a like sale of the property in question, until the matter could be examined into, it might have been granted upon the principles of the Court, because neither cestuy que trust nor cestuy que use have any legal right in the trust subject, and, therefore, they cannot maintain an action at law, upon an equitable interest; and hence it is that they are entitled, (and at all times,) if clear of fraud, to the aid of a Court of equity, since they are clearly without a remedy at law; and, on this account, when they come with clean hands, they are the peculiar favourites of equity; and so is the trustee applying under like circumstances, in relation to either cestuy que trust, or cestuy que use, as it respects the subject of the trust; but not as it respects those who violate his legal rights as trustee; since, for any such violation, he has an adequate remedy at law; as for example, in the principal case, he might maintain detinue, trover, or trespass, before a sale, beside the additional remedy upon the bond to indemnify the sheriff to sell.* The prop-

erty is Copland's, or it is not: if it is, M'Kenzie should be allowed to indemnify the sheriff, and to sell: if it is not, the plaintiffs' right would not be changed by a sale; their legal remedy is open to them; 564 and a Court of equity *should not interpose, but under such circumstances as would justify it in any other case. If, in this case, this Court can interpose in the first instance, is it not opening an avenue to this Court, by which every case whatsoever may be let in? Nay, does it not render ineffectual the act of the legislature, which makes it the duty of the sheriff to sell when he is indemnified? Or is the Court to try the fraud stated in the answer, in relation to the judgments and deeds referred to by the bill? If the Court is, may it not be called upon, in every case, to stop the proceedings at law, and to try the cause? Or is the Court to become a mere handmaid to a Court of law, and to direct an issue in all such cases? If the Court is to do this, why not let the issue be made up in the Court of law in the first instance, since every citizen, who is a defendant, has a right (as it now seems to the Court) to demur to a bill like the present, and to demand a trial by jury. Upon this view of the subject, this Court erred in granting the injunction; and, therefore, it is admitted, the counsel was correct in asking a dissolution of it, upon the ground that it should not have been granted; for which reason it is now discharged; but the plaintiffs may, according to the course of the Court, carry on this suit as an original bill for relief, or suffer it to be dismissed at the next term, under the act."

Thursday, the 4th of February, 1813, the following was delivered by JUDGE ROANE as the opinion of the Court of appeals.

The Court is of opinion, that although a party, whose property is taken in execution to satisfy the debt of another, may proceed to recover that property, or damages, for the taking and detaining thereof, in a Court of law; and although it is competent to a sheriff, having doubts as to the title of property taken in execution, to demand from the creditor an indemnifying bond, pursuant to the act in such case made and provided, yet, that

565 neither of these remedies are in exclusion of a proceeding in equity, *having for its object the retention of the property, in specie. Every argument on which the jurisdiction of the Courts of equity, to compel a performance of a contract, in specie, is founded, is supposed to hold with equal force, at least, in favour of retaining a subject of property, which another, having no title thereto, claims to arrest and dispose of by means of an execution, rather than turn the rightful owner round to seek an uncertain and inadequate reparation in damages. On this ground, the Court is of opinion, that the declared principle of the decree before us is erroneous.

With respect to the merits of this particular case, while the Court, as the case now appears, has no reason to doubt that the judgments under which the property conveyed was purchased, were founded on a valuable and even meritorious consideration; neither does it perceive any circumstances, as to the

manner of obtaining, or proceeding under the same, which, independently of that objection, would be considered as unfair, or contrary to the usages of the country in relation to such transactions. With respect to the possession of the slaves, which is alleged to have been retained by Mr. Copland, the Court is of opinion, that a title in them was duly acquired by the grantors in the deeds in the proceedings mentioned, and that the said slaves were, by them, loaned to Mrs. Copland, or to her husband; they could not, therefore, be considered as the slaves of Mr. Copland, in favour of his creditors; but such loan was liable to be terminated, and the property resumed, by the lenders, at any time within five years; which, in fact, was done, by the execution of the deeds in the proceedings mentioned.

On these grounds, the decree of dissolution is reversed, and the injunction reinstated, with liberty to the appellees to impeach the title of the appellants, by showing the judgments in the proceedings mentioned to have been voluntary, or fraudulent, on the final hearing of the cause.

566

***Sexton v. Holmes.**

Argued Feb. 4th, 1813.

Assumpsit—Declaration—Promise Must Be Charged Positively.*—The plaintiff in assumpsit must charge the promise, by the defendant, positively; not by way of recital only: for if the declaration be defective in this respect, it is a fatal error, and not cured by verdict.

See Syme v. Griffin, 4 H. & M. 277.

In an action of assumpsit, "Hugh Holmes complained of Joseph Sexton, in custody &c., of a plea, for this, to wit, that whereas, on the 4th day of March, in the year of our Lord 1804, certain articles of agreement were made, and entered into, by the said Hugh Holmes and Joseph Sexton, and a certain discourse had and moved, of, and concerning a certain tract of land in the county of Frederick, wherein and whereby it was agreed be-

tween them, that the said Hugh Holmes, on his part, should sell and convey unto the said Joseph Sexton, a certain tract of land, which he purchased of Jacob Hanner, containing 208 acres, in consideration of the sum of 300 dollars, to be paid unto the said Holmes in three annual instalments, with interest from the date; and that the said Holmes was to make a special warranty, and not to be liable for any disputes with Joseph Baker, or any other person whose lines might interlock with said Sexton; and said Holmes was to make a conveyance when called upon; in which case, the said Sexton was to give security on the land, or personal security, if said Sexton chose. And further, said Sexton, on his part, was to execute three several bonds, of 100 dollars each, payable as aforesaid, and was to have immediate possession; which said articles of agreement are now in possession of said plaintiff, and to the Court now here shown. And the said plaintiff, in consideration of said agreement, and, also, in consideration that the said defendant had undertaken, and faithfully promised to perform every thing in said agreement on his part to be performed, promised and undertook to perform every thing on his part to be performed. And the said plaintiff avers, that he hath faithfully performed all that

was required of him, on his part, 567 *as far as he was suffered by the said defendant to perform, and that he was bound to perform: but the said defendant, his said agreement and undertaking has not kept and performed, but the agreement hath broken in this, that he hath not paid the 300 dollars by instalments, or at any time, or in any manner whatever, or any part thereof, with interest, as he was bound to do; neither has he given his bonds for 100 dollars each, nor offered to do the same, nor has he given security, or offered to do so, although he has been often required to perform his contract aforesaid, but the same to do hath hitherto refused, and still doth refuse to do; and so the aforesaid plaintiff saith, that the said defendant his agreement has not kept, but has broken the same; to the damage of the plaintiff." &c.

Plea non assumpsit, to which the defendant afterwards added several other pleas.

Verdict and judgment for the plaintiff for 300 dollars damages, with legal interest thereon from the 9th of March, 1804; from which judgment the defendant appealed to this Court.

Tuesday, February 9th, 1813, JUDGE ROANE pronounced the following opinion of the Court:

"The Court (not deciding upon any other point made, or occurring, in this cause) is of opinion that the judgment is erroneous in this, that there is no promise or assumpsit sufficiently averred in the declaration. The judgment is, therefore, reversed, with costs, and judgment entered for the appellant."

568 ***Hairston v. Hughes and Others.**

Feb. 10th, 1813.

Administration Bond—Action against Sureties—Evidence of Devastavit.—Before the act of

***Assumpsit—Declaration—Promise Must Be Alleged Positively.**—It has always been, and still is a general rule in pleading, that whatever facts are necessary to constitute the cause of action should be directly and distinctly stated in the declaration, and such facts should not be left to be inferred from other facts distinctly alleged in the declaration, and arguments, inferences and matter of law should be excluded. Thus, in *Winston v. Francisco*, 2 Wash. 187, it was held, that in an action of assumpsit, the promise must be directly averred, and not by way of inference, and that the omission of such direct averment was not cured after verdict by the statute of Jeoffails, as it then was, though it provided "that a verdict shall cure the omission of an averment of any matter, without proving which, the jury ought not to have given such verdict." So in *Sexton v. Holmes*, 3 Munf. 566, the court set aside a judgment after verdict because no promise was sufficiently alleged in the declaration, though it did set forth that an article of agreement was made and entered into by the plaintiff and defendant, wherein and whereby the defendant was to do certain things, the failure to do which things was alleged. So also, in *Cooke v. Simms*, 3 Call 30, a demurrer to a declaration in assumpsit was sustained which averred that the defendant made a certain note in these words, setting forth the note verbatim, and thus alleged a breach of promise contained in the note, but which promise was not alleged in any manner except that it appeared in the note set out verbatim. *Burton v. Hansford*, 10 W. Va. 474. To the same effect, the principal case is cited in *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 627.

See further, monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 183. The principal case is also cited in *Bank v. Clarke*, 4 Leigh 609.

*See foot-note to *Gordon v. Justices of Frederick*, 1 Munf. 1; monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

February 7th, 1814. "concerning executors and administrators," (sess. acts of 1812, ch. 13, p. 40.) a decree in chancery against an executor or administrator, directing him to pay a debt of his testator, or intestate, out of the assets in his hands to be administered, (with a *ieri facias* and return of nulla bona,) was not sufficient evidence of a devastavit to authorize an action against the securities in the administration bond; but it was necessary to bring a previous suit against the executor or administrator, suggesting the devastavit.*

See Gordon's administrators v. the Justices of Frederick, 1 Munf. p. 1; Meade and others v. Brooking, ante; Catlett and others v. Carter's executors, 2 Munf. p. 24; Moore's executors v. Ferguson and others, 3 Munf. p. 421.

In an action of debt, instituted in the year 1798, on an administration bond, in the names of Hughes and others, justices of Henry county, who sued for the benefit of Stephen Smith and Bird Smith, executors of Guy Smith, deceased, against James Lyon and Sarah his wife, (late Sarah Lindsay,) Abraham Penn, George Hairston, and Jarrett Patterson, surviving obligors of Sarah Lindsay, (now Sarah Lyon,) John Lindsay, Abraham Penn, George Hairston, and Jarrett Patterson, the declaration set forth a bond, in the usual form, conditioned for the due administration of the estate of Jacob Lindsay, deceased, by the obligors, Sarah and John; and charged, as a breach of the condition, that in a suit, in the high Court of chancery, in behalf of the said Stephen Smith and Bird Smith, executors of Guy Smith, deceased, against the said administrator and administratrix, they were directed by a decree of the said Court to pay to the said plaintiffs a certain sum of money "out of the goods and chattels of the said Jacob Lindsay, in the hands of the said administratrix to be administered;" that sufficient goods and chattels, belonging to the estate of the said Jacob Lindsay, deceased, to satisfy the said decree, came to the hands and possession of the said administrator and administratrix, but were by them eloiigned, wasted, and converted to their own use, whereby the said decree remained unsatisfied.

Plea "conditions performed," and issue thereupon. The suit having abated as to all the defendants, except George Hairston, a verdict was found for the plaintiffs,

569 *assessing their damages to 326l. 5s., beside their costs; "and that goods and chattels, which were of Jacob Lindsay, deceased, in the writing obligatory aforesaid named, came to the hands of the said Sarah Lindsay, administratrix, and of John Lindsay, administrator, of Jacob Lindsay, deceased, to be administered, of the value of the damages and costs aforesaid, which they wasted;" subject to the opinion of the Court upon a point reserved at the trial, viz., "whether this action could be maintained against the securities of Sarah Lindsay and John Lindsay, on their administration bond, upon the return of 'no effects in the hands of the administrators,' by the sheriff of Patrick county, on a *ieri facias*, which issued from the high Court of chancery on a decree which the plaintiffs in this cause had therein obtained against the said administrators, without first showing a devastavit in a suit against the said administrators?"

The district Court was of opinion that, on this point reserved, the law was for the plaintiffs, and therefore entered a judgment according to the verdict; from which the defendant, Hairston, appealed.

February 10th, 1813, the president pronounced the following opinion of this Court:

"It not appearing by the decree, which is set forth in the declaration, that a waste of the estate of the intestate is established by that decree against the administrator and administratrix, the principals in the bond; the Court (not deciding, at this time, what would be the effect of the decree, if it had so appeared, in a suit against the security only, or against the security and the principal jointly) is of opinion that the said judgment is erroneous."

Judgment reversed, and entered for the appellant.

570 *Baird v. Bland and Others.

Argued May 20th, 1811, and reargued Jan. 20th, 1812.

1. *Marriage Settlement—Construction.*†—If, by a deed of marriage settlement, duly recorded, slaves be conveyed to certain trustees and their heirs, to the use of the wife, for life; and after her death, to the use of the husband, for life; and after the death of the survivor, to the use of the children of the marriage, equally to be divided between them, and their heirs for ever; upon the deaths of the husband and wife, the children of the marriage are entitled, not only to the equitable, but the absolute legal estate.

2. *Same—Statute of Limitations—When It Runs against Remainders.*‡—If such case, if the parents, in their lifetime, be deprived of the slaves, and depart this life, leaving children under age, the act of limitations does not run against the children until they attain the age of twenty-one years.

3. *Chancery Practice—Suit for Legal Estate.*†—A person entitled to a legal estate in slaves, may sue in equity to recover them, if thereby a multiplicity of suits may be prevented: calling on the defendant to discover how long he has had them in possession, and to discover and state an account of their profits.

See Alderson v. Biggars and others, 4 H. & M. 470, and Bass v. Bass, *Ibid.* 478.

Theodorick Bland and others, children of Theodorick Bland, deceased, and of Sarah, his wife, also deceased, brought suit in the late high Court of chancery against Thomas L. Lee, Peter S. Randolph, Anthony Thornton, and John Thornton, heirs of Thomas Ludwell Lee, and others, who were trustees in a deed of marriage settlement between the said husband and wife, before their marriage; by which deed, bearing date the 4th of December, 1772, sundry slaves, and other property, were conveyed to the said trustees, to the use of the said Sarah during her life; and, after her death, to the use of the said Theodorick, during his life, for the maintenance of himself and of the children of the marriage, "in lieu and satisfaction of any claim of dower or distribution which the said Sarah might claim in any of the slaves and other personal estate of which her said intended husband might die possessed; and, immediately after the death of the survivor, the said slaves and other personal estate to be to the use and behoof of such child, or children, of the body of the said Sarah, begotten by the said Theodorick, for such estate

†*Marriage Settlement—Construction.*—See monographic *note* on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

‡*Statute of Limitations.*—See monographic *note* on "Limitation of Actions" appended to Herrington v. Harkins, 1 Rob. 591.

*Note. Quære, whether the act above mentioned has altered the law in relation to the effect of a decree: since it mentions only "a judgment?"
—Note in Original Edition.

and interest therein, and for such parts and proportions thereof, as he, by deed, or will, might appoint; and in case no such deed, or will, should be executed, then to the use and behoof of all the children of the body of the said Sarah, begotten by the said Theodorick, equally to be divided between them and their heirs for ever; and, in default of such child or children, to the use and behoof of such person or persons as the said Sarah, by will, or deed, might appoint."

571 "The bill charged, in general terms, the trustees, and their heirs, with misconduct and negligence, by which the plaintiffs, in their minority, (both parents having died intestate, and without making any appointment by any other deed,) had sustained great losses; and further alleged, that the plaintiff, Theodorick, attained his full age on the 6th of December, 1797, after which he discovered that a certain John Baird, jun., by some unlawful or covinous means, had obtained the possession of a negro-man slave, named Will, one of the slaves in the said deed mentioned; and that Lydia Richardson had, in like manner, obtained the possession of another, by the name of Bill; that the plaintiffs had demanded the said slaves, which the said John Baird, jun., and Lydia Richardson, (who were made defendants,) had refused to deliver, although they well knew the same to belong to the plaintiffs, who, therefore, prayed a decree for the said slaves; that each of the said defendants be compelled to discover how long he, or she, had had possession thereof, respectively, and also to discover and state an account of profits. The bill, moreover, contained a prayer, that the heirs of the trustees be compelled to carry the trust into effect.*

Anthony Thornton, eldest son of one of the trustees, by his answer, denied any knowledge of the transactions in question, or any responsibility arising from his father's having been a trustee in the deed; averring, that he was in no manner interested in his father's estate; from which he was to receive no advantage; nor did he, by any means, think himself bound to carry into effect the trust in the deed executed by his father; but he had no objection to the plaintiffs' using his name (if necessary) in carrying on a suit, or suits, for obtaining

572 justice for them.† "No answer was filed by any other defendant, except John Baird, jun., who relied on his being a fair purchaser of the slave, Will, at a sheriff's sale, without notice of any dispute as to the title, and (alleging that, for more than five years past, to wit, from the 28th day of July, 1791, he had been in possession of the said slave) claimed the protection of the act for the limitation of actions. "This defendant never heard of the marriage settlement in the bill mentioned, nor of the trustees therein, until the commencement of a suit against him in the district Court of Petersburg, in

the names of the said trustees, or some of them, or their heirs, or the heirs of some of them, for the said slave, Will, which suit this defendant avers was prosecuted by the said Theodorick, the plaintiff, and by his own neglect dismissed. This defendant, therefore, denies the suggestion of the complainant to be true that he has no remedy at law: if a title can be made out under the said deed, it can be supported in an action of detinue, and ought not, therefore, merely at the discretion of the plaintiffs, to be brought in question in this Court." The time when the bill was filed, or subpoena issued, does not appear in the transcript of the record; but it probably was in, or before, the year 1798; the answer of John Baird, jun. being sworn to in August, 1798.

The plaintiffs proved, by the deposition of John B. Fitzhugh, that the slaves in question were two of those comprehended in the deed of trust; that Theodorick Bland, and Sarah, his wife, were married in December, 1772, and both died in April, 1793, leaving issue, the plaintiffs, Theodorick, Sophia, and Henry, Bland; that, on the 5th day of March, 1798, the deponent saw the slave, Will, in the possession of John Baird, jun., when the plaintiff, Theodorick, demanded, and Baird refused to deliver him, "alleging, that he had bought him at a sheriff's sale about seven years ago."

The suit abated as to Thomas Ludwell Lee and Peter S. Randolph, by their deaths; and the bill being taken for

573 "confessed against the defendant, Lydia Richardson, for failing to appear and answer, after an attachment for that contempt had been returned executed upon her, the cause came on to be heard the 14th of May, 1805, when the late Chancellor Wythe pronounced his opinion, "that the bill is properly maintainable in the Court of equity, not only because here the plaintiffs may, as they now do, claim the benefit of a trust estate in slaves, to which species of property the statute transferring uses into possession extendeth not; but because the plaintiffs demand (what they could but partly demand in the Court of common law) both a discovery of sundry material facts, and an account of profits, which can be settled in this Court, by one of its officers, more conveniently than by a jury; so that the plaintiffs, although relieviable by an action of detinue in the names of their trustees, are more completely relieviable by this mode of proceeding; and that of this relief the plaintiffs are not deprived by equity of the statute for limitation of actions and avoiding of suits," (the agreement in consideration of marriage, in the bill mentioned, having been legally recorded in due time,) "if the defendant's, John Baird, jun., possession, by him alleged, but not proved, had been as long as he affirmed." It was, therefore, adjudged and decreed, that the defendant, John Baird, jun., delivered to the plaintiffs the slave, Will, first named in the bill, and account for his profits, &c. A decree nisi was entered against the defendant, Lydia Richardson; and as to the defendants, Anthony Thornton and John Thornton, the bill was dismissed, with costs.

*Note. There was no demand, in the bill, of an account in what manner the trust had been executed; or by what title the defendants held the slaves.—Note in Original Edition.

†Note. According to the case of Robinson's administrator v. Brock, 1 H. & M. 213, the plaintiffs, in this case, might have brought an action of detinue in their own names, without using the names of the heirs of the trustees.—Note in Original Edition.

During the same term, on motion of John Baird, jun., by his counsel, the decree was set aside, and he was permitted to file several exhibits; from which it appeared that the negro man, Will, was taken in June, 1791, by the sheriff of Chesterfield county, upon an attachment against Theodorick Bland, for a debt alleged to be due to John Pride; and, by virtue of an order of the Court of 574 *said county, was sold by the sheriff, and bought by John Baird, jun., July 28th, 1791, for the sum of 671.; that the suit against him, in the Petersburg district Court, in the name of the heirs at law of the trustees aforesaid, was instituted September 4th, 1793, and dismissed, for want of prosecution, September 19th, 1796.

May 19th, 1806, the cause being reheard, the chancellor retained his former opinion, and renewed his decree; whereupon the defendant, John Baird, jun., appealed to this Court.

George K. Taylor, for the appellant. The Court of chancery had no jurisdiction; there being a plain and adequate remedy at law, by action of detinue in the name of the trustees. The legal title was, to all intents and purposes, vested in the trustees, who were living at the time when Baird obtained possession of the negro.* They took upon themselves a sacred duty, to assert the right whenever it was impugned. Suit should, therefore, have been brought by them. It appears, indeed, that the heirs of the trustees did bring a suit, which they might have prosecuted.

There was no necessity for a discovery. The plaintiffs themselves have exhibited testimony. The chancellor has taken another strange ground of jurisdiction; that an account of hire of negroes was demanded. But the plaintiffs were not compelled to come into equity for this. A jury could have settled it better than a commissioner. Bland and wife, when living, could not have sued the appellant, Baird, in a Court of equity; and their posterity can have no better title than they.

2. The act of limitations was a bar to the claim of the plaintiffs; (a) for the rule of equity, that the statute does not bar a trust estate, holds only as between 575 cestuy que *trust and trustees, not between cestuy que trust and trustees on one side, and strangers on the other; therefore, where a cestuy que trust, and his trustees, are both out of possession for the time limited, the party in possession has a good bar against them both. (b)

Hay, on the same side, referred also to Judge Tucker's opinion, in *Fitzhugh v. Anderson* and others, 2 H. & M. 301.

Wirt, for the appellees. The deed of marriage settlement was recorded, which was notice to all the world; so that Baird had constructive notice, if not actual. By

the deed, the children are original purchasers, taking as remainder-men, not as heirs.† The slave, named Will, was sold for Bland's debt, and purchased by Baird, while the plaintiffs were infants. The suit was brought by one of them, as soon as he came of age, for himself, and the other two, who were yet under age, to bring the trustees, and the holder of the property, into a Court of equity, demanding an account of the trust,‡ and a discovery by what title the defendant, Baird, held. The witness does not show when Baird's title commenced, or how it accrued. It was a proper case, therefore, for discovery. The plaintiffs could not know but that Baird held under the trustees themselves. The account of hire was to be founded on facts to be disclosed by the answer. At law, the plaintiffs could not have obtained a verdict for hire, because they knew not when it commenced.

If Bland and wife had sued in equity, a demurrer to their bill would not have been sustained; because they had no remedy at law, their title being equitable only. Their neglect, or omission, cannot prejudice the present plaintiffs, who claim under the deed. The act of limitations, therefore, does not apply. The whole 576 time, on *which Baird relies, ran during the minority of the plaintiffs.

The two years in Bland's lifetime did not run against them, for they do not claim as heirs, but as purchasers. I admit the law to be as Mr. Taylor has said, in relation to the legal title; but the rule is, that the act must run against the equitable title, as well as the legal, before the holder of the equitable can be barred. But it could not run against the infants. They are expressly excepted in the act. Their right of action accrued in 1793, when their father and mother died. The cestuy que trust must be equally negligent with the trustee to make the statute a bar against both. In *Llewellyn v. Mackworth*, (c) the time was counted against the cestuy que trust, who was of full age. In *Townshend v. Townshend*, (d) it was counted not upon the trustee, but upon the man who had the substantial claim to the property. No case, or dictum, can be shown, that the act shall run against the cestuy que trust merely on the ground that it ran against the trustee, or that the former cannot sue in equity, because the latter cannot sue at law.

Hay, in reply. The chancellor's benevolent feelings influenced his judgment. The decree is fraught with error from beginning to end. Suppose a landed estate conveyed to trustees to receive rents and profits, and they and cestuy que trust are both diseased; could they come into equity to try the title? Ejectment should be brought in the names of the trustees.

A plaintiff should not come into equity, merely for a discovery of facts which can be proved by testimony at law. A bill for discovery lies in cases only where the discovery cannot be obtained without the

*Note. It does not appear, from the transcript of the record, whether any of the trustees were then living, or not. The bill stated that they severally died in the years 1780, 1782, and 1783; but there was no proof on the subject.—Note in Original Edition.

(a) 4 Bac. 473.

(b) Per Lord Hardwicke, in the case of *Llewellyn v. Mackworth*, 2 Eq. Cas. Abr. 579, pl. 8. See also *Townshend v. Townshend*, 1 Bro. Ch. Rep. 554; *Harrison v. Harrison*, Call. 428.

†Note. See *Tabb and others v. Archer and others*, 3 H. & M. 390, pl. 2.

‡This appears to be a mistake. See ante.

(c) 2 Eq. Cas. Abr. 579.

(d) 1 Bro. Ch. Rep. 554.

defendant's answer. In what manner Baird got possession of the slave was unimportant, since the plaintiffs claimed under their deed. When he got possession might easily have been proved by the neighbours. The mere allegation, that the plaintiff knows not when the defendant obtained possession, is not sufficient to give the

577 Court of equity *jurisdiction. Such a doctrine would destroy the common law jurisdiction altogether.

As to the act of limitations, the trustees discontinued the suit, brought by them, before the time had elapsed. Let the consequences be upon them. If they were barred by the act, the legal title was gone; neither they, nor the cestuys que trust, could have recovered at law in 1797, the five years having then elapsed. *Equitas sequitur legem*. If the trustees were barred at law, the cestuys que trust must be barred in equity. It is monstrous that the plaintiffs should give the Court of equity jurisdiction, merely by coupling the trustees, as defendants, with Baird, whose right was complete at law by his five years' possession.

In 1 Call, 428, it is said that the statute runs, both in equity and at law, in favour of disseisors and tortfeasors. Surely, then, in favour of a bona fide purchaser. Infants are not the only objects of the favour of a Court of equity: fair purchasers are equally favoured. Baird bought at a sheriff's sale, and paid his money, without any suspicion of a defect of title.

The trustees executed the deed, and bound themselves to fulfil the trust. They have neglected their duty: but Baird is not to pay the penalty. They ought to be responsible to the cestuys que trust. Between them and the plaintiffs, I admit the Court had jurisdiction. Yet the chancellor dismissed the bill as to them,* and gave relief against the wrong person!

The great question is, can the present plaintiffs stand in a better case than their own trustees? Can the cestuys que trust be entitled to recover, when the trustees cannot either in law or equity? The moment Baird got the property, there was an existing right of action in the trustees: (it was totally unimportant whether Bland and wife were alive or not:) the act therefore began to run immediately.

578 *Wirt referred to Sugden, 242, citing *Lytton v. Lytton*, 4 Bro. Ch. Rep. 441.

Curia advisari vult.

The cause was reargued, before a full Court, January 20th, 1812; (in the absence of the reporter;) and, afterwards, on Monday, the 11th of February, 1813, the president pronounced the following opinion of the Court:

"This Court is of opinion, that the appellees, upon the deaths of their father and mother, took a legal estate, under the deed of marriage settlement, in the slaves in the bill mentioned;† and that, being infants at the time that estate vested, they were within the provisions of the act of limita-

tions, in relation to infants; and that, therefore, they are not barred by that act. And the Court is further of opinion, that, although the appellees have a legal title to the slaves in question, yet, for some of the reasons stated in the decree, and to prevent a multiplicity of suits, the Court of chancery had jurisdiction of the cause; and, for the reasons aforesaid, affirms the decree of the chancellor."

579

*Custis v. Lane.

Argued Jan. 14th, 1813.

1. *District of Columbia—Right of Residents Therein to Vote in Virginia.*—A person who, at the time of the cession of the district of Columbia to the United States, resided in that part of the county of Fairfax which, by the said cession, was comprehended in that district, and who has continued to reside there ever since, is not entitled to vote for members of the general Assembly: notwithstanding he was born in Virginia, and possesses a freehold therein.

See *Hepburn and Dundas v. Ellzey*, 3 Cranch, 446.

2. *Action on Case—Refusal to Allow Plaintiff to Vote.*—Quære, Whether an action upon the case lies against a sheriff for refusing to permit a person, who is lawfully entitled, to vote at an election of members of the general Assembly?

3. *Public Officers—Obedience to Legislative Act—Liability.*—Also, quære, whether any action lies against an officer for acting in obedience to a legislative act found to be in conflict with the constitution?

This was an action upon the case, brought by the appellant against the appellee, as high sheriff of Fairfax county, for refusing to permit him to vote in the election of members of general Assembly.

The case made by the appellant in his declaration was, that having been born within the commonwealth of Virginia, and being resident in that part of the county of Fairfax, which now constitutes a part of the district of Columbia, at the time when that district was ceded to the United States, he had resided there ever since; but had never, by any act of his own, relinquished his character of citizen of Virginia; that, on the 17th of April, 1809, he offered to vote at the election of members of the general Assembly, for the said county of Fairfax, in virtue of a freehold estate, of more than 100 acres of land; held by him in that county, and within the limits of this commonwealth; but was prohibited therefrom by the defendant.

The appellee pleaded several pleas, amounting in substance to this, that, by the act, explanatory of the act, entitled "an act concerning the election of members of general Assembly," passed January 15th, 1808, (a) the appellant was not entitled to vote, as he did not reside within the commonwealth, but resided within the district of Columbia aforesaid, at the time when he offered to vote, and did not come within the exception of that act, in favour of non-resident citizens, employed abroad in the service of the United States, or of this commonwealth. These pleas being

580 demurred to, and issue *joined thereon, judgment was rendered for the defendant in the Court below; from

*Note. The bill was not dismissed as to the trustees, but their heirs at law.—Note in Original Edition.

†Note. See *Robinson's Administrator v. Brock*, 1 H. & M. 218-256.

‡See monographic note on "Elections" appended to *West v. Ferguson*, 16 Gratt. 270. The principal case is cited in *Goddin v. Crump*, 8 Leigh 150.

(a) Rev. Code, vol. 2, p. 146, ch. 117.

which judgment an appeal was taken to this Court.

Edward I. Lee, for the appellant, contended, that, according to the constitution of Virginia, real property alone is to be represented on the floor of the legislature; and that Mr. Custis, being the owner of a sufficient freehold estate within this commonwealth, was entitled to suffrage, under the 6th article of the bill of rights, as a person "having sufficient evidence of permanent common interest with, and attachment to, the community;" and, therefore, could not be taxed, or deprived of his property for public uses, without his own consent, or that of his representatives, nor bound by any law to which they had not assented for the public good. The 7th article of the constitution declares, that "the right of suffrage, in the election of members of both houses, shall remain as exercised at present." This refers us back to the time when that instrument was adopted. In the acts of 1705, ch. 1, (a) and of 1736, ch. 1, (b) the only qualification required, was the possession of a freehold estate in a certain portion of land; nothing was said about residence, and it never was required, until the passage of the law of January, 1808, which produced this suit. The acts concerning the charters of the city of Williamsburg, (c) and borough of Norfolk, (d) show, that when residence was intended as a qualification, it was expressly so declared. By those acts, where the person is not a freeholder, residence in the city (or borough) is required, but if he be a freeholder, it is not required. The ordinance of conviction, in July, 1775, (e) declares, that "the freeholders of every county within this colony, who are, by law, properly qualified to vote for burgesses, shall have the liberty and privilege of choosing, annually, two of the most fit and able men, being freeholders of such county respectively, to be present, and to act and vote in all general conventions," &c.; and 581 *that the "landholders" in the district of West Augusta shall have the like privilege. The 12th section of the same ordinance declares, that every white man, and inhabitant of the county of Fincastle, and the district of West Augusta, who shall have been one year in possession of twenty-five acres of land, with a house and plantation in such county, or district, claiming an estate for life, at least, in the said land, shall vote, or be elected, although no legal title in the land shall have been conveyed to such possessor. This ordinance shows, that it was under peculiar circumstances only that the laws, as they existed prior to the month of May, 1776, required residence in the elector as a part of the qualification. The 5th article of the constitution requires residence on the part of the elected, or that he should be duly qualified according to law; the plain meaning of which is, according to the laws then in force, and not such as should thereafter be passed. The laws, as they then existed, did not require

the elected to be residents; but that they should be freeholders, and of a certain age. The constitution, by this provision, altered the previous laws, in this respect, and in none other.

But if the meaning of the constitution were doubtful on this subject, the general Assembly had no authority to settle the question by a law. The right of voting is a constitutional right, not to be intermeddled with by the ordinary legislature. If they can interfere at all, they may perpetually change and alter it, so as to suit party purposes and views; and some future legislature may even adopt the dangerous principle of universal suffrage. The constitution of every state in the union defines the right of suffrage; as does, also, that of the United States, leaving nothing to the discretion of such a capricious and mutable tribunal as an annual legislature.

The 2d section (4th article) of the constitution of the United States confirms the right now claimed by the people of the district of Columbia. It declares, that "the citizens of each state shall be entitled 582 to all privileges and immunities of citizens in the several states." It may be said that the district of Columbia is not a state. In the sense of the term, as used by the constitution, it is a state. It is a political society, which is the meaning of the term "state." If it be not such a state as is intended by this clause of the constitution, the consequences may be more serious than the advocates of such a doctrine are aware of. If it be not, as to some purposes, a state, in the constitutional sense of that term, what is the effect, upon that district, of the 1st section, and two last clauses of the 2d section, of the 4th article, prescribing the effect of records as evidence in the different states, and relating to fugitives from justice, or from service? And what is the effect of the clause declaring that no tax or duty shall be laid on articles exported from any state? If the district of Columbia, and the other territories of the union, be not, as to some purposes, considered as states, what is there in the constitution to prevent congress from laying a tax upon exports from the district of Columbia, or other territories, to the different States? The judicial law of the United States, which gives the federal Courts jurisdiction between a citizen of a territory and a citizen of a state, is a legislative construction of the term state, as used in that part of the constitution which relates to the jurisdiction of the Courts. Again, if the state of Virginia should be invaded by a foreign power, or an insurrection should arise in it, the people of the district would be bound to aid in its defence. If they are liable to the burthens of the residents of states, does not reason, as well as justice, say, that they ought to enjoy the privileges which the citizens of the states enjoy, where such enjoyment is not a violation of the constitution.

The district of Columbia has been ceded to the union, of which Virginia is a component part. If a resident of that district is a citizen of the United States, he must be a citizen of part, and, therefore, a cit-

(a) Edition of 1760, p. 15; Edition of 1733, p. 126.

(b) Edition of 1760, p. 102, 103.

(c) 1742, c. 2, edition of 1760, p. 122.

(d) 1762, c. 7, same book, p. 287.

(e) Ch. Rev. p. 80, 81.

izen of Virginia and no foreigner as to it. No citizen of the United States can be a foreigner as to the respective states. Such an idea is hostile to the great principles of the constitution; the intent and object of which was to cement the bonds of union between the people of the different states. If he is not a foreigner as to Virginia, he is entitled to enjoy all the rights, privileges, and immunities, which a resident citizen of the state can possess, or enjoy. But the appellant, in this case, was born in Virginia. The laws of the state declare, that every free person born within it, shall be considered a citizen of it, and shall enjoy all the privileges of a citizen, until he relinquishes that character in the manner prescribed by law. That the appellant has never expatriated himself, is averred in the declaration, and admitted by the demurrer. While the act of 1792, (a) declaring who shall be deemed citizens, remains unrepealed, the rights conferred by it cannot be taken away by implication.

The next important point in the clause is, whether the sheriff is liable to the plaintiff in this action.

The election law (b) declares, that if the sheriff refuse to take the poll when required by a candidate, or elector, &c. he shall be liable to a certain penalty. It did not mean to confine his liability to the particular instances of misconduct there stated, or to exclude an elector from his common law remedy. By authorizing a *qui tam* action against the sheriff, that act establishes the principle, that it does not belong exclusively to the respective houses of Assembly to determine the question, whether the sheriff has conducted the election agreeably to the laws of the land. The question, whether Mr. Custis has a right to vote, could never come before the house; because, supposing his vote rejected, and the members returned were duly elected without it, he could in no form whatever bring the question of his right to vote before either house of Assembly. The question is not, whether the members were entitled to their seats, but whether a citizen has been deprived of his right.

584 That an action on the case will lie for a wrong of this kind, see the case of *Ashby v. White*, 6 Mod. 45; Holt's opinion, (c) and 1 Brown's Parl. Cases, 45. An action lies for a free man for refusing his vote in the election of a mayor; 2 Lev. 250; 2 Vent. 50. And in the case of *Barnardiston v. Soame*, (d) an action, in favour of the successful candidate, against the sheriff, for a false return, was sustained, and the plaintiff had judgment for 800l. damages. The objection made in the case of *Ashby v. White*, was not sustained in England, although it is the doctrine there that the British parliament is omnipotent. Here, the objection cannot be sustained, because our legislatures possess but limited powers; and, also, because this is a personal injury to the elector, to redress which the judiciary is the only competent tribunal; for a branch of the legislature

cannot assess the damages the plaintiff has sustained by an invasion of one of the most essential rights of a citizen.

Wirt, for the appellee. The consequences of allowing the vote now in question, would be extremely inconvenient. The government of this state, together with its representation in congress, might thereby be thrown into the hands of the citizens of other states, or of foreigners, by their agents; and such a process would be facilitated by our laws of naturalization. But it is contended, that both the policy and the letter of our law is in favour of the appellant; it being intended by the constitution, that nothing but real property should be represented. If so, the rule established is most unequal; for fifty thousand acres have no greater vote than fifty. The act of 1783, prohibiting the migration of certain persons to this commonwealth, and permitting others to return, but not to be capable of voting for members to either house of Assembly, (e) is a contemporaneous construction of the constitution by the legislature, showing that freehold alone was not considered as carrying with it the inseparable right of suffrage.

585 Persons, not lands, are the object of government; for their sakes society was formed, and government instituted. In simple democracy, the right of voting on all laws and trials implies the constant presence of the voter. Representative government is, confessedly, only a modification of the original democracy: those who would have voted in person, now vote for representatives, and, of course, must be residents. But, as persons who had not the common interest might intrude into elections, a badge of permanent residence is required. Such is the origin of the laws requiring electors to be owners of freehold estates in lands. But, according to Mr. Lee's argument, the evidence of permanent citizenship has shoved out the citizen himself, and taken his place.

That this is the policy of the constitution, is clear from the very section of the bill of rights, relied upon by Mr. Lee. It is asked, what is stronger evidence of permanent common interest with, and attachment to, the community, than owning a part of it? I answer, residence. A freehold alone does not give its owner a common interest with the community, while his person is exempt from all state impositions. In such a case his interest may be opposite to that of the people generally; in some cases, for example, where the question is whether a land tax or a poll tax shall be laid. As to the liability of the citizen of the District of Columbia to be called out by the president of the United States, to repress insurrections in, or repel invasions of, Virginia, this may be an argument for his having a vote in administering the general government; but it is no more an argument for his voting in Virginia than in any other state. If his land is liable to be taxed, it is protected in return. If he wishes to derive the full benefits of residence and freehold combined, let him come into Virginia, and submit his person, as well as his land, to our laws:

(a) Revised Code, vol. 1, p. 307.

(b) *Ibid*, p. 22, sect. 17.

(c) 3 Lord Raym. 938, and 1 Salk. 19. S. C.

(d) 2 Lev. 114; Pollexfen, 470; 3 Keb. 365, 369, 389, 664.

(e) Ch. Rev. 212.

let him pay the same price for his vote that every other citizen pays, and he shall have it.

But it is said that Mr. Custis is a 586 citizen of Virginia. *That he is so, is not averred in the declaration; and the contrary is plainly inferable from it. A citizen of the district of Columbia is under the "exclusive jurisdiction" of congress; though born in Virginia, he has ceased, by his own consent, to be a citizen of this commonwealth. The soil has been ceded to congress, and all the people upon it, who, by choosing to remain there, "freely submitted" to the act of cession. (a)

The right of suffrage, as exercised before and at the time of the adoption of our state constitution, according to the existing law, and the practice under it, was not enjoyed by non-residents. The parties to the ordinance of 1775, and for whose benefit it was intended, were "the oppressed people of this country," (b) who surely were not the non-resident landholders. The oppressions complained of were all of a personal character, and necessarily implied residence. This ordinance points back to pre-existing laws relative to elections of burgesses; and in examining the qualifications of electors, under those laws, we are to consider them as applicable to those who were the objects of the ordinance, viz., the people of this state.

The members of the first legislative Assembly in Virginia, which met at Jamestown, June 19th, 1619, were elected by the different boroughs(c) then existing. In July, 1720, by an ordinance, "establishing the constitution of the colony," the power of choosing burgesses was vested in the "inhabitants" of every town hundred, or settlement. (d) By a law, passed in 1639, it was provided, that "no sheriff should compel any man to go off the plantation where he lived(e) to choose burgesses." In 1646, the burgesses were to be elected by a plurality of voices of the free men present at the election. (f) In 1654, the right of suffrage was abridged,* but vested in 587 "all housekeepers, whether freeholders, leaseholders, or otherwise tenants." (g) In March, 1657, it was extended to "all free men inhabiting in this colony." (h) The act of 1670, which again required the voters to be "freeholders and housekeepers," (i) is an important connecting link between the old and more recent series of laws, and shows that the having a freehold was only a qualification superadded to residence. In 1676, one of Bacon's laws (k) repealed the law forbidding free men to vote, and admitted them, "together with the freeholders and housekeepers, to vote as formerly." The king's instructions to

Sir William Berkeley, in 1677, (l) directed him to "take care that the members of Assembly be elected only by freeholders, as being more agreeable to the custom of England."

This series of laws was all along applicable merely to the inhabitants of the colony. The question was only, whether freeholders, or housekeepers, or free men, residing therein, were to vote. When, therefore, a law passes on this subject in general terms, it is obviously confined to the people of the colony.

The act of 1705, ch. 1, (m) from its connection with the preceding laws, the political state of the county, and the language of the law itself, is equally limited to persons residing here. The mode of publishing the writ of election "at the church door;" (sect. 2;) the clause requiring every freeholder "actually resident within the county," where the election is to be made respectively, to appear and give his vote; (sect. 3;) the punishment for voting without being a freeholder, and for taking a false oath concerning it; (sect. 4;) the provision that, when a writ issued to supply a vacancy, the sheriff was to give notice to "every particular freeholder residing within the county or town;" (sect. 8;) and the proclamation to be made by the sheriff at the court-house door, "giving public notice of the time appointed for a court to be held for receiving and certifying to the next general Assembly the propositions and grievances, and the 588 public claims of "all and every person or persons within his county;" (sect. 15;) circumstances all combining to show that this law was intended for residents only. The act of 1736, ch. 1, (n) which defined the quantity of land of which a freehold should consist, annulled conveyances fraudulently made to qualify persons to vote, required the voter to have been in possession twelve months before the teate of the writ of election, and modified the oath to fit these changes in the law, is subject to the same general remarks as the former law. Its whole complexion shows it to be intended for the people of the colony only.

What was the practice under this series of laws? Did the colonists of Maryland or Carolina vote for burgesses in Virginia? We are not told so by history.

It is insisted, however, that Mr. Custis, if not a citizen of Virginia, is so of another state, and, as such is, by virtue of the constitution of the United States, entitled to all the privileges of a citizen of Virginia. But it was decided, in *Hepburn and Dundas v. Ellzey*, 2 Cranch, 452, that the district of Columbia is not a state within the meaning of the constitution. The same arguments, which are now urged by Mr. Lee, were used by him in that case, and overruled.

But if the appellant was entitled to vote, he is not entitled to an action against the sheriff, who obeyed the law, and, therefore, is not responsible. He is not to be called upon to say whether the act of 1808 is con-

(a) 3 Cranch, 446.

(b) See the Preamble, Ch. Rev. p. 30.

(c) 1 Marshall's Life of Washington, p. 61.

(d) *Ibid.* p. 63.

(e) Henning's Stat. at large, vol. 1, p. 237.

(f) *Ibid.* p. 533.

*Note. See the same volume of Henning's Statutes at large, p. 403, and 404, from which it appears that the right of suffrage was again extended to all free men, in March, 1655.—Note in Original Edition.

(g) Henning's Stat. at large, vol. 1, p. 412.

(h) *Ibid.* p. 475.

(i) Henning's Stat. at large, vol. 2, p. 280.

(k) *Ibid.* p. 376.

(l) *Ibid.* p. 425.

(m) Ed. of 1769, p. 15.

(n) Ed. of 1769, p. 103.

stitutional, or not. Suppose judgment should be given for the plaintiff in this action, and the legislature should persist in requiring residence within the commonwealth as one of the qualifications of electors, how could the controversy between the judiciary and the general Assembly be settled? If such a suit as this could be countenanced, the sheriff might be liable to ten thousand actions. Let the suitor apply to the legislature, and not tear the sheriff to pieces for doing his duty by obeying an act of Assembly.

589 *Call, in reply. The plaintiff had a right to vote under the act of 1736, ch. 1; which was in force at the time of the revolution. By the second section of that act, a freehold estate in 100 acres of uninhabited land was sufficient to entitle its owner to a vote. Of course, it did not require county residence, but only citizenship, which was common to all British subjects. The practice under that law was accordant; and so the constitution is to be understood.

The people of the district of Columbia did not, by the cession, lose their political rights. They are citizens still, because they still owe allegiance; for they have not expatriated themselves in the manner prescribed by the act of Assembly; and their own express will is necessary to expatriation; for the state cannot abandon them if guilty of no crime. (a) There is nothing in this incompatible with their duties to the United States; the allegiance to both governments being concurrent; (b) and congress having passed no law to the contrary. Besides, the federal constitution does not give to congress the absolute dominion, but a right of legislation only, while the seat of government continues within that district. A qualified cession only was, therefore, intended; so that the United States got a franchise; but the absolute property, with an eventual reverter of occupation, remains in the state of Virginia. The case of Hepburn and Dundas v. Ellzey, 2 Cranch, 452, depended on the act of congress only, which described the jurisdiction of the federal courts, and did not decide what would have been the case if a man residing in that part of the district, on the other side of the Potomac, and calling himself a citizen of Maryland, had sued in the circuit Court of Virginia.

2. This action properly lies; because the law admits of no right without a remedy. The refusal to permit a person to vote, who is lawfully entitled, is an injury which deprives him of his rank in society, and subjects him to be taxed, and legislated for, without being represented. The act of Assembly, giving a penalty
590 against *the sheriff for taking the poll illegally, surely does not mean to take away a right.

The defendant's objections are not tenable. The sheriff is not obliged to judge of the constitutionality of the law. He may avoid this by putting the voter's name on the back of the poll. But, if it were otherwise, he would only have to do what he must, at his peril, in various other cases.

For example, if a general warrant, which by the constitution is void, were issued by a Court or judge, the sheriff must obey the supreme law of the land. In this case, however, it is not his duty, neither has he the authority to judge of the law or the constitution, but only to submit the questions arising upon both to the house of delegates, by putting on the back of the poll the name of the person whose right to vote is doubted. By doing this, he may avoid the danger of any action against him.

It is said, by Mr. Wirt, that the sheriff obeyed the law. But that is the question. This argument is only answering our objection to the constitutionality of the act of Assembly, by producing the act itself. He says, too, suppose the legislature should persist in opposition to a judgment in favour of the plaintiff. But this is not to be presumed. The opinions of the Court of appeals, declaring particular acts of Assembly unconstitutional, have always prevailed. In such an event, the general Assembly would probably repeal the law.

Saturday, February 13th, 1813, JUDGE ROANE, (after stating the case) pronounced the following opinion of the Court:

If the pleas of the appellee should even be adjudged to be bad, yet, upon the principle of going up to the first fault, judgment would still be rendered against the appellant, if, on the case made by his declaration, he has no right to recover; and it is evident that his right may be much weaker under the declaration than
under the pleas, as the latter do not

591 exclude (as the former does) *the idea of his having been still a citizen of this commonwealth, at the time he offered to vote. We infer this diversity, from its being stated in the declaration that the appellant was inhabiting within the district of Columbia at the time of its separation from this commonwealth; he was consequently expatriated thereby from the government of Virginia.

The act of Virginia, on the subject of expatriation, relates only to individual cases; it does not relate to those public and general acts of expatriation, by cession, or otherwise, which are more or less incident to all governments and countries. With respect to the particular cession now in question, it was contemplated and provided for by the constitution of the United States, agreed to by the commonwealth of Virginia, by its act tendering the territory to the general government, and also by the congress of the United States, who accepted the cession. To all these acts the appellant, by his representatives, was a party. He has therefore, no reason to complain that he has been cut off from the dominion of Virginia, in consideration of, perhaps, adequate advantages. That he is no longer within the jurisdiction of the commonwealth of Virginia, is manifest from this consideration, that congress are vested, by the constitution, with exclusive power of legislation over the territory in question; and it is only by the consent and courtesy of congress that any of the laws of Virginia have been permitted to operate therein. This last fact will be fully manifested by recurring to the several acts of

(a) Vattel, 5 sect. 17; Puffendorf, §81.

(b) 3 Dallas, 158; 2 Dallas, 204, Collet v. Collet.

congress on the subject. It follows, that the district of Columbia being without the jurisdiction of the laws of Virginia, is, as to it, another and distinct jurisdiction, and that the appellant is not merely a citizen of Virginia, abiding, or inhabiting therein, but passed, with that territory, from the jurisdiction of this commonwealth, by the act of cession, and owes no allegiance thereto. It might well, therefore, be true, that the case made by the pleas might be in favour of the appellant, and yet 592 that he is prohibited *from recovering, upon the weaker ground of claim admitted by his own declaration.

With respect to the right of a citizen, or subject, of a foreign government, to intermeddle with the civil polity of Virginia, and, especially, to exercise the all-important function of legislation, the matter cannot admit of a possible doubt. Such subjects, or citizens, cannot exercise this inestimable right, as they owe to the commonwealth no corresponding duties, and would not be amenable to the laws by them enacted. They cannot exercise this right in person, for their personal attendance may be necessary, at the same time, in their own country; and, besides, in time of war, they would be prohibited from coming here for the purpose. In some small democracies, the people have exercised the legislative power in person; and this principle is not lost sight of, when, owing to the extent of the territory, or the numbers of the people, they are compelled to exercise that power by means of deputies. This necessity of acting by agents does not change the principle; does not let in, to the appointment of such deputies, persons who, but for the necessity aforesaid, would be inhibited from acting in their primary and original character. In other words, none are competent to legislate mediately, by their representatives, but those who would be admitted, but for the impediments aforesaid, to exercise the right in person.

It follows, from these premises, that before this great principle shall be departed from, it ought, at least, manifestly to appear, from the act of government itself, that an exception has been explicitly assented to by the people; in a case in any degree equivocal, the general principle would undoubtedly turn the scale.

There is no such exception to be found in the constitution of this commonwealth. That instrument, and the declaration of rights on which it is based, has no eye towards the subjects of foreign powers. It only purports to declare the rights, and settle the duties of those who 593 *are parties to the compact. There is not only no such exception in that instrument, but, on the contrary, the converse is explicitly declared and expressed. The declaration of rights is stated to have been made by the representatives "of the good people of Virginia;" and it is declared, "that these rights do pertain to them, and their posterity, as the basis and foundation of government." This instrument, therefore, can never be construed to bestow the inestimable right of suffrage upon aliens and enemies, who have no "permanent common interest with, or

attachment to," this community; who owe paramount and conflicting duties to other sovereigns; who have superior attachments in other countries; and who, from their residence elsewhere, cannot perform duties which imply the necessity of a residence within this commonwealth. On the case made by the declaration, therefore, the appellant is, clearly, not entitled to recover.

With respect to the ground supposed to be taken by the pleas as aforesaid; while we are free to admit that it is weaker for the appellee than that made by the declaration, which admits the appellant to be no citizen, and leaves a great discretion to the officer, as to the fact of a foreign residence; we are of opinion, that the provision of the act of 1808, in relation to it, is in consonance with the principles of the constitution. As the constitution is to be construed, as aforesaid, only in reference to our own citizens; so, such of them are not embraced by its provisions in favour of the right of suffrage, who, through absence, are disabled from performing the duties in question; whose other ties of allegiance, temporary or perpetual, are thrown into a scale conflicting with their duties and allegiance to this commonwealth, and whose foreign residence diminishes their former "common interest with, and attachment to," this commonwealth.

Persons standing in this predicament cannot be admitted to the right of 594 suffrage, without running counter *to all the principles on which that right is founded. As well might a resident citizen claim to vote, after he had parted with that freehold which guaranteed his attachment to the community.

In thus deciding against the right of the appellant, upon the general principles just mentioned, the Court is, by no means, disposed to admit, that that result would be varied by any of the legislative provisions upon the subject. On the contrary, a recurrence to the various acts in our code, ancient and modern, will manifestly show that they are in strict conformity therewith. On every ground, therefore, the judgment of the Court below is correct, and ought to be affirmed.

In taking this view of the subject, the Court has neither considered nor decided the question, whether an action will lie against a sheriff for refusing to receive the vote of a person duly qualified; and much less has it decided, whether such action would lie against an officer, acting in obedience to a legislative act, found to be in conflict with the constitution. While this last case can rarely be expected to occur, its importance would require the most serious and deliberate consideration; and, even with respect to the first, it cannot often be expected to arise, under all the care which is taken by our constitution and laws to define, explicitly, the rights and qualifications of the electors. Whenever either question, however, shall occur, and become necessary to be decided, the Court will not shrink from the investigation and decision thereof.

APPENDIX.

JUDGE ROANE'S opinion in the case of *Watkins v. Taylor and Mewburn*, reported 2 Munford, 424.

[This opinion was accidentally omitted in its proper place.]

JUDGE ROANE. If one man goes to another, and obtains from him a sum of money, to be repaid at a future day, to himself, or to another, for his use, nothing more passing between the parties than a request to receive the money on one hand, and a promise to repay it on the other, this transaction would be considered as a loan of the money; and if a greater sum is reserved than is produced by the principal sum and legal interest, it would be deemed a loan interdicted by the statute of usury; and, in the absence of all other testimony on the subject, the parties would be considered to have met together for the purpose of effectuating a loan. It would not be necessary, in such case, to show that there was a lengthy treaty for a loan, but the treaty would be inferred, and receive its character from the transaction itself: in the language of the cases on this subject, "the thing would speak for itself." This is a complete answer to the elaborate averment of the appellee, in his answer, that he had no idea of lending his money, and did not suppose that the appellant wished to borrow it. He did in fact lend the money to the appellant. These parties did not meet for the purpose of buying and selling the bonds of Heth: for, 1st. The appellant was possessed of none of those bonds; and 2dly. It is not shown that any of them were in existence at the time, or, at least, enough of them to pay the sum contracted for; and, besides, it is not pretended

596 that the *appellee was himself to purchase Heth's bonds for the sum advanced, but only that Heth himself would receive them in payment of the debt due him; a transaction to which, whatever might be the general operation of the law on this subject, Heth was no party, and as to which the appellee was incompetent to bind him. These parties, then, having met for the purpose of borrowing and lending a sum of money, and probably under the severe pressure of the borrower, and not for that of selling bonds, the Court will look steadily at the object for which they came together, and will be astute to detect and ferret out every shift and device by which the provisions of the statute of usury might be evaded. In pursuance of this principle, however well established the doctrine may be, in this country, that bonds may be sold for less than their nominal value, considered as a distinct and insulated transaction, it is equally clear that such sale, at a great sacrifice, when combined with the loan of money, will be considered as a shift to evade the statute. The case of *Gibson v. Fristoe* is much stronger on this point than the present; for, in that case, there was not only a forbearance,

merely, of a debt, and not a loan, in the popular sense, but also the party was possessed of the bonds of others, which he set down at an under value; and yet such sale was considered as a device to elude the statute; whereas Heth's bonds, in this case, were not possessed by the appellant, and were not shown to have been in the market. In that case it could have been better argued than in this, that the purpose was to sell bonds, and not to cover usury; for the party had them in possession as his property, and was, besides, treating with the very person who was to receive them; whereas, in this case, it is a very weak presumption, both that a person would undertake to sell what he had not, and is not shown to have existed, and that one man would undertake to make a bargain for another. This case, then, supposing the stipulation concerning the reception of Heth's bonds to have been a

597 part of the agreement in question, is more *than decided for the appellant by the case of *Gibson v. Fristoe*: in this case, as to that, the subordinate purpose (or the accessory) must receive its character from the principal one, which was to lend money at usurious interest. But, in truth, this pretension, respecting the reception of Heth's bonds, formed no part of the agreement. It is true it is spoken of in the bill as a part of the agreement: but, beside that the transaction (so taken) is usurious in itself, independently considered, the statute of usury is relied on by the bill, or, in other words, the transaction is declared by that part of the bill to be usurious; and the whole bill must be taken together. The only witness who speaks on this subject is Anthony Robinson; but his testimony falls short of the mark; he only says he thinks the lot was to be paid for in bonds, but what bonds he knew not, but rather understood that Heth's bond would be accepted; i. e., that there was a binding agreement to pay the sum of 1,200l., (exceeding the principal and interest of the sum received,) which he thinks might be paid in bonds, but only an understanding or expectation that Heth's bonds would be received by Heth, who was no party to the contract. As to this expectation, were it even a part of the contract, it would not disrobe the transaction of its usurious character. The case is complete on the part of the appellant, by showing that a sum was received on loan, for which a greater sum than the law allows, was to be repaid at a future day. It then became incumbent on the appellee to justify the transaction, by not only showing an agreement, that the appellant might have delivered himself therefrom by paying Heth's bonds, but, also, that such bonds were in the market, and that the requisite amount thereof might have been acquired for a sum not exceeding the principal and legal interest of the money borrowed. In that case, the

transaction might possibly (but on this I give no conclusive opinion) fall within a known rule on this subject, that, where the party may relieve himself from the penalty, by paying the legal sum by a given

598 day, the transaction *is not usurious.

In respect of such circumstances, however, this case is entirely naked; and even considering Heth's bonds as agreed to be received in payment of the 1,200l., there is nothing to show that (if they could have purchased at all) they would not have cost their whole nominal amount; except, indeed, one bond of 300l., which is shown to have been purchased at a considerable discount, without, however, showing what that rate of discount was.

On the bill, and Robinson's deposition, therefore, there is no pretence to say that these bonds were agreed to be received; and, if they were, the case of Gibson v. Fristoe more than shows that, having reference to the purpose for which the parties met, the transaction respecting these bonds is, nevertheless, usurious. If a sale of bonds actually holden at the time, was infected by the unlawful purpose for which the parties met together, much more will a sale of bonds which were neither in the market, nor in existence, but, for any thing that appears, were entirely in nubibus.

The answer of the appellee, on the other hand, disclaims this pretension respecting Heth's bonds, and sets up a new ground for justifying the transaction; namely, that the appellant had a prospect of selling his tobacco for a high price. Without stopping to inquire how far this allegation is to be regarded, in relation to its being new matter not responsive to the bill, or otherwise, it is evident it was, at most, (as well as the pretension respecting Heth's bonds,) only an expectation of the parties; and both of them were properly admitted to be so by the appellee's counsel. Neither of such expectations, however, can change the character of the transaction in question, more than, for example, an expectation that produce will, before the day of payment, rise to an enormous price, or that, before such day, the borrower, on a usurious contract, will succeed to an inheritance; either of which

events would, as well as the prospects
599 now in question, *retribute to the borrower the loss sustained by the usurious, interest.

The answer of the appellee, however, although entirely impotent in relation to the alleged prospect of selling tobacco, is very strong and clear to show the actual purpose for which the parties met together: after denying that he applied to the appellant to know how much he would take "to bind himself to pay the 1,200l. due to Heth," he avers that the proposal moved from the appellant to him, and was ultimately acceded to by him. What proposal? Why, surely, a proposal "to bind himself to pay the debt due to Heth," in consideration of a sum to be advanced by the appellee. When we add to this, that the appellee entirely disclaims, as a part of this proposal, and, a fortiori, of his agreement, the pretension respecting Heth's bonds, (keeping out of view, also, for the reason aforesaid, the subsequent or cotemporary expectation existing between the

appellant and Heth, respecting the sale of tobacco,) what is it but a naked proposal and contract to pay 1,200l. at a future day, in consideration of 800l. then received? I consider the contract, therefore, as clearly usurious, and am of opinion that the decree should be reversed.

Opinion of the Court in the case of Bowles v. Bingham, reported in 2 Munford, 442-448.

[This opinion was delivered by JUDGE ROANE, and not by the President, and was omitted in its proper place by a mistake of the Reporter.]

This is a bill of interpleader, brought by the administrator of Harriet Bowles, a deceased infant, against the appellant, her father, and her relations, ex parte materna, of whom the wife of the appellee, 600 Bingham, was one, "praying that the conflicting claims of these respective parties, to the estate of the said Harriet, may be settled by the decree of the Court of chancery, and the said administrator thereby enabled to make distribution of her estate. The ground stated, as well in the bill as in the answers of the maternal relations aforesaid, for excluding the right of the appellant, is, that, although the said Harriet was born after the intermarriage of the said appellant with her mother, the said appellant was not, in fact, her father; had disclaimed her as his child; had repudiated her mother; and separated himself from her by articles of agreement, which are made an exhibit in the cause; these articles, it is further alleged, were made very shortly after the birth of the said Harriet; which birth, it is, also, alleged, took place in about three months after the marriage.

Throwing out of this case the answers touching the facts aforesaid, of all the defendants, (that of Bowles only excepted,) on the ground that the answer of one defendant is incompetent to bind another, if not on the further ground that the respective defendants to a bill of interpleader may be considered, in some sense, as plaintiffs, in relation to each other, there is no evidence remaining in the cause, touching the principal question, except the answer of the appellant; for the articles of separation, while they state that that measure was produced by a convincing cause, rendering it impossible that the parties should live any longer together, do not specify what that cause was. That instrument does not bring forward, and rely on, the particular facts, on the ground of which the claim of the appellant is now opposed. As to the answer of the appellant, while it admits that he intermarried with the mother of the said Harriet, and that the said Harriet was born after the said marriage, it neither admits that her birth was at a time which, taken in relation to that of the marriage, rendered it certain that she was begotten before the marriage, nor avers

that at such time he had no access to
601 her said mother, *and far less that such access, by him, was impossible. For any thing appearing in this answer, then, the said Harriet may be considered as having been begotten, as well as born, during wedlock, and, also, at a time when non-access, on the part of the husband, has not been shown, (if pretended,) either by

himself, or by others. As this construction, however, may be too rigid, as the appellant, perhaps, intended distinctly to admit the facts stated in the bill, showing that the said Harriet must have been begotten before the marriage, we will consider the case as if this circumstance, resulting from the respective times of the marriage, and of the birth of the said Harriet, had been particularly and distinctly admitted by his answer.

This answer admits, more particularly, that the said appellant "always insisted, that the said Harriet, though born in wedlock, was not his child." This opinion of the appellant is entirely consistent with the idea, that he had access to her said mother, at the time of procreation, but that some other person, who might also have had access to her, about the same time, was, in his opinion, in reality, the father of the child; and this opinion, so far from being bottomed upon a supposed inability of procreation, on his part, or a non-access to his wife, (which are the only grounds of exception tolerated in cases of this sort,) may have been induced either by a feverish and unwarrantable jealousy on his part, by a belief of a simultaneous and concurrent access on the part of other men, or by other circumstances equally uncertain and equivocal. This concession, therefore, (supposing that the doctrines applying to cases of procreation during marriage, apply at least with equal force to those taking place before marriage,) will fall far short of the desideratum required in cases of the former character.

With respect to procreations during marriage, the presumption is, that all persons born during marriage are legitimate. This presumption can be destroyed only by contrary proof, demonstrating that the 602 child is not the *child of the husband; which, again, can only be, by showing that, from his continued absence from his wife, at or about the time of procreation, or from the impotency of his body, it is impossible that he should be the father. This presumption, in favour of legitimacy, is so strong, and the exceptions thereto are held under such strictness, that, where a man was divorced from his wife, propter perpetuam generandi impotentiam, and then married another woman, who had issue during the marriage, that issue was holden to be his, on the ground that a man may be habilis et inhabilis diversis temporibus.(a) It is not, therefore, a mere circumstance of probability that will operate in this case to bastardize the issue. Such issue will be held to be legitimate, unless it be conclusively shown, that a person, other than the husband, must necessarily and unavoidably have been the father. This doctrine applies, a fortiori, it is believed, to cases of procreation before the marriage.

While the wise policy of our law, anxiously desiring that every child shall be assigned to some responsible person as his parent, for his nurture and education, and finding it necessary to act by general rules, has adopted as the rule, in this case, that "pater est

quem nuptiæ demonstrant;" and while, in relation to children procreated during the marriage, it only tolerates an inquiry going to show, that the husband could by no possibility have been the father of the child, it will, certainly, not relax that rule in relation to a procreation before the marriage, to cases in which the husband has entered into a matrimonial engagement with his wife, not only with a full knowledge of the rule aforesaid, but, also, (in general,) with a knowledge of her particular situation, in relation to her pregnancy, or otherwise. Our law wisely throws a veil over acts of incontinency, in such cases, and, certainly, will not, without necessity, and in a spirit of departure from a wise rule of public economy before mentioned, inundate our Courts with indecent inquiries, whether this or that man, whether the husband or another, committed a given act of immorality and fornication. It

603 will, at *least, emphatically, interdict the husband from giving evidence in such case, for the reasons so luminously assigned, in relation to procreations during the marriage, in the case of *Goodright v. Moss*.(b) It is even better that a particular grievance should exist, than a scene of this sort be opened, without necessity, in a country in which public decorum is a part of its law, to contaminate and destroy the morals and peace of our country.

If, in the time of Justinian, it was deemed proper, by that emperor, to establish the age of 14 as the general age of puberty, (though it is evident that the state of puberty must vary with the particular habits and constitutions of individuals,) rather than continue the indecent usage therefore existing of judging of such puberty, in relation to each particular case, by an inspection of the habit of the body; reasons founded on a like regard to decorum, may well be considered as having justified the general regulation we are now considering. It is no impeachment of the wisdom of the rule in either instance, or of the policy of acting by a general regulation, that particular cases may chance to occur, to which the spirit of the rule, in either case, may be inapplicable.

While, therefore, we are inclined to think that the inquiry in question is occluded on general grounds, sanctioned by principles contained as well in our own municipal code, as the codes of other enlightened nations, we are clearly of opinion, upon the particular evidence in this case, which is not only inadmissible, as aforesaid, but does not repel the possibility of the infant Harriet's having been actually begotten by the appellant; that the said Harriet was legitimate; that the appellant is to be considered as her father, under the sound construction of our laws; and, as such, is entitled to her estate, in preference to the maternal relations of the said Harriet or any other person or persons. The consequence is, that the decree of the chancellor, in favour of the maternal relations, must be reversed, and rendered in favour of the appellant, agreeably to the foregoing ideas, pursuing in other respects the provisions in the said decree contained.

(a) 5 Co. Rep. 98, b. *Burle's Case*.

(b) Cowp. 591.

INDEX.

ABATEMENT.

1. If the plaintiff be permitted to amend his declaration, by consent of parties, after issue joined, on a plea to the action, the defendant ought not to be permitted to plead in abatement any variance between the amended declaration and the writ, which equally existed between the writ and the original declaration.

Moss v. Slipp. 159

2. In an action of debt against one obligor only, if the declaration describe the bond as joint, and do not state the other obligor to be dead, it is a fatal error, (though not pleaded in abatement,) and is not cured by verdict.

Newman v. Graham. 187

3. An appeal from a judgment in ejectment, does not abate by the death of the lessor of the plaintiff: notwithstanding such lessor claimed the land for life only.

Medley v. Medley. 191

4. See Judgment, No. 8.

Saunders v. Gaines. 235

5. See Appeal, No. 16, and

Wells v. Jackson, pl. 1. 458

ACCIDENTS.

1. A common carrier is liable for all accidents to goods intrusted to him for transportation, except such as arise from the act of God, the act of the enemies of the commonwealth, or the act of the owner of the goods.

Murphy, Brown & Co. v. Staton. 236

2. In such case, if a loss happens, the onus probandi lies on the carrier, to exempt him from the liability. And it is not enough for him to prove, (where the goods are carried by water,) that the navigation is attended with so much danger, that a loss may happen notwithstanding the utmost endeavours of the waterman and crew to prevent it; that the person conducting the boat possesses competent skill, has used due diligence, and provided hands of sufficient strength and experience to assist him.

ACCOUNT.

1. A defendant cannot have the advantage of the act imposing a limitation of one year upon actions on store accounts, without pleading it; the Court not being directed to cause such items as have been of more than one year's standing, in such accounts, to be expunged, or to instruct the jury to "disregard" them; and the jury not being required to "disallow and reject" them, without a plea.

Taylor's administratrix v. Richards & Co. 8

2. A decree against an executor, or administrator, for a balance due on his administration account, ought not to be, "that he pay the same out of the estate in his hands to be administered;" but as his own proper debt.

Sheppard's executor v. Starke and wife. 29

3. In this case, a commission of five per cent. on the moneys received by the executor, was allowed him, in lieu of all expenses; such commission to be deducted from the balance due the estate at the end of each year.

4. Where interest is charged against an executor or administrator, (in settling his administration account,) on balances due at the end of each year, it ought not to be carried to the accounts of the succeeding years, so as to convert it into principal, and make it bear interest, nor to be deducted from the payments made in such succeeding years.

5. An acknowledgment by a feme covert is not sufficient to establish an account against her husband, though it be for articles furnished her before the marriage.

6. An executor is not to be charged with the debts due to the estate of his testator, at the time when they became due, but only at the time when he actually received them, except such debts as are lost by his negligence or improper conduct.

Cavendish v. Fleming. 198

7. An executor's account, rendered on oath, is prima facie evidence of the sums received by him for the estate of his testator, and of the times when received.

8. An executor, except as to debts lost by his negligence or improper conduct, is chargeable with interest only on his actual receipts; and, generally,

where interest is charged, the rule established in the case Granberry v. Granberry, 1 Wash. 249, ought to be observed.

9. An executor is not chargeable with interest on a legacy, payable to an infant, before a guardian has been appointed, and he has received notice of such appointment.

10. Under what circumstances an executor is not to be charged with the loss of a debt, contracted with him on behalf of the estate of his testator, or for a loss incurred by his intrusting an agent with bonds for collection.

11. An executor may reasonably be allowed a commission of ten per cent. on moneys received by him, where the debts were very small and numerous, and the debtors presumed to have been much dispersed.

12. See Executors and Administrators, Nos. 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39, and M'Call v. Peachy's adm'r. 288

13. When a party claims to charge another by virtue of an account rendered, he must take that account altogether, and not garble or alter it, unless he can surcharge or falsify the same, either by showing errors in calculation, or by proving, from other testimony, that it is incorrect as to the amount charged or debited, or stated upon principles not conformable to the agreement or understanding of the parties at the time.

Freeland, &c. v. Cocke's representatives, pl. 1. 352

14. In such case, the court of equity may direct the books of the party rendering the account to be produced, to see whether such account is drawn up conformably with the books, or altered by an after thought; in the former of which events, a presumption would arise that such was the original understanding and intention of the parties, unless proof were exhibited to the contrary; and, in the latter, such presumption would be done away.

15. On a bill of injunction to stay proceedings on a judgment at law, if it appear from a commissioner's report, not excepted to by the defendant that the complainant is entitled to a credit which the defendant failed to give, the court ought not to set aside the order for account, and dismiss the bill, on the ground that the complainant had neglected to carry into effect a previous order referring, by consent of parties, the accounts between them to a different commissioner; but the last order having been made on the defendant's motion, the report being excepted to, for want of notice to the complainant of the time and place of taking the account, and such exception appearing well founded, a new account ought to be directed to be taken.

Roberts v. Jordans, pl. 2. 438

16. A person entitled to a legal estate in slaves, may sue, in equity, to recover them, if thereby a multiplicity of suits may be prevented, calling on the defendant to discover how long he has had them in possession, and to discover and state an account of their profits.

Baird v. Bland and others, pl. 3. 570

ACTION.

1. An action in behalf of an apprentice, upon his indenture apprenticeship, ought not to be brought in the name of the overseers of the poor, but in his own name.

Pointexter v. Wilton and others. 183

2. See Abatement, No. 2.

Newman v. Graham. 187

See Partnership, No. 1.

Gariand v. Davidson. 189

3. If persons contracting by a charter-party, under seal, bind themselves, each to the other, as on their own behalf, each may maintain an action, for covenant broken, against the other, in his individual capacity, notwithstanding they were described in the introductory part of the instrument, and in their signatures, as agents for other persons.

Hartshorne v. Whittles. 357

4. An administrator may declare in the debt and detain, on a bond executed to himself as such; and his executor or administrator has a right to bring an action upon it.

Bowden, ex'or of Moore, v. Taggart. 513

5. After a judgment against an executor or administrator, as such, a fieri facias and return of nulla

bona, an action, against him alone, on his administration bond, could always be maintained, without any previous suit suggesting a devastavit.

- Meade and others v. Brooking, 545
 6. Before the act of February 7th, 1814, "concerning executors and administrators," (sess. acts of 1813, ch. 13, p. 40,) a decree in chancery against an executor or administrator, directing him to pay a debt of his testator, or intestate, out of the assets in his hands to be administered, (with a fieri facias and return of nulla bona,) was not sufficient evidence of a devastavit to authorize an action against the securities in the administration bond; but it was necessary to bring a previous suit against the executor or administrator, suggesting the devastavit.
 Hairston v. Hughes and others, 568
 7. Quære, whether an action upon the case lies against a sheriff for refusing to permit a person, who is lawfully entitled, to vote at an election of members of the general assembly?
 Custis v. Lane, pl. 2, 579
 8. Also, quære, whether any action lies against an officer, for acting in obedience to a legislative act, found to be in conflict with the constitution?
 Ibid., pl. 3, 579

ACTS OF ASSEMBLY.

1. The act of assembly allowing damages on the affirmation of decrees in chancery, does not authorize the recovery of such damages of a security, in a bond bearing date before that act.
 Woodson v. Johns, 230
 2. See Constitution, and
 Custis v. Lane, pl. 3, 579

ADMINISTRATION.

See Executors and Administrators.

ADMINISTRATION ACCOUNT.

See Account.

ADMINISTRATION BOND.

1. After a judgment against an executor or administrator, as such, a fieri facias and return of nulla bona, an action, against him alone, on his administration bond, could always be maintained, without any previous suit suggesting a devastavit.
 Meade and others v. Brooking, 545
 2. Before the act of February 7th, 1814, "concerning executors and administrators," (sess. acts of 1813, ch. 13, p. 40,) a decree in chancery against an executor or administrator, directing him to pay a debt of his testator, or intestate, out of the assets in his hands to be administered, (with a fieri facias and return of nulla bona,) was not sufficient evidence of a devastavit to authorize an action against the securities in the administration bond; but it was necessary to bring a previous suit against the executor or administrator, suggesting the devastavit.
 Hairston v. Hughes and others, 568

ADMINISTRATORS.

See Executors and Administrators.

AFFIDAVIT.

1. See Vouchers, Nos. 1, 2, 3, and
 McCall v. Peachy's adm'r, pl. 12, 13, 14, 289
 2. See Bill of Exchange, No. 1, and
 Wright v. Hencock & Co., pl. 3, 531

AFFIRMANCE.

The court of appeals, in affirming a decree, will add any explanation which may be necessary to make it correctly understood.
 Mayo v. Purcell, 243

AGENT.

1. If an agent employed to sell a tract of land become the purchaser, by bargaining with his employer, from whom he conceals the fact that a better price could be got from another person, he is guilty of fraud, and the contract ought to be vacated.
 Moseley's adm'r's and heirs v. Buck and Brander, 232
 2. In such case, the court of equity will compel him to reconvey the land, on receiving back his purchase money, with interest, and make him account for the rents and profits.
 Ibid., 232
 3. See Action, No. 3.
 Hartshorne v. Whittles, 357

AGREEMENT.

1. A parol agreement, by an executor, to pay a legacy out of his own estate, is not void, under the act to prevent frauds and perjuries, if a decree was previously obtained for the legacy to be satisfied out of certain property appointed by the testator; for part of which property the executor was accountable under the decree, and responsible de bonis

propriis; and such agreement was made in consideration of forbearance to enforce the decree.

- Patton, adm'r of Page, v. Williams and Wife, 59
 2. See Pleading, No. 3.
 Moss v. Stipp, 159
 3. See Purchaser, No. 12.
 Foreman v. Newkirk and others, 275
 4. Rent may be payable in advance, by contract; and such rent may be distrained for, if not paid when due.
 Williams v. Howard, 377
 5. See Compensation, No. 2.
 Beverley v. Lawson's heirs, pl. 2, 317
 6. An agreement under seal, by which A. (being much involved in debt) binds certain slaves to B. until they attain the age of twenty-one years, upon a condition, merely, "that B. shall treat them in a lawful and humane manner, and, if he shall die or remove from the county, they shall be treated equally well, or it shall be optional with A., whether they shall remain any longer in the said service," is not on valuable consideration, but voluntary only, and void against creditors.
 Broadfoot v. Dyer, 350
 7. See Charter-Party, and
 Hartshorne v. Whittles, 357

AMENDMENT.

1. A decree which is final in all respects, except that "liberty is reserved to the parties, or either of them, to resort to the court for its further interposition if it should be found necessary," may be amended, on motion, in a summary way, or by bill of review.
 Sheppard's ex'or v. Starke and wife, 29
 2. Quære, after a suit in chancery has been set for hearing, has the plaintiff a right to amend his bill before the hearing, as a matter of course, upon paying the defendant all costs occasioned thereby? or is such amendment to be permitted, only upon good cause shown?
 Boykin's devisees v. Smith and others, 103
 3. If the plaintiff be permitted to amend his declaration, by consent of parties, after issue joined on a plea to the action, the defendant ought not to be permitted to plead in abatement any variance between the amended declaration and the writ, which equally existed between the writ and the original declaration.
 Moss v. Stipp, 159

ANSWER IN CHANCERY.

See Equity.

APPEAL.

1. Where the evidence spread on the record is contradictory, and the point in dispute depends on the credibility of witnesses, the appellate court (not having the witnesses personally before it) ought not to reverse the judgment of that court, which had lights (from the manner of giving in the testimony, and other extraneous circumstances) which the superior court, in its appellate character, does not possess.
 Chaney v. Saunders, 51
 2. Upon a county court's overruling a motion for dissolution of an injunction, the parties cannot make the injunction perpetual, by consent, in order that an appeal may be taken; but, to authorize an appeal, the cause must be regularly proceeded in, to a final decree.
 Blakey v. West, 75
 3. Under the third section of the act of January 20th, 1814, concerning the proceedings in courts of chancery, (Rev. Code, vol. 2, p. 29,) an appeal from an order dissolving an injunction could not be taken; but only from the dismissal of the bill.
 Pitts, ex'or of Rowzee, v. Tidwell, 88
 4. It is not competent to a complainant to dismiss his own bill, and then object, in an appellate court, that the prayer thereof has not been decreed in his favour.
 Ibid., 88
 5. Where an injunction is wholly dissolved in a county or corporation court, the bill is not to stand dismissed, until two succeeding courts have been held thereafter in such county or corporation; and the appellate court will not presume from length of time that two such courts were held; but this circumstance must explicitly appear in the transcript of the record.
 Ibid., 88
 6. Quære, if it do explicitly appear that two such courts were held, and it do not appear that, at or before the second court, any cause was shown against the dismissal of the bill, can the clerk's neglecting to enter the dismissal have the effect of keeping the cause on the docket?
 Ibid., 88
 7. An appellate court ought not to reverse a judgment, without proceeding to give such judgment as the inferior court should have given.
 Darby v. Henderson, 115

8. In an action of debt, in a county court, on a single bill, for more than one hundred dollars, if the jury find for the plaintiff the debt in the declaration mentioned, to be discharged by less than one hundred dollars, and, upon a writ of supersedeas, at the instance of the defendant, the judgment be reversed, the plaintiff cannot appeal to the court of appeals from such judgment of reversal.

Lewis v. Long, 136

9. On a bill of exceptions, to the opinion of the court below refusing to grant a continuance, the appellate court ought not to reverse the judgment, for a ground of continuance not stated in such exceptions.

Ross v. Norvell, 170

10. An appeal from a judgment in ejectment, does not abate by the death of the lessor of the plaintiff: notwithstanding such lessor claimed the land for life only.

Medley v. Medley, 191

11. See New Trial, No. 1.

Hume v. Beale, 236

12. In a decree of reversal, the appellate court will, if requested, farther direct, that, in case the money and costs recovered by the appellee shall have been paid, the same be refunded, with lawful interest from the time of payment.

Stanard v. Brownlow, 329

13. The security in a bond for the prosecution of an injunction, is not liable for the costs and damages which may accrue on an appeal to a superior court.

Woodson v. Johns, 390

14. The act of assembly allowing damages on the affirmation of decrees in chancery, does not authorize the recovery of such damages of a security in a bond bearing date before that act.

Ib.

15. When a decree, in favour of the vendor against the purchaser of lands, and of sundry personal property, is reversed, and the cause remanded, for a reference of the title, and a survey to be made before commissioners, the court of appeals will direct that the appellant have liberty to show and prove to them, if he can, what parts of the personal property stipulated for were not delivered under the contract, and the value thereof; although the court would not have remanded the cause for that purpose alone.

Beverley v. Lawson's heirs, pl. 4, 317

16. The plaintiff cannot appeal from a judgment in favour of all the defendants except one, in a joint action of trespass, until the suit has been abated, dismissed, or decided as to that one.

Wells v. Jackson, pl. 1, 458

APPEALS, (COURT OF.)

1. To give the court of appeals jurisdiction, on the ground that the matter in controversy is a freehold or franchise, the right to the freehold or franchise must be directly the subject of the action, not incidentally or collaterally.

Hutchinson v. Kellam, 302

2. If, therefore, in an action of trespass quare clausum fregit, the damages recovered be less than one hundred dollars, the defendant cannot appeal to this court; notwithstanding it appears from the record that the title or bounds of land were drawn in question.

Ib.

3. See Appeal, No. 8.

Lewis v. Long, 136

4. The court of chancery cannot correct, on motion, or by bill of review, any error apparent on the face of the proceedings, in a decree which has been affirmed by the court of appeals.

Campbell v. Price and others, 327

5. The court of appeals, in affirming a decree, will add any explanation which may be necessary to make it correctly understood.

Mayo v. Purcell, 243

APPEARANCE BAIL.

See Bails.

APPRAISEMENT.

1. An appraisement of a decedent's estate, though not signed by the executor or administrator, and, therefore, not to be received as an inventory, is admissible as prima facie evidence of the value of the estate.

Rogers's adm'r v. Chandler's adm'r, 65

APPRENTICE.

1. An action in behalf of an apprentice, upon his indenture of apprenticeship, ought not to be brought in the name of the overseers of the poor, but in his own name.

Poindexter v. Wilton and others, 183

ARBITRATION.

See Award.

ARREST.

1. A warrant to arrest a person, of whom surety for the peace is demanded, being executed neither by a sworn officer, nor the person to whom it was directed by the magistrate, but by an individual selected by the prosecutor, who erased the name of the person appointed by the magistrate, and substituted that of the person selected by himself, is thereby rendered altogether illegal, and void as a justification, but may be given in evidence in mitigation of damages.

Wells v. Jackson, pl. 2, 458

2. Quære, if the persons to be arrested be described only by their surnames, the counties they reside in, and their professions, or trades, without their christian names, is not such warrant too general and uncertain, and, therefore, illegal and void? pl. 3, Ib.

3. A warrant directing the "associates" of persons named to be arrested, without mentioning the names of such associates, is illegal, and void as to them. pl. 4, Ib.

ARREST OF JUDGMENT.

1. It seems, that a party, to whom a new trial is granted, may, at the next term, without claiming such trial, file errors in arrest of judgment.

Hall v. Smith, Young & Hyde, pl. 1, 550

2. In assumpsit against the assignor of a bond, a consideration for the assignment ought to be set forth in the declaration; and if it be omitted, judgment may be arrested. pl. 2, Ib.

ASSEMBLY, (GENERAL.)

See Suffrage, (Right of,) and

Custis v. Lane, pl. 1, 2, 579

610

*ASSETS.

1. A testator bequeathing to the executors of his daughter's husband, to be divided among her children by him, a sum of money, it was considered as a legacy to them, from their grandfather, and not assets belonging to the estate of their father, notwithstanding the object of the bequest was, in the will, stated to be, to make up their mother's fortune, part of which was not paid in her lifetime, nor to her husband after her death.

Patton, adm'r of Page, v. Williams and wife, 59

2. A fund appointed by a will, for payment of debts and legacies, must be considered sufficient, unless the contrary be proved.

Ib.

3. Upon issue joined on the plea of fully administered, a verdict finding, in general terms, the issue for the plaintiff, and that assets, equal to the claim of the plaintiff, came to the hands of the defendant, is uncertain and insufficient. It should set forth, with sufficient certainty, what portion of the assets, which came to the defendant's hands, was unadministered at the time of suing out the plaintiff's writ.

Rogers's adm'r v. Chandler's adm'r, 65

4. See Administration Bond, No. 1, and

Meade and others v. Brooking, pl. 1, 548

5. See Administration Bond, No. 2, and

Hairston v. Hughes and others, 568

ASSIGNMENT.

1. The assignee of the bond is not in a better situation than the assignor.

Stockton v. Cook, 68

2. Quære, whether proof of a confession, by the assignor of a bond, after the assignment, that the money had been paid to him before the assignment, can be given in evidence against the assignee?

Lewis v. Long, 136

3. Where the purchaser of land gives bonds for the purchase money, payable at different times, and the agreement is, that, if the title to any part of the land prove defective, a deduction from the purchase money shall be made in proportion to the value of the land lost; a court of equity will not protect the purchaser against an assignee of one of the bonds, on the ground of a defect in the title to part of the land; if it appear that the bonds not assigned, and remaining unsatisfied, are sufficient to indemnify him against such loss.

Foreman v. Newkirk and others, 275

4. A court of equity having dissolved an injunction against the assignee of a bond, because the payments, for which credits are claimed by the complainant, were made to the obligee after notice of the assignment, ought further to decree, that the obligee (being a defendant to the bill) do repay the sums so received by him, so soon as the complainant shall have paid the amount of the judgment to the assignee.

Roberts v. Jordons, pl. 3, 488

5. In assumpsit against the assignor of a bond, a consideration for the assignment ought to be set forth in the declaration; and if it be omitted, judgment may be arrested.

Hall v. Smith, Young & Hyde, pl. 2. 550

6. A person assigning a lease, for value received, but without any special agreement to be responsible for the title, is not bound to restore the purchase money, upon the eviction of the assignee in consequence of a defect in the lessor's title; especially where the lessor has not been previously resorted to, or shown to be insolvent, and where the possibility of the eviction was in contemplation of both the parties at the time of the assignment.

M'Olenahan v. Gwynn, pl. 1. 555

7. Where a lease is assigned, and the assignee is evicted through a defect in the lessor's title, he may sue the lessor for compensation. pl. 2. Ib.

ASSUMPSIT.

1. Where an executor has a claim against the estate of his testator, depending on a quantum meruit only, he may exhibit a bill in equity, against the co-executors and legatees, to have such claim established and fixed at a certain sum.

Baker v. Baker and others. 223

2. In such case, he ought to state the claim with reasonable certainty, by setting forth his own estimate of his services, but should he fail to do so, his bill ought not to be dismissed, but leave to amend it should be granted on motion. Ib.

3. In assumpsit against the assignor of a bond, a consideration for the assignment ought to be set forth in the declaration; and if it be omitted, judgment may be arrested.

Hall v. Smith, Young & Hyde, pl. 2. 550

4. A count for money had and received adjudged good after verdict, although the sum received was left blank. pl. 3. Ib.

5. The plaintiff in assumpsit must charge the promise, by the defendant, positively, not by way of recital only; for if the declaration be defective in this respect, it is a fatal error, and not cured by verdict.

Sexton v. Holmes. 506

ATTACHMENT IN CHANCERY.

1. In a suit in chancery against a defendant who is out of the country, and another within the same, having in his hands effects of, or otherwise indebted to, such absentee, a decree cannot be entered against the defendant in this country until, by legal proof, and regular proceedings, the plaintiff has established his claim against the absentee.

Gibson v. White. 94

2. In such case, if the defendant in this country appear not to be a debtor of the absentee, but to hold effects belonging to him, by a title not effectual against creditors, or without any title at all, he should be considered personally responsible, only for so much as he may have consumed, or appropriated to his own use, so as not to be forthcoming, or for the profits he may have received; but, for that amount, a decree may be made against him, personally, in the first place, holding the property in his hands ultimately bound, if he be insolvent; and for the balance of the plaintiff's claim, the court may proceed, in the first place, against the property itself, either by considering such defendant a trustee thereof for the use of creditors, and directing a sale unless the debt be paid by a given day, or by sequestering it (under the act of assembly) as the property of the absentee. Ib.

BAIL.

1. It seems, that a special bail's surrender of his principal to the sheriff is effectual, without his exhibiting a bail piece, or other written evidence of his being bail; if the surrender be made in the county, in the court of which he was accepted and entered as special bail, in open court; and it appears that the fact was known to the sheriff, who, nevertheless, refused to accept the surrender, and hold the principal in custody.

Evans v. Freeland. 119

2. Where the defendant to a suit has not pleaded, but his appearance bail has, a judgment stating, that "the attorney for the defendant withdraw his plea, &c., and, therefore, that the plaintiff recover against the defendant," must be understood as a judgment against the bail only, (without including the principal,) and is therefore erroneous.

Lee's adm'r v. Carter & Forbes. 121

3. If the defendant in an action of covenant die after judgment by default against him and the bail for his appearance, and before a writ of inquiry executed, the plaintiff cannot have a scire facias against the bail, but only against the executors and administrators of the defendant.

Saunders v. Gaines. 225

4. A debtor, being surrendered to the sheriff by his special bail, (after judgment against him in a county court,) cannot legally be detained in jail, or within the prison bounds, on a bond given for that purpose, more than twenty days from the time of such surrender, if the creditor, his attorney or agent, do not, within that time, charge him in execution in writing.

Green v. Garrett. 539

5. A clerk's entering and confirming a judgment, at rules, against a defendant, and another person as "security for his appearance," is not sufficient to make such person liable as appearance bail; but a copy of the bail bond should be inserted in the transcript of the record; for want of which, the judgment should be reversed.

Charles v. Buford. 457

BAILMENT.

See Slaves, No. 10, and

Williams v. Moore. 510

BAR.

1. It seems, that a final decree, in a suit by legatees for the division of a testator's estate, is a bar to a bill exhibited by the same persons, or their legal representatives, suggesting that the executor had kept back a part of the property, but not averring that this was new matter, since discovered, or that the decree was obtained by fraud.

Legrand v. Francisco. 83

2. If a judgment in a summary motion be reversed on the ground that the plaintiff's claim is not supported by evidence, the appellate court should proceed to enter judgment, that the plaintiff take nothing by his motion. And such judgment would be a bar to another motion for the same cause of action. But if such judgment be not entered, the judgment of reversal is too imperfect to be a legal bar.

Webb, ex'or of Osborne, v. M'Neil. 184

3. The pendency of the bill in equity in a county court, after dissolution of an injunction, is no bar to the complainant's obtaining another injunction from the superior court of chancery.

Roberts v. Jordans, pl. 1. 488

BARGAIN AND SALE.

1. A deed of bargain and sale from a person who (having the right to enter) has formally and peaceably entered on the land thereby conveyed, is good to pass his title; notwithstanding another person was in actual and adverse possession of the same land at the time of such entry and conveyance.

Birthing, lessee of Hall, v. Hall, pl. 2. 586

BASTARD CHILD.

1. Under the 18th section of the act of 1792, "providing for the poor," &c., a person is not to be bound to support a bastard child, unless it appear that such child has either actually been, or is likely to be, "chargeable to the parish. And where the bastard child has never been placed on the parish list, but has been supported without any engagement of the overseers of the poor respecting it, the court is not authorized to enter a retrospective judgment, compelling the alleged father to pay for its previous maintenance.

Fall v. The Overseers of the Poor of Augusta County. 496

2. If a single woman, having been delivered of a bastard child, on her oath charge a certain man with being its father, and aver that there is no possibility of her being mistaken; it is competent for the person accused to invalidate her testimony by proving that about nine months before its birth, she was guilty of criminal intercourse with other men; but if the defendant admit that he, also, had criminal intercourse with her about the same time, such proof may be rejected, and he may be confined to proof of the general character of the mother. Ib.

BILL IN CHANCERY.

1. Under the prayer for general relief, the plaintiff, in equity, cannot recover a claim distinct from that demanded, or put in issue, by his bill.

Sheppard's ex'or v. Starke and wife. 29

2. It seems, that a final decree, in a suit by legatees for the division of a testator's estate, is a bar to a bill exhibited by the same persons, or their legal representatives, suggesting that the executor had kept back a part of the property, but not averring that this was new matter, since discovered, or that the decree was obtained by fraud.

Legrand v. Francisco. 83

3. See Amendment, No. 2.

Boykin's devisees v. Smith and others. 109

4. See Towns, No. 2, and

Mayo v. Murchie, pl. 4. 358

BILL OF EXCEPTIONS.

1. On a bill of exceptions to the opinion of the court below, refusing to grant a continuance, the appellate court ought not to reverse the judgment, for a ground of continuance not stated in such exceptions.

Ross v. Norvell.

170

2. Where, for reasons appearing to the court, (though not specified,) a verdict is set aside, without requiring payment of costs, the appellate court will take it for granted those reasons were sufficient, no bill of exceptions being filed.

Hume v. Beale.

226

BILL OF EXCHANGE.

1. A copy of a bill of exchange and notarial protest, with an affidavit of the payee, that the original is lost or mislaid, is not legal evidence to charge the drawer.

Wright v. Hancock & Co., pl. 3.

521

BILL OF LADING.

1. If a creditor, holding a deed of trust to secure his debt, antedate a bill of lading for part of the property, for the purpose of overreaching another creditor who had previously obtained a bill of lading for the same, this is a badge of fraud, which may operate to deprive him of the advantage of the deed.

Wright v. Hancock & Co., pl. 2.

521

BILL OF REVIEW.

1. A decree which is final in all respects, except that "liberty is reserved to the parties, or either of them, to resort to the court for its further interposition if it should be found necessary," may be amended on motion, in a summary way, or by bill of review.

Sheppard's ex'or v. Starke and wife.

29

2. It is no ground for a bill of review, that the party was prevented from proving certain important facts, by wrong advice of one of his counsel, or that the other was unable to attend to the cause, when called for trial, which circumstance was unknown to the party until after the decree.

Franklin v. Wilkinson.

113

BILL OF SALE.

1. An absolute bill of sale, of slaves, by an executor, who is, nevertheless, permitted to retain the possession thereof, is fraudulent and void, as to legatees, as well as creditors and purchasers.

Robertson v. Ewell.

1

BLANKS.

1. After verdict, in an action for breach of a promise to marry, judgment ought not to be reversed, on the ground that the time when the marriage was to be solemnized, is left blank in the declaration.

Milstead v. Redman.

219

2. A count for money had and received adjudged good after verdict, although the sum received was left blank.

Hall v. Smith, Young & Hyde, pl. 3.

560

BOND.

1. An executor ought not to be compelled to make distribution of a residuum, until bond and security be given, by the distributees, as required by the act of assembly in the case of an administrator.

Sheppard's ex'or v. Starke and wife.

29

2. The assignee of the bond is not in a better situation than the assignor.

Stockton v. Cook.

68

3. A writing, beginning, "Know all men, &c., that I, H. R., of the county, &c., am held and firmly bound," &c., and running throughout in the name of H. R. alone, is not to be received as evidence in support of a declaration, against H. R. and H. B., charging that they both acknowledged themselves to be indebted, &c.; notwithstanding the name of H. B. was signed under that of H. R., and issue was not joined on the plea of non est factum, or nil debet, but of payment by H. B.

Bell v. Allen's adm'r.

118

4. See Appeal, No. 8.

Lewis v. Long.

136

5. Quære, whether proof of any confession by the assignor of a bond after the assignment, that the money had been paid to him before the assignment, can be given in evidence against the assignee.

Ib.

6. In an action of debt against one obligor only, if the declaration describe the bond as joint, and do not state the other obligor to be dead, it is a fatal error, (though not pleaded in abatement,) and is not cured by verdict.

Newman v. Graham.

187

7. A declaration in debt against two partners in trade, charging that one of them executed the bond for himself and another, (without any other averment,) is too defective to support a judgment against such other partner, though he pleaded payment, and a verdict was found against him.

Garland v. Davidson.

189

8. The security in a bond, for the prosecution of an injunction, is not liable for the costs and damages which may accrue on an appeal to a superior court.

Woodson v. Johns.

230

9. In a debt on a bond, with a collateral condition, the plaintiff cannot recover any damages not demanded in the declaration, or in the assignment of breaches.

Ib.

10. The act of assembly, allowing damages on the affirmation of decrees in chancery, does not authorize the recovery of such damages, of a security, in a bond bearing date before that act.

Ib.

11. In debt on a bond, if the defendant, after craving oyer, plead "payment," and it appear, from the condition of the bond, that only a part of the debt had become due at the time of institution of the suit, the plea extends to that part only, and not to sums which might become due thereafter.

Thatcher & Herndon v. Taylor & Cochrane.

249

12. A judgment on a bond, for payment of a debt by instalments, should be, "for the debt in the declaration mentioned, to be discharged by the sum due at the time of institution of the suit, reserving liberty to the plaintiff to resort to a scire facias to recover such other damages as might thereafter arise under "the condition of the bond."

Ib.

13. It is no plea, to an action upon an injunction bond, "that the injunction was not dissolved unconditionally, but upon terms that the plaintiff, at law, should execute a bond for securing the title to a tract of land;" without averring in the plea that such bond was not thereupon given.

Gray & Scott v. Campbell.

251

14. Where an injunction is dissolved upon a condition, and that condition has been complied with by the defendant in equity, the surety, in the injunction bond, is not exonerated.

Ib.

15. See Prison Bounds, and

Green v. Garrett.

339

16. A court of equity will not compel a security in a bond, to contribute to the relief of his co-security, who has been forced to pay the debt, unless it appear, that due diligence was used, without effect, to obtain reimbursement from the principal obligor, or that he was insolvent.

McCormack's adm'r v. Obannon's ex'or, &c.

484

17. A clerk's entering and confirming a judgment, at rules, against a defendant, and another person, as "security for his appearance," is not sufficient to make such person liable as appearance bail, but a copy of the bail bond should be inserted in the transcript of the record, for want of which, the judgment should be reversed.

Quarles v. Buford.

487

18. A court of equity having dissolved an injunction against the assignee of a bond, because the payments, for which credits are claimed by the complainant, were made to the obligee after notice of the assignment, ought further to decree, that the obligee (being a defendant to the bill) do repay the sums so received by him, so soon as the complainant shall have paid the amount of the judgment to the assignee.

Roberts v. Jordans, pl. 3.

488

19. An administrator may declare in the debet and detinet, on a bond executed to himself as such, and his executor or administrator has a right to bring an action upon it.

Bowden, ex'or of Moore, v. Taggart.

513

20. See Devises, Nos. 45, 46.

Foster and wife v. Crenshaw's ex'ors.

514

21. See Administration Bond, and

Meade and others v. Brooking.

548

22. See Administration Bond, No. 2, and

Hairston v. Hughes and others.

568

BOOKS OF ACCOUNTS.

1. In what case a court of equity may direct the books of a party rendering an account, to be produced.

Freeland, &c. v. Cocke's representatives, pl. 2.

352

BREACH.

1. In an action upon a written agreement, for the sale of a tract of land, setting forth that the vendor agreed to give the vendee possession, and a conveyance free of incumbrances, on or before a certain day; for which the vendee agreed to "pay to the vendor part of the purchase money on the same day, and to give him, for the balance, a deed of trust, or such other security as he might require; and that the conveyance was not to

be executed until the first payment was made and security given; the declaration, in behalf of the vendor, sufficiently charged a breach, by stating that the plaintiff was, on that day, in lawful and peaceful possession of the land, and ready to give the defendant possession, with a proper conveyance, clear of all incumbrances, but that the defendant failed to make the payment and give the security.

- Moss v. Stipp, 159
2. What pleas, to such a declaration, are insufficient. Ib.
3. See Declaration, No. 12.
Woodson v. Johns, 230

CAPIAS AD SATISFACIENDUM.

1. See Execution, No. 2, and
Dix v. Evans, pl. 2, 308

CARRIER.

1. A common carrier is liable for all accidents to goods intrusted to him for transportation, except such as arise from the act of God, the act of the enemies of the commonwealth, or the act of the owner of the goods.

Murphy, Brown & Co. v. Staton, 289
2. In such case, if a loss happen, the onus probandi lies on the carrier, to exempt him from the liability. And it is not enough for him to prove, (where the goods are carried by water,) and the navigation is attended with so much danger, that a loss may happen notwithstanding the utmost endeavours of the watermen and crew to prevent it; that the person conducting the boat possesses competent skill, has used due diligence, and provided hands of sufficient strength and experience to assist him. Ib.

CASE, (ACTION UPON THE.)

1. See Action, No. 7.
Custis v. Lane, pl. 2, 579

CHANCERY.

1. See Parties, No. 1.
Sheppard's executor v. Starke and wife, 30
Also, Chancery, No. 6. and
Branch's adm'r v. Booker's adm'r, 48
2. In a suit in chancery, on behalf of a person who claimed a share of a residuum as purchaser from one of the legatees, the administrator de bonis non, and all the children of the testator were defendants to the bill; but proceedings were had against two of them only, viz. the legatee, of whom the plaintiff purchased, and another who also claimed the same share by a pretended purchase, it appearing that, by a decree in a suit in behalf of the administrator de bonis non, a division among certain persons, as residuary legatees, had been directed, and one of the defendants, now before the court, had been ordered to pay to the other the share in question. Yet it was determined that proceedings should have been had against all the defendants, and the cause was remanded to the court below for that purpose.

Purcell v. Maddox, 79
3. Where a defendant in chancery has not answered the bill, it is error to enter a final decree against him, without the previous service of a decree nisi. And his appearing before commissioners appointed to take an account, or having notice of their proceeding to take it, does not preclude him from making this objection.

Legrand v. Francisco, 83
4. It seems, that a final decree, in a suit by legatees for the division of a testator's estate, is a bar to a bill exhibited by the same persons, or their legal representatives, suggesting that the executor had kept back a part of the property, but not averring that this was new matter, since discovered, or that the decree was obtained by fraud. Ib.

5. Under the 3d section of the act of January 30th, 1804, concerning the proceedings in courts of chancery, (Rev. Code, vol. 2, p. 20,) an appeal from an order dissolving an injunction, could not be taken, but only from the dismissal of the bill.

Pitts, ex'or of Rowzee, v. Tidwell, 88
6. It is not competent to a complainant to dismiss his bill, and then object, in an appellate court, that the prayer thereof has not been decreed in his favour. Ib.

7. Where an injunction is wholly dissolved in a county or corporation court, the bill is not to stand dismissed, until two succeeding courts have been held thereafter in such county or corporation; and the appellate court will not presume, from length of time, that two such courts were held; but this circumstance must explicitly appear in the transcript of the record. Ib.

8. Quære. If it do explicitly appear that two such courts were held, and it do not appear that, at or before the second court, any cause was shown

against the dismissal of the bill, can the clerk's neglecting to enter the dismissal have the effect of keeping the cause on the docket? Ib.

9. In a suit in chancery against a defendant, who is out of this country, and another, within the same, having in his hands effects of, or otherwise indebted to, such absentee, a decree cannot be entered against the defendant in this country, until, by legal proof, and regular proceedings, the plaintiff has established his claim against the absentee.

Gibson v. White, 94
10. In such case, if the defendant in this country, appear not to be a debtor of the absentee, but to hold effects belonging to him, by a title not effectual against creditors, or without any title at all, he should be considered personally responsible, only for so much as he may have consumed, or appropriated to his own use, so as not to be forthcoming, or for the profits he may have received; but for that amount a decree may be made against him personally, in the first place; holding the property in his hands ultimately bound, if he be insolvent; and, for the balance of the plaintiff's claim, the court may proceed, in the first place, against the property itself, either by considering such defendant a trustee thereof for the use of creditors, and directing a sale unless the debt be paid by a given day; or by sequestering it, (under the act of assembly,) as the property of the absentee. Ib.

11. Quære, after a suit in chancery has been set for hearing, has the plaintiff a right to amend his bill before the hearing, as a matter of course, upon paying the defendant all costs occasioned thereby? Or in such amendment to be permitted, only upon good cause shown?

Boykin's devisees v. Smith and others, 103
12. See Practice, No. 4.

Franklin v. Wilkinson, 112

13. It is no ground for a bill of review, that the party was prevented from proving certain important facts, by wrong advice of one of his counsel; or that the other was unable to attend the cause, when called for trial, which circumstance was unknown to the party until after the decree. Ib.

14. The court of chancery cannot correct on motion, or by bill of review, any error apparent on the face of the proceedings, in a decree which has been affirmed by the court of appeals.

Campbell v. Price and others, 227
15. In a decree of reversal, the appellate court will, if requested, farther direct, that, in case the money and costs recovered by the appellee shall have been paid, the same be refunded, with lawful interest from the time of payment.

Stanard v. Brownlow, 229
16. A decree in chancery, declaring the court's opinion that an agreement for the sale of a tract of land should be specifically performed by both the parties, and directing the vendee to execute a mortgage of the same land to secure the purchase money, is to be understood as requiring the vendor, in the first place, to make a title to him.

Mayo v. Purcell, 243

17. See Assignment, No. 3.

Foreman v. Newkirk and others, 275

18. A suit in chancery being brought by legatees against the executors and widow of the testator, for a settlement of the administration account, and distribution of the personal estate among the plaintiffs; if it appear that the widow has not fully received her share, the court should not dismiss the bill as to her, but decree in her favour the sum to which she appears entitled.

Ball's devisees v. Ball's ex'rs and widow, 279

19. See Vouchers, Nos. 1, 2, 3.

McCall v. Peachy's adm'r, pl. 12, 13, 14, 288

20. See Superior Court of Chancery, No. 1.

Roberts v. Jordans, pl. 1, 486

21. See Injunction, No. 17. and
Wilson & Trent v. Butler and others, 550

22. See Administration Bond, No. 2, and
Hairston v. Hughes and others, 508

CHARTER PARTY.

1. If persons contracting by a charter party under seal, bind themselves, each to the other, as on their own behalf, each may maintain an action, for covenant broken, against the other, in his individual capacity, notwithstanding they were described in the introductory part of the instrument, and in their signatures, as agents for other persons.

Hartshorne v. Whittles, 357

CHILDREN.

1. If, by a deed of marriage settlement, duly recorded, slaves be conveyed to certain trustees and their heirs, to the use of the wife, for life; and,

after her death, to the use of the husband for life; and, after the death of the survivor, to the use of the children of the marriage, equally to be divided between them, and their heirs forever; upon the deaths of the husband and wife, the children of the marriage are entitled, not only to the equitable, but the absolute legal estate.

Baird v. Bland and others, pl. 1, 570
 2. In such case, if the parents, in their lifetime, be deprived of the slaves, and depart this life, leaving children under age, the act of limitations does not run against the children, until they attain the age of twenty-one years, pl. 2. Ib.

CITIZENSHIP.

1. See Columbia. (District of.) and
 Custis v. Lane, pl. 1, 570

COLUMBIA. (DISTRICT OF.)

1. A person who, at the time of the cession of the District of Columbia to the United States, resided in that part of the county of Fairfax which, by the said cession, was comprehended in that District, and who has continued to reside there ever since, is not entitled to vote for members of the general assembly, notwithstanding he was born in Virginia, and possesses a freehold therein.

Custis v. Lane, pl. 1, 579

COLLUSION.

1. See Fraud, Nos. 10, 11, and
 Wright v. Hancock & Co., pl. 1, 2, 531

COMBINATION.

1. See Fraud, Nos. 10, 11, and
 Wright v. Hancock & Co., pl. 1, 2, 531

COMMISSIONS.

1. In this case, a commission of five per cent. on the moneys received by the executor, was allowed him, in lieu of all expenses; such commission to be deducted from the balance due the estate at the end of each year.

Sheppard's ex'rs v. Starke and wife, pl. 7, 30

2. An executor may reasonably be allowed a commission of ten per centum on moneys received by him, where the debts were very small and numerous, and the debtors presumed to have been much dispersed.

Cavendish v. Fleming, 198

3. In this case, under circumstances of extraordinary trouble attendant on the administration, the administrator was allowed a commission of ten per centum, on all specie received by him, in full satisfaction for receiving, putting out, and paying away the same; as, also, for his trouble and services in the administration and management of the estate; such commission to be allowed only once, on receiving the same sum of money; and as to the paper money, a commission was allowed of five per centum on the value thereof, when received, and the same on the value thereof when paid away, according to the legal scale of depreciation.

M'Call v. Peachy's adm'r, pl. 17, 238

COMMON.

1. See Equity, No. 32, and
 Mayo v. Murchie, pl. 1, 358
 2. See Towns, No. 2, and pl. 4, Ib.

COMPENSATION.

1. See Purchaser, No. 13.
 Foreman v. Newkirk and others, 375

2. If lands be sold according to certain metes and bounds, and by a covenant under seal, the vendor agreed to warrant the title against all persons whatsoever, he is bound to include in a conveyance with general warranty; and, in case of eviction, to make compensation for all the lands within those bounds, which he held and claimed, as his own, at the time of the sale, and showed to the purchaser as part of the lands sold, notwithstanding his title thereto may be defective. But he is not bound to convey lands which were not held and claimed by him at the time of the sale, nor shown as part of the lands sold, although his title-papers may comprehend them.

Beverley v. Lawson's heirs, pl. 2, 317

3. Where a lease is assigned, and the assignee is evicted through a defect in the lessor's title, he may sue the lessor for compensation.

M'Clenahan v. Gwynn, 566

COMPROMISE.

1. Under what circumstances a right to relief in

equity may be lost by acts of confirmation and compromise.

Mason v. Williams, 126

CONCEALMENT.

1. If an agent, employed to sell a tract of land, become, himself, the purchaser, by bargaining with his employer, from whom he conceals the fact that a better price could be got from another person, he is guilty of fraud, and the contract ought to be vacated.

Moseley's adm'r's and heirs v. Buck & Brander, 232

2. In such case, the court of equity will compel him to reconvey the land, on receiving back his purchase money, with interest, and make him account for the rents and profits. Ib.

CONDITION.

1. Where an injunction is dissolved upon a condition, and that condition has been complied with by the defendant in equity, the surety in the injunction bond is not exonerated.

Gray & Scott v. Campbell, 251

CONFESSION.

1. Quære, whether proof of any confession, by the assignor of a bond, after the assignment, that the money had been paid to him before the assignment, can be given in evidence against the assignee?

Lewis v. Long, 126

CONFESSION OF JUDGMENT.

1. A confession of judgment, and release of equity, will be supported, though made by a man of weak understanding, in the habit of making improvident bargains, addicted to intoxication, and embarrassed in his circumstances; and, though such confession was induced by the plaintiff's giving him time to pay the money, if no other influence was exerted, and no fraud was committed in obtaining such confession, the same being deliberately and voluntarily made by the defendant, or by virtue of a power of attorney, deliberately and voluntarily executed by him.

Mason v. Williams, 126

2. A defendant's relinquishing his plea, and agreeing to the plaintiff's damages, is a confession of judgment, and, of course, a release of errors.

Cooke v. Pope's adm'r, 107

3. A confession of judgment, for no certain sum, in an action sounding in damages, is not sufficient to authorize the court to assess the damages and enter judgment for a certain sum, but a writ of inquiry should be executed.

Dunbar v. Lindenbergers, 108

CONFIRMATION.

1. Under what circumstances a right to relief in equity may be lost by acts of confirmation and compromise.

Mason v. Williams, 126

CONNIVANCE.

1. If a creditor holding a deed of trust, to secure his debt, permit the grantor to take, use, and sell the property, (contrary to the tenor of such deed,) or connive at his doing so, it is a badge of fraud, which may deprive him of the advantage of the deed.

Wright v. Hancock & Co., pl. 2, 251

CONSENT.

1. Upon a county court's overruling a motion for dissolution of an injunction, the parties cannot make the injunction perpetual, by consent, in order that an appeal may be taken; but, to authorize an appeal, the cause must be regularly proceeded in, to a final decree.

Blakey v. West, 75

2. See Equity, No. 84, and
 Mayo v. Murchie, pl. 2, 358

CONSIDERATION.

1. See Lands, No. 2, and

Shobe's ex'rs v. Carr and wife, pl. 4, 10

2. In assumpsit, against the assignor of a bond, a consideration for the assignment ought to be set forth in the declaration; and if it be omitted, judgment may be arrested.

Hall v. Smith, Young & Hyde, pl. 2, 560

CONSTITUTION.

1. Quære, whether any action lies against an

officer, for acting in obedience to a legislative act, found to be in conflict with the constitution?
Custis v. Lane, pl. 3. 579

CONSTRUCTION OF LAWS.

1. Construction of the act of 1785, ch. 61, s. 3, declaring that a posthumous child, pretermitted in his father's will, is to have the same portion of his estate as if he had died intestate. See *Posthumous Child*, and
Armistead and others v. Dangerfield and wife, 20
2. Under the stat. 21 Hen. VIII., ch. 4, a conveyance by part of the executors, named in a will, (by which "the executors therein mentioned" are empowered to convey,) is justified where the others refuse to qualify. See *Conveyance*, and
Geddy & Knox v. Butler and wife, pl. 2. 345

CONTINGENT REMAINDER.

1. A tract of land was conveyed, in trust, "to I. L., his heirs and assigns, for ever, to the use of the grantor, during her natural life; and, after her death, to the use of her son, L. L., and his heirs and assigns, for ever; but her said son to possess, as soon as he should arrive at full age, a certain part thereof; her intended husband to have the use of the remaining part during his life, or until he should marry, after her death, and no longer; and if the said L. L. should die before he arrived at the age of twenty-one years, or, if he should die without child, or children, the said trustee, his heirs and assigns, to hold the said lands to the use of the grantor's daughter, M. L., and her heirs and assigns, for ever." It was decided that L. L., the son, was seised in fee, of the lands conveyed by the deed, from the date thereof, (subject to the reservations and exceptions in favour of the grantor and her intended husband,) with a right to take possession of part, on attaining the age of twenty-one years; which estate in fee, was subject to be defeated by his dying under age, and without a child, but that the concurrence of both these contingencies was necessary to defeat that estate; and, therefore, it appearing that L. L. did attain the age of twenty-one years, though he afterwards died without any child, no right accrued to the daughter under the deed.

Coleman and wife v. Holladay, 510

2. See *Reversion*, No. 3.
Birthing, lessee of Hall, v. Hall, pl. 1. 586

CONTINUANCE.

1. A continuance ought not to be granted at law, on the ground that the party, a few days before that appointed for the trial, filed a bill in equity for a discovery of usury, as auxiliary to his defence at law; unless he make affidavit that the usury therein charged had recently come to his knowledge.
Ross v. Norvell, 170
2. On a bill of exceptions to the opinion of the court below, refusing to grant a continuance, the appellate court ought not to reverse the judgment for a ground of continuance not stated in such exceptions. *Ib.*
3. Under what circumstances a party, having been repeatedly indulged with continuances of a cause, may, with propriety, be refused a farther continuance.
Milstead v. Redman, 319

CONTRACT.

See *Agreement and Marriage Contract*.

1. See *Pleading*, Nos. 3, 4, 5.
Moss v. Stipp, 159
2. Rent may be payable in advance, by contract; and such rent may be distrained for, if not paid when due.
Williams v. Howard, 277

CONTRIBUTION.

1. The portion of a pretermitted posthumous child is not to be raised by a division of the estate into equal parts, but by a proportionable contribution by the devisees and legatees, and those claiming under them.
Armistead and others v. Dangerfield and wife, 20
2. Purchasers from the devisees and legatees are not exempted from contributing to make up the portion of such posthumous child, by their having purchased without notice of such claim. *Ib.*
3. A court of equity will not compel a security in a bond to contribute to the relief of his co-security, who has been forced to pay the debt, unless it appear that due diligence was used, without effect, to obtain reimbursement from the principal obligor, or that he was insolvent.
M'Cormack's adm'r v. Obannon's ex'or &c., 48

CONVEYANCE.

1. See *Breach*, Nos. 1, 2.
Moss v. Stipp, 159
2. Where a testator, who empowered his executors to sell and convey certain real estate, died before the 1st of January, 1787, the construction of the will, as to the power of the executors to convey, is to be governed by the statute of 31 Hen. VIII. ch. 4, and not by the act of 1785, ch. 61; notwithstanding the conveyance was executed after the 1st of January, 1787.
Geddy & Knox v. Butler and wife, pl. 1. 345
3. Under the stat. 21 Hen. VIII. ch. 4, a conveyance by part of the executors named in a will, (by which "the executors therein mentioned" are empowered to convey,) is justified where the others refuse to qualify. And such refusal may be found on proof of declarations in pays, or presumed from circumstances, without any renunciation of record. But a special verdict, in ejectment, finding that the executors who failed to join in the deed "never did take upon themselves the burthen of executing the will, and never did relinquish their rights so to do," (when it appears that they were living at the time of the date of the deed,) is so defective that a venire facias de novo should be awarded. *pl. 2.* *Ib.*
4. See *Contingent Remainder*, and
Coleman and wife v. Holladay, 510
5. See *Fraud*, Nos. 10, 11, and
Wright v. Hencock & Co., pl. 1, 2. 521
6. See *Bargain and Sale*, and
Birthing, lessee of Hall, v. Hall, pl. 2. 536
7. See *Trust* (Deed of) No. 5, and
Wilson & Trent v. Butler and others, pl. 2. 559
8. See *Marriage Settlement*, Nos. 3, 4, and
Baird v. Bland and others, pl. 1, 2. 570

COPIES.

1. A copy of a bill of exchange and notarial protest, with an affidavit of the payee that the original is lost or mislaid, is not legal evidence to charge the drawer.
Wright v. Hencock & Co., pl. 3. 521

CORPORATION, (SERGEANT OF.)

- See *Sergeant of Corporation*, and
Darby v. Henderson, 115

COSTS.

1. On a mortgagor's bill, for an account of profits, and a conveyance of the mortgaged premises; if he be still indebted on the mortgage, his equity of redemption should be allowed him; but the costs of suit should be decreed against him.
Turner v. Turner, 66
2. Where, for reasons appearing to the court, (though not specified,) a verdict is set aside, without requiring payment of costs, the appellate court will take it for granted those reasons were sufficient; no bill of exceptions being filed.
Hume v. Beale, 236
3. The security in a bond for the prosecution of an injunction is not liable for the costs and damages, which may accrue on an appeal to a superior court.
Woodson v. Johns, 230
4. Judgment may be rendered for interest from the date of a three months' replevy
 619 "bond, on the rent and costs of the distress added together."
Williams v. Howard, 277

COUNTY COURT.

1. See *Injunction*, No. 13, and
Roberts v. Jordans, pl. 1. 483
2. If two of the persons nominated to the governor by a county court have successively been commissioned to execute the office of sheriff in such county, and each has failed to give bond within the time prescribed by law, the governor with advice of council cannot thereupon commission the person who was commissioned in the first instance.
Bowers and others v. Millar, 493

COURT.

1. A confession of judgment for no certain sum in an action sounding in damages, is not sufficient to authorize the court to assess the damages, and enter judgment for a certain sum; but a writ of inquiry should be executed.
Dunbar v. Lindenbergers, 169
2. A point on which a party requested the court to instruct the jury, is not to be regarded as a mere abstract question, (concerning which the court was not bound to give an opinion,) if it appear from the

pleadings that such point might have applied to the case before the jury, and the contrary be not stated.

Shelton v. Cocke, Crawford & Co., 191

COURT-HOUSE.

1. The court of a county having caused a court-house and jail to be erected in or about the year 1764, and courts having been continually held in such court-house, until the year 1801; it ought, in a court of equity, to be presumed, that the title to two acres of the land built upon and adjacent, was duly vested in the court and their successors; although no deed from the original proprietor can be produced.

Boykin's devisees v. Smith and others, 103
2. Quære, ought not such presumption to take place at law, as well as equity. Ib.
3. It seems, that, in such case, a decision, in ejectment, against a person claiming by assignment from the county court, is no bar to his recovering the land in a court of equity. Ib.

COVENANT.

1. In an action of covenant, the declaration describing the covenant as sealed by the defendant, without mentioning any other person; and the plea being covenants performed; though without praying over; a joint and several covenant sealed by the defendant, and others, but in other respects answering to the description in the declaration, is admissible as evidence to the jury.

Hollingsworths v. Dunbar, 168

2. See Practice, No. 18.

Saunders v. Gaines, 325

3. On a covenant, in which the plaintiff engaged to serve the defendant, as his overseer, for one year, and the defendant to pay to the plaintiff a certain part of all grain "made on the plantation," (after deducting the seed,) oats excepted; a declaration charging that the defendant did not, at the close of the year, pay to the plaintiff such part of the grain "made on the plantation," (without setting forth what crop was made,) is good after verdict.

Laughlin v. Flood, executor of Washington, 355

4. See Compensation, No. 2.

Beverly v. Lawson's heirs, pl. 2, 317

5. See Charter Party, and

Hartshorne v. Whittles, 337

CREDITORS.

1. See Executors and Administrators, No. 1.

Robertson v. Ewell, 1

2. See Voluntary Agreement, and

Broadfoot v. Dyer, 350

3. What circumstances of collusion and combination, between a debtor and one of his creditors, to injure and defraud the rest, are sufficient to prevent such creditor from being entitled to any prior lien by virtue of a deed of trust executed for his benefit by the debtor.

Wright v. Hencock & Co., pl. 1, 531

4. What are badges of fraud in such case. pl. 2, Ib.

5. See Trust (Deed of) No. 5, and

Wilson & Trent v. Butler and others, pl. 2, 550

DAMAGES.

1. A defendant's relinquishing his plea, and agreeing to the plaintiff's damages, is a confession of judgment, and, of course, a release of errors.

Cooke v. Pope's adm'r, 107

2. A confession of judgment, for no certain sum, in an action sounding in damages, is not sufficient to authorize the court to assess the damages, and enter judgment for a certain sum; but a writ of inquiry should be executed.

Dunbar v. Lindenbergers, 169

3. See Costs, No. 3.

Woodson v. Johns, 230

4. In debt on a bond with a collateral condition, the plaintiff cannot recover any damages not demanded in the declaration, or in the assignment of breaches. Ib.

5. The act of assembly allowing damages on the affirmation of decrees in chancery does not authorize the recovery of such damages of a security in a bond bearing date before that act. Ib.

6. See Warrant, No. 1, and

Wells v. Jackson, pl. 2, 468

DEBET AND DETINET.

1. An administrator may declare in debet and detinet on a bond executed to himself as such; and his executor or administrator has a right to bring an action upon it.

Bowden, ex'or of Moore, v. Taggart, 513

DEBT.

1. See Appeal, No. 8.

Lewis v. Long, 186

2. In an action of debt against one obligor only, if the declaration describe the bond as joint, and do not state the other obligor to be dead, it is a fatal error, (though not pleaded in abatement,) and is not cured by verdict.

Newman v. Graham, 187

3. See Declaration, No. 10.

Garland v. Davidson, 189

4. Although the acknowledgment of a debt by one or more of the partners of a mercantile firm, after the dissolution thereof, is competent to do away the bar of the act of limitations in an action brought against the firm, (the existence of the debt being first proved by other testimony or admitted by the pleadings,) yet such acknowledgment is not proper evidence of the existence of the debt, so as to charge the other partners.

Shelton v. Cocke, Crawford & Co., 191

5. In debt on a bond with a collateral condition, the plaintiff cannot recover any damages not demanded in the declaration, or in the assignment of breaches.

Woodson v. Johns, 230

6. In debt on a bond, if the defendant, after craving over plead "payment," and it appear from the condition of the bond that only a part of the debt had become due at the time of institution of the suit, the plea extends to that part only, and not to sums which might become due thereafter.

Thatcher & Herndon v. Taylor & Cochrane, 249

7. A judgment on a bond, for payment of a debt by instalments, should be, for the debt in the declaration mentioned, to be discharged by the sum due at the time of institution of the suit; reserving liberty to the plaintiff to resort to a scire facias to recover such other damages as might thereafter arise under the condition of the bond. Ib.

DEBTORS.

1. A sergeant of a corporation has not the right to sue for money due to an insolvent debtor.

Darby v. Henderson, 115

2. See Bail, No. 4.

Green v. Garrett, 339

3. What circumstances of collusion and combination, between a debtor and one of his creditors to injure and defraud the rest, are sufficient to prevent such creditor from being entitled to any prior lien by virtue of a deed of trust executed for his benefit by the debtor.

Wright v. Hencock & Co., pl. 1, 531

4. What are badges of fraud in such case. pl. 2, Ib.

5. See Trust (Deed of) No. 5, and

Wilson & Trent v. Butler and others, pl. 2, 556

DECLARATION.

1. After issue joined, in ejectment, on the title only, and a verdict for the plaintiff for the land in one of the counts in the declaration mentioned, it is no ground for arrest of judgment, that the two counts laid demises of the same land from different persons.

Throckmorton v. Cooper's lessee, 98

2. Quære, would a demurrer to the declaration in this case have been sustained? Ib.

3. A writing, beginning, "Know all men, &c. that I, H. R. of the county, &c., am held and firmly bound, &c.," and running throughout in the name of H. R. alone, is not to be received as evidence in support of a declaration against H. R. & H. B., charging that they both acknowledged themselves to be indebted, &c.; notwithstanding the name of H. B. was signed under that of H. R., and issue was not joined on the plea of non est factum or nil debet, but of payment by H. B.

Bell v. Allen's adm'r, 118

4. It is not necessary, in the declaration in detinue, to state a special demand and refusal, but the general charge that the defendant, "although often requested," &c., is sufficient.

Mortimer v. Brumfield, 122

5. See Amendment, No. 3.

Moss v. Stipp, 159

6. In an action upon a written agreement for the sale of a tract of land, setting forth that the vendor agreed to give the vendee possession, and a conveyance free of incumbrances, on or before a certain day; for which the vendee agreed to pay to the vendor part of the purchase money on the same day, and to give him, for the balance, a deed of trust, or such other security as he might require; and that the conveyance was not to be executed until the first payment was made and security given; the declaration in behalf of the vendor,

sufficiently charged a breach, by stating that the plaintiff was on that day in lawful and peaceful possession of the land, and ready to give the defendant possession, with a proper conveyance clear of all incumbrances; but the defendant failed to make the payment and give the security. *Ib.*

7. What pleas to such a declaration are insufficient. *Ib.*

8. In an action of covenant, the declaration describing the covenant as sealed by the defendant, without mentioning any other person; and the plea being "covenants performed;" though without praying over; a joint and several covenant sealed by the defendant and others, but in other respects answering to the description in the declaration is admissible as evidence to the jury.

Hollingsworths v. Dunbar. 168

9. In an action of debt against one obligor only, if the declaration describe the bond as joint, and do not state the other obligor to be dead, it is a fatal error, (though not pleaded in abatement,) and is not cured by verdict.

Newman v. Graham. 187

10. A declaration in debt, against two partners in trade, charging that one of them executed the bond for himself and another, (without any other averment,) is too defective to support a judgment against such other partner, though he pleaded payment and a verdict was found against him.

Garland v. Davidson. 189

11. After verdict, in an action for breach of a promise to marry, judgment ought not to be reversed on the ground that the time when the marriage was to be solemnized is left blank in the declaration.

Milstead v. Redman. 219

12. In debt on a bond with a collateral condition, the plaintiff cannot recover any damages not demanded in the declaration, or in the assignment of breaches.

Woodson v. Johns. 280

13. On a covenant, in which the plaintiff engaged to serve the defendant, as his overseer, for one year; and the defendant to pay to the plaintiff a certain part of all grain "made on the plantation," (after deducting the seed,) oats excepted; a declaration charging that the defendant did not, at the close of the year, pay to the plaintiff such part of the grain "made on the plantation," (without setting forth what crop was made,) is good after verdict.

Laughlin v. Flood, ex'or of Washington. 285

14. An administrator may declare in the debt and detinet on a bond executed to himself as such; and his executor or administrator has a right to bring an action upon it.

Bowden, ex'or of Moore, v. Taggart. 518

15. In assumpsit against the assignor of a bond, a consideration for the assignment ought to be set forth in the declaration; and if it be omitted, judgment may be arrested.

Hall v. Smith, Young & Hyde, pl. 2. 550

16. A count for money had and received adjudged good after verdict; although the sum received was left blank. *pl. 2.* *Ib.*

17. The plaintiff in assumpsit must charge the promise, by the defendant, positively; not by way of recital only; for if the declaration be defective in this respect, it is a fatal error, and not cured by verdict.

Sexton v. Holmes. 566

DECREE.

1. A decree which is final in all respects, except that "liberty is reserved to the parties, or either of them, to resort to the court for its further interposition, if it should be found necessary," may be amended, on motion, in a summary way, or by bill of review.

Sheppard's ex'or v. Starke and wife, pl. 1. 29

2. If it appear on the face of the record, that proper parties to the suit are wanting, the decree will be reversed, unless the objection was expressly relinquished in the court below. *Ibid, pl. 2.* *Ib.*

3. The court cannot decree a distribution in favour of persons not parties to the cause. *Ibid, pl. 4.* 29

4. A decree against an executor or administrator, for a balance due on his administration account, ought not to be, "that he pay the same out of the estate in his hands to be administered," but as his own proper debt. *Ibid, pl. 6.* *Ib.*

5. See *Legacy, and*

Pattin, adm'r of Page, v. Williams and wife. 59
6. Where a mortgagor is admitted to redeem, upon his bill filed for that purpose, the decree ought not to be, in general terms, that, upon his paying the money with interest, the mortgagee shall convey to him the mortgaged premises, but that such conveyance be made, if he, within a limited time, do make such payment, and, if not, that he be fore-

closed of all equity of redemption, and that the mortgaged premises be sold.

Turner v. Turner. 66

7. Where a defendant in chancery has not answered the bill, it is error to enter a final decree against him, without the previous service of a decree nisi, and his appearing before commissioners appointed to take an account, or having notice of their proceeding to take it, does not preclude him from making this objection.

Legrand v. Francisco. 83

8. It seems that a final decree in a suit by legatees for the division of a testator's estate is a bar to a bill, exhibited by the same persons, or their legal representatives suggesting that the executor had kept back a part of the property, but not averring that this was new matter, since discovered, or that the decree was obtained by fraud. *Ib.*

9. The court of chancery cannot correct, on motion, or by bill of review, any error, apparent on the face of proceedings in a decree which has been affirmed by the court of appeals.

Campbell v. Price and others. 227

10. See *Chancery, No. 15.*

Stanard v. Brownlow. 229

11. A decree in chancery, declaring the court's opinion that an agreement for the sale of a tract of land should be specifically performed by both the parties, and directing the vendee to execute a mortgage of the same land to secure the purchase money, is to be understood as requiring the vendor, in the first place, to make a title to him.

Mayo v. Purcell. 243

12. The court of appeals, in affirming a decree, will add any explanation which may be necessary to make it correctly understood. *Ib.*

13. See *Sale, No. 3, and*

Beverley v. Lawson's heirs, pl. 2. 317

14. See *Title, No. 4, and Ibid, pl. 4.*

15. See *Devisees, No. 4.*

Foster and wife v. Crenshaw's ex'ors, pl. 2. 514

16. See *Administration Bond, No. 2, and*

Hairston v. Hughes and others. 568

622

*DEDUCTIONS.

1. An executor or administrator may with propriety be credited for deductions made by him from accounts left by his testator or intestate for collection; if it appear that the charges in those accounts were unusually extravagant and it be not proved that in making such deductions, he acted fraudulently or disadvantageously for the estate.

McCall v. Peachy's adm'r. 288

DEED.

1. If an executor or administrator wish to prove, by a deed of trust, that certain property in his possession is not to be considered assets, he must specially plead the deed, and cannot give it in evidence under a plea of "fully administered," in which it is not mentioned.

Taylor's administratrix v. Richards & Co. 8

2. The trustee, in a deed of trust conveying property to be sold for payment of a debt, is equally the agent of the debtor and creditor, and a competent witness, in an action of ejectment against the debtor, in behalf of a purchaser from himself, (to whom he has made a deed with warranty against himself and his heirs only,) to prove that the sale of the property was advertised according to the terms of the deed of trust.

Ross v. Norvell. 170

3. See *Conveyance, No. 2.*

Geddy & Knox v. Butler and wife. 345

4. See *Contingent Remainder, and*

Coleman and wife v. Holladay. 510

5. See *Fraud, No. 10, 11, and*

Wright v. Hencock & Co., pl. 1, 2. 521

6. See *Entry (Right of) and*

Birthright, lessee of Hall, v. Hall, pl. 2. 596

7. See *Marriage Settlement, Nos. 2, 3, 4, and*

Baird v. Bland and others, pl. 1, 2. 570

8. See *Trust (Deed of) No. 5, and*

Wilson & Trent v. Butler and others, pl. 2. 569

DEFENDANT.

1. Where the defendant to a suit has not pleaded, but his appearance bail has, a judgment stating, that the attorney for the defendant withdraws his plea, &c., and therefore, that the plaintiff recover against the defendant, must be understood as a judgment against the bail only, without including the principal; and is therefore erroneous.

Lee's adm'r v. Carter and Forbes. 121

2. A court of equity, having dissolved an injunction against the assignee of a bond, because the payments for which credits are claimed by the complainant, were made to the obligee after notice of the assignment, ought further to decree that the

obligee (being a defendant to the bill) do repay the sums so received by him, so soon as the complainant shall have paid the amount of the judgment to the assignee.

Roberts v. Jordans, pl. 3.

488

DEFICIENCY.

See Purchaser, No. 13.

Foreman v. Newkirk and others,

275

DEMAND AND REFUSAL.

1. It is not necessary, in the declaration in detinue, to state a special demand and refusal; but the general charge, that the defendant, "although often requested, &c." is sufficient.

Mordimer v. Brumfield,

122

DEPOSITIONS.

1. If two actions be pending between the same parties, and in the same court, *quære*, whether a deposition, taken by virtue of a notice, in which the particular action is not distinctly specified, can be read as evidence in either action?

Chaney v. Saunders,

51

2. If the time appointed for taking a deposition be between the hours of twelve and one, *quære*, whether it can be read upon a certificate stating, merely, "that it is taken after twelve o'clock?"

Ib.

DESCRIPTION.

1. If persons to be arrested be described in the warrant, by their surnames, the counties they reside in, and their professions or trades, without mentioning their christian names; *quære*, if such warrant be not too general and uncertain, and therefore illegal and void?

Wells v. Jackson, pl. 3.

458

2. A warrant directing the "associates" of persons named, to be arrested, without mentioning the names of such associates, is illegal and void as to them. pl. 4.

Ib.

DETINUE.

1. It is not necessary, in the declaration in detinue, to state a special demand and refusal; but the general charge, that the defendant, "although often requested, &c." is sufficient.

Mortimer v. Brumfield,

123

DEVASTAVIT.

1. A decree against an executor or administrator, for a balance due on his administration account, ought not to be, "that he pay the same out of the estate in his hands to be administered;" but, "as his own proper debt."

Sheppard's executor v. Starke and wife, pl. 6.

20

2. See Administration Bond, and Meade and others v. Brooking,

548

*3. See Executors and Administrators, No. 48, and Hainston v. Hughes and others,

568

DEVISE.

See Wills.

1. See Disseisin, and

Davis and wife v. Martin,

285

DEVISEES.

1. If a testator devise, to two of his sons, certain lands, rated at a certain sum, allowing them to pay his other children equal shares of that sum, by instalments; such devisees, and those claiming under them, are personally responsible (in proportion to their respective estates) for the payment of such instalments, with lawful interest from the times when payable; and (in aid of such responsibility) the lands so devised are liable.

Shobe's executors v. Carr and wife,

10

2. The portion of a pretermitted posthumous child is not to be raised by a division of the estate into equal parts, but by a proportionable contribution by the devisees and legatees, and those claiming under them.

Armistead and others v. Dangerfield and

20

3. Purchasers from the devisees and legatees are not exempted from contributing to make up the portion of such posthumous child, by their having purchased without notice of such claim. *Ibid*, pl. 6.

Ib.

4. Lands devised (without any specific charge by will or deed) ought not to be charged in equity to satisfy a bond debt of the devisor, until the personal estate is exhausted, including a remainder in slaves, expectant upon an estate for the life of the testator's widow.

Foster and wife v. Crenshaw's executors,

514

5. A judgment at law being obtained against one of two obligors in a joint and several bond, and no proceedings to enforce it appearing, a court of equity ought not to charge the lands of the other obligor in possession of his devisees, without having made the obligor against whom the judgment was rendered, or his representatives, parties to the suit. *Ibid*, pl. 2.

6. When lands held by several devisees in the same will are charged in equity to satisfy a bond debt of the devisor, the decree should be against the lands of all the devisees, (or the money received, or claimed, in lieu thereof,) in rateable proportions; and not against the land of one only, with liberty to that one to sue the others for contribution. *Ibid*, pl. 3.

DISCOVERY.

1. See Forthcoming Bond, and

Lusk v. Ramsay, pl. 3, 4.

417

2. A person entitled to a legal estate in slaves may sue in equity to recover them, if thereby a multiplicity of suits may be prevented; calling on the defendant to discover how long he has had them in possession, and to discover and state an account of their profits.

Baird v. Bland and others, pl. 3,

570

DISMISSION.

1. It is not competent to a complainant to dismiss his own bill, and then object, in an appellate court, that the prayer thereof has not been decreed in his favour.

Pitts, executor of Rowzee, v. Tidwell,

88

2. Where an injunction is wholly dissolved in a county or corporation court, the bill is not to stand dismissed, until two succeeding courts have been held thereafter in such county or corporation; and the appellate court will not presume, from length of time, that two such courts were held; but this circumstance must explicitly appear in the transcript of the record.

Ib.

3. *Quære*. If it do explicitly appear, that two such courts were held; and it do not appear that, at or before the second court, any cause was shown against the dismission of the bill; can the clerk's neglecting to enter the dismission have the effect of keeping the cause on the docket?

Ib.

4. See Appeal, No. 16, and

Wells v. Jackson, pl. 1,

458

DISSEISIN.

1. A testator, who died before the first of January, 1787, (when the act of 1785, ch. 61, took effect,) could not devise a tract of land of which he was actually disseised, when he made his will, and at the time of his death.

Davis and wife v. Martin,

285

2. If A. be tenant of the freehold, and B. tortuously enter upon, and turn the subtenant of A. out of possession, claiming the land as his absolute property; and he, or those holding under him, continue to hold the same, by actual adverse possession, until the death of A.; this is an actual disseisin of A., so that, (in such a case, before the 1st of Jan. 1787,) he could not, for the purpose of being enabled to devise the land, elect to consider himself as not disseised.

Ib.

DISTRESS.

1. See Replevy-Bond, and

Williams v. Howard,

277

2. It seems, that, on a lease of a tract of land, with sundry slaves and other personal property, reserving, by way of rent, a gross sum payable annually, the remedy by distress may be resorted to, without any express stipulation.

Williams v. Howard,

277

3. Rent may be payable in advance by contract; and such rent may be distrained for, if not paid when due.

Ib.

624

*DISTRIBUTEES.

1. See Legatees, No. 3.

Sheppard's executor v. Starke and wife, pl. 3,

26

Branch's adm'r v. Booker's adm'r,

43

DISTRIBUTIONS.

1. The court cannot decree a distribution in favour of persons not parties to the cause.

Sheppard's executor v. Starke and wife,

29

2. An executor ought not to be compelled to make distribution of a residuum, until bond and security be given by the distributees, as required by the act of assembly in the case of an administrator.

Ib.

3. See Dower, No. 2, and

Ball's devisees v. Ball's executors and widow,

279

DIVISION.

1. The portion of a pretermitted posthumous child

is not to be raised by a division of the estate into equal parts, but by a proportionable contribution by the devisees and legatees, and those claiming under them.

Armistead and others v. Dangerfield and wife. 20
2. In a division of slaves among legatees, if those allotted to some of them be valued at more, and to others at less, than their respective shares; and the commissioners making the division direct, that each person whose allotment is too large shall pay a surplus, without designating to whom; it seems, that such payments are to be made to the executor, and by him to the other legatees, so as to make the division equal; and he is accountable, if he deliver the slaves allotted to any legatee, without receiving the surplus payable from him or her.

Sheppard's executor v. Starke and wife. 20
3. Where a division of a testator's estate in pursuance of his will is not to be made at one and the same time, but at the several periods when any one or more of his children shall separate from the family, it is not necessary that all the legatees be made parties to each suit in chancery for a division, but only those entitled to participate in the division then in question.

Branch's adm'r v. Booker's adm'r. 43
4. Quære, if a testator direct that each of his children, upon separating from the family, shall have a child's share of the personal property, is it to be such part as he or she would have been entitled to in case of the father's intestacy? or is the whole to be divided among the children, excluding the widow? or among the children and the widow, in such manner as to give her a child's part? Ib.

5. In such case, the marriage of a daughter (with the widow's consent, if such consent be requisite under the will) is, itself, such a separation from the family as entitles her husband to demand her share of the estate; and this, although she continue, until her death, to reside with the widow, and no demand be made, of an allotment of her share, during her lifetime. He is, also, entitled to the profits received upon such share from the day of the marriage, or a reasonable time thereafter, with interest thereupon; and is, in like manner, chargeable with his proportion of the expense of maintaining such slaves as produce no profit. Ib.

DOWER.

1. A marriage settlement of land and slaves, for the wife's jointure, "in full satisfaction of her dower, or thirds, in any lands, tenements, and hereditaments, whereof the husband should at any time during his life be seized of any estate of inheritance," was not a bar to her right of dower in the slaves; though made before the act of 1793 declaring slaves to be personal estate.

Ball's devisees v. Ball's executors and widow. 379
2. A suit in chancery being brought by legatees against the executors and widow of the testator, for a settlement of the administration account, and distribution of the personal estate among the plaintiffs; if it appear that the widow has not fully received her share, the court should not dismiss the bill as to her, but decree in her favour the sum to which she appears entitled. Ib.

EJECTMENT.

1. After issue joined, in ejectment, on the title only, and a verdict for the plaintiff for the land in one of the counts in the declaration mentioned, it is no ground for arrest of judgment, that the two counts laid demises of the same land from different persons.

Throckmorton v. Cooper's lessee. 98
2. Quære, would a demurrer to the declaration in this case have been sustained? Ib.

3. An appeal from a judgment in ejectment does not abate by the death of the lessor of the plaintiff; notwithstanding such lessor claimed the land for life only.

Medley v. Medley. 191
4. See Conveyance. No. 2.
Geddy & Knox v. Butler and wife, pl. 2. 345

ELECTION.

1. If A. be tenant of the freehold, and B. tortuously enter upon and turn the subtenant of A. out of possession, claiming the land as his absolute property; and he, or those claiming under him, continue *to hold the same, by actual adverse possession, until the death of A.; this is an actual disseisin of A. so that, (in such a case before the 1st of Jan. 1787,) he could not, for the purpose of being enabled to devise the land, elect to consider himself as not disseised.

Davis and wife v. Martin. 285

ENQUIRY, (WRIT OF.)

1. A confession of judgment, for no certain sum,

is an action sounding in damages, is not sufficient to authorize the court to assess the damages, and enter judgment for a certain sum: but a writ of enquiry should be executed.

Dunbar v. Lindenbergers.

169

ENTRY, (RIGHT OF.)

1. A deed of bargain and sale from a person who (having the right to enter) has formally and peaceably entered, on the land thereby conveyed, is good to pass his title; notwithstanding another person was in actual and adverse possession of the same land at the time of such entry and conveyance.

Birthright, lessee of Hall, v. Hall, pl. 2.

536

EQUITY.

See Marriage Contract.

1. A decree, which is final in all respects, except that "liberty is reserved to the parties, or either of them, to resort to the court for its further interposition, if it should be found necessary," may be amended, on motion, in a summary way, or by bill of review.

Sheppard's ex'r v. Starke and wife.

29

2. It it appear, on the face of the record, that proper parties to the suit are wanting, the decree will be reversed, unless the objection was expressly relinquished in the court below.

Ib.
3. All the residuary legatees or distributees, together with the executors or administrators of such as have died since the testator or intestate, ought to be parties to a suit for division of a residuum.

Ib.

But see post.

43

4. The court cannot decree a distribution, in favour of persons not parties to the cause.

Ib.

5. Under the prayer for general relief, the plaintiff in equity cannot recover a claim distinct from that demanded or put in issue by the bill.

29

6. A decree, against an executor or administrator, for a balance due on his administration account, ought not to be "that he pay the same out of the estate in his hands to be administered;" but as his own proper debt.

Ib.

7. Where a division of a testator's estate in pursuance of his will is not to be made at one and the same time, but at these several periods when any one or more of his children shall separate from the family, it is not necessary that all the legatees be made parties to each suit in chancery for a division; but only those entitled to participate in the division then in question.

Branch's adm'r v. Booker's adm'r.

43

8. If, by an agreement under seal, between the vendor and purchaser of a tract of land, it be covenanted, that, if any part thereof should be recovered by law from the purchaser, the vendor will abate, or refund, in proportion; and that he will not bring suit upon the bond for the purchase money, until the quantity of land which the purchaser is to get be ascertained; provided the purchaser prosecute a suit for that purpose in reasonable time;—a court of equity will give relief by injunction against a premature suit on the bond; and if it appear that the purchaser prosecuted his suit in reasonable time, and could not recover the land, the court will decree that the injunction be perpetual; that whatever money has been paid be refunded; that the bond be surrendered and cancelled, and the contract rescinded.

Bullitt's ex'rs v. Songster's adm'rs.

54

9. In such case, if the purchaser assigned to the vendor a bond of a third person, in part payment, the court will decree that such bond be returned, or (if he fail to return it) that the vendor pay the purchaser the amount thereof, with interest; no equity in favour of the vendor appearing to exempt him from such responsibility.

Ib.

10. The executor or administrator, and not the heir, of the purchaser, is entitled to relief, in case the suit on the bond be against the executor or administrator.

Ib.

11. Where a mortgagor is admitted to redeem, upon his bill filed for that purpose, the decree ought not to be, in general terms, that upon his paying the money with interest, the mortgagee shall convey to him the mortgaged premises; but, that such conveyance be made, if he, within a limited time, do make such payment; and if not, that he be foreclosed of all equity of redemption; and that the mortgaged premises be sold.

Turner v. Turner.

66

12. A mortgagor's bill, for an account of profits and a conveyance of the mortgaged premises, if he be still indebted on the mortgage, his equity of redemption should be allowed him; but the costs of suit should be decreed against him.

Ib.

13. A purchaser of land, warranted by the vendor to be free of all incumbrances, is not precluded from relief in equity, against his bond for the pur-

chase money, by the circumstance that, before he made the purchase, he was fully apprized of the incumbrance.

Stockton v. Cook, 68
14. The assignee of the bond is not in a better situation than the assignor.

15. It seems, that a person who claims title to a slave taken in execution may get relief 636
in equity, by an injunction to prevent the sale, notwithstanding his remedy at law.

Randolph v. Randolph and others, 99
16. The court of a county having caused a court-house and a jail to be erected, in or about the year 1764, and courts having been continually held in such court-house until the year 1801, it ought, in a court of equity, to be presumed, that the title to two acres of the land built upon and adjacent, were duly vested in the court and their successors; although no deed from the original proprietor can be produced.

Boykin's devisees v. Smith and others, 103
17. Quære. Ought not such presumption to take place at law, as well as in equity.

18. It seems, that, in such case, a decision, in ejectment, against a person claiming by assignment from the county court, is no bar to his recovering the land in a court of equity.

19. After an injunction has been wholly dissolved, if the cause be set for hearing on motion of the defendant in equity, he cannot take advantage of the circumstance that the bill should have been dismissed under the act of assembly.

Franklin v. Wilkinson, 112
20. Under what circumstances a right to relief in equity may be lost by acts of confirmation and compromise.

Mason v. Williams, 126
21. A confession of judgment and release of equity will be supported, though made by a man of weak understanding, in the habit of making improvident bargains, addicted to intoxication, and embarrassed in his circumstances; and though such confession was induced by the plaintiff's giving him time to pay the money, if no other influence was exerted, and no fraud was committed, in obtaining such confession, the same being deliberately and voluntarily made by the defendant, or by virtue of a power of attorney deliberately and voluntarily executed by him.

22. A continuance ought not to be granted at law, on the ground that the party, a few days before that appointed for the trial, filed a bill in equity for a discovery of usury, as auxiliary to his defence at law; unless he make affidavit that the usury therein charged had recently come to his knowledge.

Ross v. Norvell, 170
23. Where an executor has a claim against the estate of his testator, depending on a quantum meruit only, he may exhibit a bill in equity, against the co-executors and legatees, to have such claim established and fixed at a certain sum.

Baker v. Baker and others, 222
24. In such case, he ought to state the claim with reasonable certainty, by setting forth his own estimate of his services, but should he fail to do so, his bill ought not to be dismissed, but leave to amend it should be granted on motion.

25. If an agent employed to sell a tract of land become himself the purchaser, by bargaining with his employer, from whom he conceals the fact that a better price could be got from another person, he is guilty of fraud, and the contract ought to be vacated.

Moseley's adm'r and heirs v. Buck & Brander, 232
26. In such case, the court of equity will compel him to re-convey the land, on receiving back his purchase money with interest, and make him account for the rents and profits.

27. See Purchaser, No. 13.

Foreman v. Newkirk and others, 276

28. See Chancery, No. 18.

Ball's devisees v. Ball's ex'ors and widow, 279

29. See Perishable goods, No. 1.

McCall v. Peachy's adm'r, 288

30. See Vouchers, Nos. 1, 2, 3, and

McCall v. Peachy's adm'r, pl. 12, 13, 14, Ib.

31. See Title, No. 1.

Beverly v. Lawson's heirs, 317

32. See Account, No. 13, 14, and

Freeland, &c. v. Cock's representatives, pl. 1, 2, 352

33. If the owner of a tract of land, on a navigable river, was authorized by law to establish a town upon it, and dispose of the lots by way of lottery; and, in the scheme of such lottery as advertised, adventurers therein were assured that the lots should be laid off in a town "convenient to the river, with public landings;" parol testimony is admissible, in aid of the inference deducible from such printed proposals, to establish an equitable

title in the inhabitants of the town, as tenants in common, to a piece of ground between the river and the lots actually laid off for the town.

Mayo v. Murchie, pl. 1, 368

34. Where a plaintiff in equity, having the equitable title to land, sues for the legal title, the person holding such legal title is a sufficient defendant, without making the person of whom he purchased a party to the suit. Ibid, pl. 2, Ib.

35. Although consent of parties cannot give a court of equity jurisdiction, or supply the total absence of other necessary parties, yet such consent may dispense with the strictness of form, and enable the court to decide a cause in relation to parties, who are in fact, though possibly irregularly, before it. Ibid, pl. 3, Ib.

36. Under what circumstances, a single surviving trustee of a town is competent to be the plaintiff in a bill in equity, for the purpose of asserting the right of the inhabitants generally to land laid off and annexed to such town as a common. Ibid, pl. 4, Ib.

37. If the sheriff, after taking a forthcoming bond, accept the same goods from the defendant, in discharge of his body from another execution, and prevent the surety in such bond from delivering them on the day of sale therein appointed; a court of equity, on a bill for discovery and injunction exhibited by the surety, will require the sheriff and all parties concerned to answer a charge of fraud and combination, and (whether fraud be established or not) *will perpetually enjoin a judgment, rendered against the surety upon the forthcoming bond, as unconscionable against him; leaving the plaintiff in that judgment to his remedy against the sheriff; and the sheriff to his remedy against the person who indemnified him, or to whom, by mistake, or in his own wrong, he paid the money in satisfaction of the second execution.

Lusk v. Ramsay, pl. 3, 417

38. The plaintiff in the second execution, to satisfy which the sheriff improperly sells the goods, need not be a party to such suit in chancery; because the surety in the bond wants no decree against him. Ibid, pl. 4, Ib.

39. A court of equity will not compel a security in a bond to contribute to the relief of his co-security who has been forced to pay the debt; unless it appear that due diligence was used, without effect, to obtain reimbursement from the principal obligor, or that he was insolvent.

McCormack's adm'r v. O'Bannon's ex'or, &c., 484

40. The pendency of the bill in equity, in a county court, after dissolution of an injunction, is no bar to the complainant's obtaining another injunction from the superior court of chancery.

Roberts v. Jordans, pl. 1, 488

41. See Account, No. 15. Ibid, pl. 2, Ib.

42. See Assignment, No. 4. Ibid, pl. 3.

43. See Devisees, No. 4.

Foster and wife v. Crenshaw's ex'ors, 514

44. Although a person, whose property is taken in execution to satisfy the debt of another, may proceed to recover that property, or damages for the taking and detaining thereof, in a court of law; and although the sheriff, having doubts as to the title to the property, may demand from the creditor an indemnifying bond; yet neither of these remedies is in exclusion of a bill of injunction to prevent the sale.

Wilson & Trent v. Butler and others, pl. 1, 569

45. See Administration Bond, No. 2.

Hairston v. Hughes and others, 568

46. See Children, Nos. 1, 2.

Baird v. Bland and others, pl. 1, 2, 570

47. A person entitled to a legal estate in slaves may sue in equity to recover them, if thereby a multiplicity of suits may be prevented; calling on the defendant to discover how long he has had them in possession, and to discover and state an account of their profits. Ibid, pl. 3, Ib.

ERROR.

1. See Evidence, No. 3.

Chaney v. Saunders, 61

2. An appellate court ought not to reverse a judgment, without proceeding to give such judgment as the inferior court should have given.

Darby v. Henderson, 115

3. See Appeal, No. 9.

Ross v. Norvell, 170

4. See Abatement, No. 2.

Newman v. Graham, 187

5. See Partnership, No. 1.

Garland v. Davidson, 189

6. The court of chancery cannot correct on motion or by bill of review, any error, apparent on the face of the proceedings, in a decree which has been affirmed by the court of appeals.

Campbell v. Price and others, 227

7. If a jury be impanelled "to try the issue joined," when, in reality, no issue is joined, the judgment must be reversed, and the verdict set aside, notwithstanding it was against the party who failed to meet, by a negative on his side, the affirmative matter pleaded on the other side.

Wilkinson's adm'r's v. Bennett. 314

8. It seems, that a party, to whom a new trial is granted may, at the next term, without claiming such trial, file errors in arrest of judgment.

Hall v. Smith, Young & Hyde, pl. 1. 550

9. See Arrest of Judgment, No. 2, and *Ibid.*, pl. 2. *Ib.*

10. See Recital, and *Sexton v. Holmes*, 566

EVICTION.

1. A person assessing a lease, for value received, but without any special agreement to be responsible for the title is not bound to restore the purchase money, upon the eviction of the assignee in consequence of a defect in the lessor's title; especially where the lessor has not been resorted to, or shown to be insolvent, and where the possibility of the eviction was in contemplation of both the parties at the time of the assignment.

M'Clenahan v. Gwynn, pl. 1. 556

2. Where a lease is assigned, and the assignee is evicted through a defect in the lessor's title, he may sue the lessor for compensation. *Ibid.*, pl. 2. *Ib.*

EVIDENCE.

1. If an executor or administrator wish to prove, by a deed of trust, that certain property in his possession is not to be considered assets, he must specially plead the deed, and cannot give it in evidence under a plea of "fully administered," in which it is not mentioned.

Taylor's adm'r v. Richards & Co., 8

2. See Gift, No. 1.

3. Where the evidence spread on the record is contradictory, and the point in dispute depends on the credibility of witnesses, the appellate court (not having the witnesses personally before it) ought not to reverse the judgment of that court which had lights, (from the manner of giving in the testimony, and other extraneous circumstances,) which the superior court, in its "appellate character, does not possess.

Chaney v. Saunders, 51

4. If two actions be pending between the same parties, and in the same court; quære, whether a deposition, by virtue of a notice in which the particular action is not distinctly specified, can be read as evidence in either action? *Ib.*

5. If the time appointed for taking a deposition be between the hours of twelve and one; quære, whether it can be read upon a certificate stating, merely, that it is taken after twelve o'clock? *Ib.*

6. An appraisement of a decedent's estate, though not signed by the executor or administrator, and therefore not to be received as an inventory, is admissible as prima facie evidence of the value of the estate.

Roger's adm'r v. Chandler's adm'r, 65

7. In an action on the case against a sheriff for failing to levy an execution, if the return on the execution was that there were no effects with which the debt could be satisfied, the burthen is thrown on the plaintiff of proving the falsehood of such return; and the court, if requested in a proper manner, ought so to instruct the jury. But if the defendant request the court to instruct the jury that it is incumbent on the plaintiff to prove the falsehood of the return mentioned in the declaration, and no return be distinctly stated therein, the court ought to decline giving any instruction in pursuance of such request.

Davis v. Johnson & Co., 81

8. A writing, beginning, "Know all men, &c. that I, H. R. of the county, &c., am held and firmly bound, &c.," and running throughout in the name of H. R. alone, is not to be received as evidence in support of a declaration against H. R. & H. B., charging that they both acknowledged themselves to be indebted, &c.; notwithstanding the name of H. B. was signed under that of H. R., and issue was not joined on the plea of non est factum or nil debet, but of payment by H. B.

Bell v. Allen's adm'r, 118

9. Quære, whether proof of any confession by the assignor of a bond, after the assignment, that the money had been paid to him before the assignment, can be given in evidence against the assignee? *Ib.*

Lewis v. Long, 136

10. In an action of covenant, the declaration describing the covenant as sealed by the defendant, without mentioning any other person; and the plea being "covenants performed;" though without praying oyer: a joint and several covenant sealed

by the defendant, and others, but in other respects answering to the description in the declaration, is admissible as evidence to the jury.

Hollingsworths v. Dunbar, 168

11. The trustee, in a deed of trust conveying property to be sold for payment of a debt, is equally the agent of the debtor and creditor, and a competent witness, in an action of ejectment against the debtor, in behalf of a purchaser from himself, (to whom he has made a deed with warranty against himself and his heirs only,) to prove that the sale of the property was advertised according to the terms of the deed of trust.

Ross v. Norvell, 170

12. Although the acknowledgment of a debt by one or more of the partners of a mercantile firm, after the dissolution thereof, is competent to do away the bar of the act of limitations in an action brought against the firm, the existence of the debt being first proved by other testimony, or admitted by the pleadings, yet such acknowledgment is not proper evidence of the existence of the debt, so as to charge the other partners.

Shelton v. Cocke, Crawford & Co., 191

13. See Carrier, No. 2.

Murphy, Brown & Co. v. Staton, 230

14. See Vouchers, Nos. 1, 2, 3

M'Call v. Peachy's adm'r, 288

15. An executor's refusal to qualify may be found on proof of declarations in pays, or presumed from circumstances, without any renunciation of record.

Geddy & Knox v. Butler and wife, pl. 2. 345

16. See Equity, No. 82, and

Mayo v. Murchie, pl. 1. 358

17. A warrant, though illegal and void as a justification, may be given in evidence, in mitigation of damages. See Warrant, No. 1, and

Wells v. Jackson, pl. 2. 456

18. If a single woman, having been delivered of a bastard child, on her oath charge a certain man with being its father, and aver that there is no possibility of her being mistaken: it is competent for the person accused to invalidate her testimony by proving that, about nine months before its birth, she was guilty of criminal intercourse with other men. But, if the defendant admit that he, also, had criminal intercourse with her about the same time, such proof may be rejected, and he may be confined to proof of the general character of the mother.

Fall v. the overseers of the poor of Augusta county, pl. 2. 495

19. A copy of a bill of exchange and notarial protest, with an affidavit of the payee that the original is lost or mislaid, is not legal evidence to charge the drawer.

Wright v. Hencock & Co., pl. 2. 521

EXCEPTIONS, (BILL OF.)

See Bill of Exceptions.

EXECUTION.

1. In an action on the case against a sheriff for failing to levy an execution, if the return on the execution was that there were no effects with which the debt could be satisfied, the burthen is thrown on the plaintiff of proving the falsehood of such return; and the court, if requested in a proper manner, ought so to instruct the jury. But if the defendant request the court to instruct the jury that it is incumbent on the plaintiff to prove the falsehood of the return mentioned in the declaration, and no return be distinctly stated therein, the court ought to decline giving any instruction in pursuance of such request.

Davis v. Johnson & Co., 81

2. The sheriff's failing to mention, in his return of an execution, one of the negroes on whom it was levied, is no ground for reversing a judgment on a forfeited forthcoming bond, in which that negro is mentioned as one of those on whom such execution was levied.

Dix v. Evans, 308

3. It seems, that, where a capias ad satisfaciendum is executed at any time before the return-day thereof, the sheriff may receive property tendered by the debtor in discharge of his body out of custody, and appoint a day of sale posterior to the return-day; and that a bond for the forthcoming of such property is good in law, though dated after the return-day. *Ib.*

4. A debtor, being surrendered to the sheriff by his special bail, (after judgment against him in a county court,) cannot legally be detained, in jail, or within the prison bounds, on a bond given for that purpose, more than twenty days from the time of such surrender, if the creditor, his attorney, or agent, do not within that time, charge him in execution in writing.

Green v. Garrett, 330

5. The lien, by virtue of a writ of fieri facias upon the property of the debtor, is not released by his giving a forthcoming bond, but continues until such bond is forfeited.

Lusk v. Ramsay, pl. 1. 417

6. The surety in a forthcoming bond has a right to deliver the property on the day of sale, if he can, on that day, peaceably obtain possession thereof. *Ibid.*, pl. 2. 417

7. See Equity, Nos. 36, 37, and *Ibid.*, pl. 3, 4. 417

8. See Nulla Bona, No. 1. 418

Meade and others v. Brooking, 548

9. See Nulla Bona, No. 2. 568

Hairston v. Hughes and others, 568

EXECUTIVE.

1. See Sheriff, No. 4. 493

Bowers and others v. Millar, 493

EXECUTORS AND ADMINISTRATORS.

1. An absolute bill of sale of slaves by an executor, who is nevertheless permitted to retain the possession thereof, is fraudulent and void, as to legatees, as well as creditors and purchasers.

Robertson v. Ewell, 1

2. Quære, whether a sale by an executor of slaves belonging to the estate of his testator, for the purpose of paying a private debt of his own to the purchaser, be void as to residuary legatees upon its appearing that the personal assets were sufficient (exclusive of slaves) for paying the debts and expenses, and that the purchaser knew in what right the executor held the property, though he might not have known the state of the assets? *Ib.*

3. If an executor or administrator wish to prove, by a deed of trust, that certain property in his possession is not to be considered assets, he must specially plead the deed, and cannot give it in evidence under a plea of "fully administered," in which it is not mentioned.

Taylor's administratrix v. Richards & Co., 8

4. All the residuary legatees or distributees, together with the executors or administrators of such as have died since the testator or intestate, ought to be parties to a suit for division of a residuum.

Sheppard's executor v. Starke and wife, pl. 3. 30

5. A decree against an executor or administrator, for a balance due on his administration account, ought not to be, that he pay the same out of the estate in "his hands to be administered;" but as his own proper debt.

Sheppard's executors v. Starke and wife, 30

6. In this case, a commission of five per cent. on the moneys received by the executor, was allowed him in lieu of all expenses; such commission to be deducted from the balance due the estate at the end of each year. *Ib.*

7. When interest is charged, against an executor or administrator, (in settling his administration account,) on balances due at the end of each year, it ought not to be carried to the account of the succeeding years, so as to convert it into principal, and make it bear interest; nor to be deducted from the payments made in such succeeding years. *Ib.*

8. An executor ought not to be compelled to make distribution of a residuum, until bond and security be given, by the distributees, as required by the act of assembly in the case of an administrator. *Ib.*

9. In a division of slaves among legatees, if those allotted to some of them be valued at more, and to others at less, than their respective shares; and the commissioners making the division direct, that each person whose allotment is too large shall pay a surplus, without designating to whom; it seems, that such payments are to be made to the executor, and by him to the other legatees, so as to make the division equal; and he is accountable, if he deliver the slaves allotted to any legatee, without receiving the surplus payable from him or her. *Ib.*

10. See Wills, Nos. 24, 25.

Branch's adm'r v. Booker's adm'r, 43

11. The executor or administrator, and not the heir of the purchaser, is entitled to relief, in case the suit on the bond be against the executor or administrator.

Bullitt's ex'ors v. Songster's adm'rs, 54

12. See Legacy, No. 3.

Patton, adm'r of Page, v. Williams and wife, 50

13. See Wills, No. 7. 417

14. Upon issue joined on the plea of "fully administered," a verdict finding in general terms the issue for the plaintiff, and that assets equal to the claim of the plaintiff came to the hands of the defendant, is uncertain and insufficient. It should set forth, with sufficient certainty, what portion of the assets, which came to the defendant's hands,

was unadministered at the time of suing out plaintiff's writ.

Rogers's adm'r v. Chandler's adm'r, 65

15. See Appraisalment, No. 1. 16.

16. See Chancery, No. 2. 79

Purcell v. Maddox, 79

17. See Decree, No. 7. 88

Legrand v. Francisco, 88

18. An executor is not to be charged with the debts due to the estate of his testator, at the time when they became due, but only at the time when he actually received them; except such debts as are lost by his negligence or improper conduct.

Cavendish v. Fleming, 198

19. An executor's account, rendered on oath, is *prima facie* evidence of the sums received by him for the estate of his testator, and of the times when received. *Ib.*

20. An executor, except as to debts lost by his negligence or improper conduct, is chargeable with interest, only on his actual receipts; and, generally, where interest is charged, the rule established in the case of Granbery v. Granbery (1 Wash. 249,) ought to be observed. *Ib.*

21. An executor is not chargeable with interest on a legacy payable to an infant before a guardian has been appointed, and he has received notice of such appointment. *Ib.*

22. Under what circumstances, an executor is not to be charged with the loss of a debt, contracted with him on behalf of the estate of his testator, or for a loss incurred by his entrusting an agent with bonds for collection. *Ib.*

23. An executor may reasonably be allowed a commission of ten per centum on moneys received by him, where the debts were very small and numerous, and the debtors presumed to have been much dispersed. *Ib.*

24. Where an executor has a claim against the estate of his testator, depending on a quantum meruit only, he may exhibit a bill in equity against his co-executors and legatees, to have such claim established, and fixed at a certain sum.

Baker v. Baker and others, 222

25. In such case, he ought to state the claim with reasonable certainty, by setting forth his own estimate of his services; but, should he fail to do so, his bill ought not to be dismissed, but leave to amend it should be granted on motion. *Ib.*

26. If the defendant in an action of covenant die, after judgment by default against him and the bail for his appearance, and before a writ of inquiry executed, the plaintiff cannot have a *scire facias* against the bail, but only against the executors and administrators of the defendant.

Saunders v. Gains, 225

27. In determining which of the goods and chattels of a testator or intestate shall be sold, "as liable to perish, consume, or be the worse for using or keeping," some latitude of discretion must be allowed to the executor or administrator; and his conduct, appearing to be fair and, probably proceeding from a good intention, ought to be sanctioned by a court of equity.

M'Call v. Peachy's adm'r, 268

28. An administrator with the will annexed has, in general, the same powers which, under the will, the executors would have had, if they had qualified. *Ib.*

29. Where a testator directs the moneys arising from certain sources (among which are the rents of his lands) to be placed out at interest, his executor is impliedly authorized to make leases of such lands, not already occupied by tenants, as are not necessary to be reserved for cultivation by the testator's own slaves. *Ib.*

30. A testator, by directing certain moneys to be placed out at interest, "upon good and sufficient securities, in Virginia or Maryland, as his executors should think proper," authorized them to invest the same in loan-office certificates, or other public securities. *Ib.*

31. If an executor be authorized by the will to put certain moneys out at interest, his changing the bonds, shifting the debts, or applying moneys to his own use, or that of his friends, without any fraudulent design, is no reason for charging him, to the amount in specie, for so much paper money received. *Ib.*

32. In such case, it being important that the moneys should be kept at interest, which could, perhaps, be better effected by changing the bonds than by receiving the money from one man, and seeking for another to whom to lend it; the executor should not be liable in case of insolvencies, unless the change was made injudiciously, or from fraudulent motives; and, as to any moneys actually converted by him to his own use, or lent to his friends without security, he should be chargeable with the value thereof, at the times, respectively, when it was so converted or lent; provided, that,

In all such cases of loans, without security, if the borrower, and also the executor himself, (who, in that case, stands in the place of a security,) were sufficiently adequate and responsible, at the time, for the sums so lent as aforesaid, (of which competency the subsequent repayment of the money should be deemed conclusive evidence,) the foregoing rule ought not to apply; but, in such cases they should be considered as on a common footing with other borrowers, and the account be taken accordingly. Ib.

63. In all cases, in which an executor or administrator has debited himself with, or assumed the debts of, others to the estate of his testator or intestate, the same ought to be considered as a payment by them to him, and carried to the account of paper money or specie, as the case may be; and if, in any case, such debts were not due at the time the same were debited, or assumed as aforesaid, the said executor or administrator should be charged only as at the time the same became payable. Ib.

64. An executor or administrator, omitting to insert in the inventory certain credits belonging to the estate of the testator or intestate, is not to be charged, on that account, with more than shall be proven to have been received by him, or lost by his negligence. Ib.

65. An executor or administrator may with propriety be credited for deductions made by him from accounts left by his testator or intestate for collection; if it appear that the charges in those accounts were unusually extravagant, and it be not proved that, in making such deductions, he acted fraudulently or disadvantageously for the estate. Ib.

66. In general, an executor or administrator should not be debited, or credited, with the value of paper money, at the times when received, or paid away by him, unless it be proved that he received it unnecessarily, or improperly delayed paying it away to those entitled to it. But the account of debits and credits should be stated in paper money and the balance scaled at the time of the last payment, which balance, turned into specie, should be carried to the subsequent account in specie. Ib.

67. An executor or administrator is not chargeable specifically with tobacco received by him, and not disbursed on account of his testator's estate; but only with the price actually received for such tobacco, where that can be ascertained; and, where not, with the then current value thereof. Ib.

68. Where an ex parte settlement of an administration account has taken place before commissioners appointed by the court, in which the executor or administrator qualified; if the legatees afterwards bring a suit in chancery for a new examination and settlement of such account, the vouchers in support thereof, if they be not ostensible, should be presumed to have existed, and the onus probandi thrown on the adverse party. Ib.

69. But it seems, the executor or administrator may be required to produce the vouchers, unless he shall declare on oath, or otherwise prove, that they were deposited with the clerk of such court, at or after examination of the account by the commissioners, and have not come to his possession since. Ib.

40. In such case, if the vouchers, or official copies of them be produced, the plaintiffs may, nevertheless, controvert the articles intended to be justified by them. Any article ought to be allowed on the oath of the defendant, if it be of such a nature, that the expenses probably must have been incurred, or that, perhaps, a voucher for it could not have been procured: for example, mourning for the widow, mid-wife's fees, services performed by a negro carpenter, and the like. Ib.

41. The executor ought not to be charged, at the suit of a general residuary legatee, with the wearing apparel of the testator, if the same be not proved to have been converted to his use, and a sale of it was not necessary for payment of debts or legacies. Ib.

42. An executor or administrator is chargeable with interest, in all cases where he has received it; and, also, where paper money, or specie, remained in his hands more than a reasonable time, (which, in this case, was said to be six months,) without being applied to the purposes of the estate. Ib.

43. In this case, under circumstances of extraordinary trouble attendant on the administration, the administrator was allowed a commission of ten per centum on all specie received by him, in full satisfaction for receiving, putting out, and paying away the same, as also for his trouble and services in the administration and management of the estate; such commission to be allowed only once, on receiving the same sum of money; and as to the paper money, a commission was allowed of five per centum on the value thereof when received, and the same on the value thereof when paid away, according to the legal scale of depreciation. Ib.

44. See *Wills*, No. 16, and

Geddy & Knox v. Butler and wife, pl. 1. 345

45. Under the stat. 31 Hen. VIII. ch. 4, a conveyance by part of the executors named in a will, (by which "the executors therein mentioned" are empowered to convey,) is justified where the others refuse to qualify. And such refusal may be found on proof of declarations in pays, or presumed from circumstances, without any renunciation of record. See *Verdict*, and

Geddy and Knox v. Butler and wife, pl. 2. 345

46. An administrator may declare in the debt and detinet on a bond executed to himself as such; and his executor or administrator has a right to bring an action upon it.

Bowden, ex'or of Moore, v. Taggart. 513

47. After a judgment against an executor or administrator, as such, a fieri facias and return of nulla bona, an action, against him alone, on his administration bond, could always be maintained, without any previous suit suggesting a devastavit. Meade and others v. Brooking. 548

48. Before the act of Feb. 7th, 1814, "concerning executors and administrators," (Sess. acts, 1813, ch. 18, p. 40,) a decree in chancery against an executor or administrator, directing him to pay a debt of his testator, or intestate, out of the assets in his hands to be administered, (with a fieri facias and return of nulla bona,) was not sufficient evidence of a devastavit to authorize an action against the securities in the administration bond; but it was necessary to bring a previous suit against the executor or administrator, suggesting the devastavit.

Hairston v. Hughes and others. 506

EXPATRIATION.

See *Columbia*, (District of,) and
Custis v. Lane, pl. 1. 579

683 *FEE SIMPLE.

See *Contingent Remainder*, and
Coleman and wife v. Holladay. 510

FERI FACIAS.

1. See *Execution*, No. 5.
Lusk v. Ramsay, pl. 1. 417

2. See *Nulla Bona*, No. 1.
Meade and others v. Brooking, pl. 1. 548

3. See *Nulla Bona*, No. 2.
Hairston v. Hughes and others. 506

FORTHCOMING BOND.

1. The sheriff's failing to mention, in his return of an execution, one of the negroes on whom it was levied, is no ground for reversing a judgment on a forthcoming bond, in which that negro is mentioned as one of those on whom such execution is levied.

Dix v. Evans. 308

2. It seems, that where a capias ad satisfaciendum is executed at any time before the return day thereof, the sheriff may receive property tendered by the debtor in discharge of his body out of custody, and appoint a day of sale posterior to the return day; and that a bond for the forthcoming of such property is good in law, though dated after such return day. Ib.

3. The lien, by virtue of a writ of fieri facias, upon the property of the debtor, is not released by his giving a forthcoming bond; but continues until such bond is forfeited.

Lusk v. Ramsay, pl. 1. 417

4. The surety in a forthcoming bond has a right to deliver the property on the day of sale if he can on that day peaceably obtain possession thereof.

Lusk v. Ramsay, pl. 2. 417

5. If the sheriff, after taking a forthcoming bond, accept the same goods from the defendant, in discharge of his body from another execution, and prevent the surety in such bond from delivering them on the day of sale therein appointed, a court of equity, on a bill for discovery and injunction, exhibited by the surety, will require the sheriff and all parties concerned to answer a charge of fraud and combination, and (whether fraud be established or not) will perpetually enjoin a judgment, rendered against the surety upon the forthcoming bond, as unconscionable against him; leaving the plaintiff in that judgment his remedy against the sheriff, and the sheriff his remedy against the person who indemnified him, or to whom, by mistake, or in his own wrong, he paid the money in satisfaction of the second execution. Ibid, pl. 3.

6. The plaintiff in the second execution, to satisfy which the sheriff improperly sells the goods, need

not be a party to such suit in chancery; because the surety in the bond wants no decree against him. *Ibid.*, pl. 4.

FRANCHISE.

See Freehold, No. 1, 2, and
Hutchinson v. Kellam, 302

FRAUD.

1. An absolute bill of sale of slaves, by an executor, who is nevertheless permitted to retain the possession thereof, is fraudulent and void, as to legatees, as well as creditors and purchasers.

Robertson v. Ewell, 1

2. It is not necessary, in a special verdict, that fraud be found expressly or nomine: if facts, amounting to fraud in legal construction be found. *Ib.*

3. A confession of judgment and release of equity will be supported, though made by a man of a weak understanding, in the habit of making improvident bargains, addicted to intoxication, and embarrassed in his circumstances; and though such confession was induced by the plaintiff's giving him time to pay the money, if no other influence was exerted, and no fraud was committed, in obtaining such confession; the same being deliberately and voluntarily made by the defendant, or by virtue of a power of attorney deliberately and voluntarily executed by him.

Mason v. Williams, 126

4. If an agent employed to sell a tract of land become himself the purchaser, by bargaining with his employer, from whom he conceals the fact that a better price could be got from another person, he is guilty of fraud, and the contract ought to be vacated.

Moseley's adm'r and heirs v. Buck & Brander, 332

5. In such case, the court of equity will compel him to re-convey the land, on receiving back his purchase money with interest, and make him account for the rents and profits. *Ib.*

6. If an executor be authorized by the will to put certain monies out at interest, his changing the bonds, shifting the debts, or applying monies to his own use, or that of his friends, without any fraudulent design, is no reason for charging him to the amount, in specie, for so much paper money received.

McCall v. Peachy's adm'r, 238

7. See Executors and Administrators, 35, and *Ibid.*

8. See Voluntary Agreement, and *Broadfoot v. Dyer*, 350

9. See Forthcoming Bond, Nos. 4, 5.
Lusk v. Ramsay, pl. 3, 4, 417

10. What circumstances of collusion and combination, between a debtor and one of his creditors, to injure and defraud the rest, are sufficient to prevent such creditor from being entitled, to any prior lien by virtue of a deed of trust executed for his benefit by the debtor.

Wright v. Hencock & Co., pl. 1, 521

11. The badges of fraud in this case were, that the deed was executed on the eve of the debtor's departure from the state, and shortly after the receipt of intelligence materially affecting his credit; that the value of the property conveyed by it was more than double the amount of the debt intended to be secured; that a bill of lading for part of the property was antedated by the grantee, for the purpose of overreaching another creditor, who had previously obtained a bill of lading for the same; that the grantee, on applying for an injunction, to prevent a sale at the instance of a third creditor, refused to accede to just and reasonable terms offered him by the court; and, finally, that he permitted the grantor to take, use, and sell the property, (contrary to the tenor of the deed,) or connived at his doing so. *Ibid.*, pl. 2, 521

12. A suit on a bond was brought against the debtor in a county in which he did not reside: he confessed judgment on the return of the writ and furnished the sheriff having the execution with a list of slaves and other property of his, to be advertised to be sold at his own house: the property (without being seen by the sheriff until the day of sale) was advertised, and sold to the creditor for a fair price, though no other person bidden. The creditor, (whose claim was proved to be just and bona fide, being a brother of the debtor's wife permitted the property to remain in the debtor's possession, and, within five years afterwards, conveyed the same, in trust, for the use of the wife and children of the debtor, by a deed recorded in a different county from that in which the property was. None of these circum-

stances were considered unfair; and the deed was adjudged to be good against other creditors.

Wilson & Trent v. Butler and others, pl. 2, 559

FRAUDS, (STATUTE OF.)

1. A parol agreement, by an executor, to pay a legacy out of his own estate, is not void under the act to prevent frauds and perjuries, if a decree was previously obtained for the legacy to be satisfied from certain property appointed by the testator; for part of which property the executor was accountable, under the decree, and responsible de bonis propriis; and such agreement was made in consideration of forbearance to enforce the decree.

Patton, adm'r of Page v. Williams and wife, 59
2. A release entered of record, by a verbal direction in open court, is valid under the statute of frauds; for the clerk who makes the note or memorandum, is to be considered as the agent of both parties.

Boykin's devisees v. Smith and others, 102

FREEHOLD.

1. To give the court of appeals jurisdiction on the ground that the matter in controversy is a freehold, or franchise, the right to the freehold or franchise must be directly the subject of the action, not incidentally or collaterally.

Hutchinson v. Kellam, 302

2. If, therefore, in an action of trespass quare clausum fregit, the damages recovered be less than one hundred dollars, the defendant cannot appeal to this court, notwithstanding it appears from the record that the title or bounds of land were drawn in question. *Ib.*

GENERAL ASSEMBLY.

See Suffrage, (Right of,) and
Custis v. Lane, pl. 1, 2, 579

GIFT.

1. A testator having put his daughter's husband into possession of a leasehold tract of land, and delivered him the lease, permanent improvements, also, being made by the son-in-law, with the assistance of the family, and parol declarations by the testator, that he had given him the land in consideration of his having married his daughter, and to prevent his moving to Kentucky, being proved, it was decided, that the son-in-law had an equitable title to the land, for the time the lease had to run; and to a release of the legal title from the heirs, or executors, according as the interest conveyed by the lease might be greater or less.

Shobe's ex'ors v. Carr and wife, 10

GOVERNOR.

See Sheriffs, No. 4.

Bowers and others v. Millar, 492

HEIRS.

1. The executor or administrator, and not the heir, of the purchaser, is entitled to relief, in case the suit on the bond be against the executor or administrator.

Bullitt's ex'ors v. Songster's adm'rs, 54

HIRE OF SLAVES.

1. See Posthumous Child, No. 4, and *Armistead and others v. Dangerfield and wife*, pl. 4, 20

2. See Discovery, No. 2.

Baird v. Bland and others, pl. 3, 570

HUSBAND AND WIFE.

1. An acknowledgment by a feme covert is not sufficient to establish an account against her husband; though it be for articles furnished her before the marriage.

Sheppard's ex'or v. Starke and wife, pl. 10, 39

2. In what case the marriage is itself such a separation of the wife from the family of her deceased father, as entitles the husband to demand her share of the estate. See *Wills*, Nos. 24, 25.

Branch's adm'x v. Booker's adm'r, 43

3. See Marriage Settlement, Nos. 3, 4, and
Baird v. Bland and others, pl. 1, 2, 570

INCUMBRANCE.

1. A purchaser of land, warranted by the vendor to be free of all incumbrance, is not precluded from relief in equity, against his bond for the purchase money, by the circumstance that, before he made the purchase, he was fully apprised of the incumbrance.

Stockton v. Cook, 68

2. See Declaration, No. 6.
 Moss v. Stipp, 159
3. If the purchaser agree to pay a certain sum in discharge of an incumbrance, for which sum he is to have a credit in part of the purchase money, and it does not appear that the vendor deceived him with respect to the sum for which the removal of such incumbrance could be obtained, he is not to be credited for any larger sum, which the incumbrancer may compel him to pay.
 Mayo v. Purcell, 248

INDEMNIFICATION.

- See Purchaser, No. 18.
 Foreman v. Newkirk and others, 275

INFANT.

1. Where a slave is given to an infant, and left by the donor with the mother of such infant for its benefit, (the father being dead,) the possession by the mother is to be considered possession by the infant.

- Mortimer v. Brumfield, 123
2. An executor is not chargeable with interest on a legacy payable to an infant before a guardian has been appointed, and he has received notice of such appointment.

- Gavendish v. Fleming, 198
3. See Children, No. 2, and
 Baird v. Bland and others, pl. 2, 570

INJUNCTION.

1. If, by an agreement under seal, between the vendor and purchaser of a tract of land, it be covenanted, that, if any part thereof should be recovered by law from the purchaser, the vendor will abate or refund in proportion, and that he will not bring suit upon the bond for the purchase money until the quantity of land which the purchaser prosecutes a suit for that purpose in reasonable time, a court of equity will give relief by injunction against a premature suit on the bond; and, if it appear that the purchaser prosecuted his suit in reasonable time, and could not recover the land, the court will decree that the injunction be perpetual; that whatever money has been paid be refunded; that the bond be surrendered and cancelled, and the contract rescinded.

- Bullitt's ex'ors v. Songster's adm'rs, 54
2. In such case, if the purchaser assigned to the vendor a bond of a third person in part payment, the court will decree that such bond be returned, or, (if he fail to return it,) that the vendor pay the amount thereof with interest; no equity in favour of the vendor appearing to exempt him from such responsibility. Ib.

3. Upon a county court's overruling a motion for dissolution of an injunction, the parties cannot make the injunction perpetual by consent, in order that an appeal may be taken; but, to authorize an appeal, the cause must be regularly proceeded in, to a final decree.

- Blakey v. West, 75

4. Under the 8d section of the act of January 20, 1804, concerning the proceedings in courts of chancery, (Rev. Code, vol. 2, p. 20,) an appeal from an order dissolving an injunction could not be taken but only from the dismissal of the bill.

- Pitts, executor of Rowzee, v. Tidwell, 88

5. Where an injunction is wholly dissolved in a county or corporation court, the bill is not to stand dismissed, until two succeeding courts have been held thereafter in such county or corporation; and the appellate court will not presume, from length of time, that two such courts were held; but this circumstance must explicitly appear in the transcript of the record. Ib.

6. Quære. If it do explicitly appear that two such courts were held, and it do not appear that, at or before the second court, any cause was shown against the dismissal of the bill, can the clerk's neglecting to enter the dismissal have the effect of keeping the cause on the docket? Ib.

7. It seems, that a person who claims title to a slave taken in execution may get relief in equity by an injunction to prevent the sale, notwithstanding his remedy at law.

- Randolph v. Randolph and others, 99
8. After an injunction has been wholly dissolved, if the cause be set for hearing on motion of the defendant in equity, he cannot take advantage of the circumstance that the bill should have been dismissed under the act of assembly.

- Franklin v. Wilkinson, 112
9. The security in a bond for the prosecution of an injunction, is not liable for the costs and damages which may accrue on an appeal to a superior court.

- Woodson v. Johns, 280

- 635
- *10. It is no plea to an action upon an injunction bond, "that the injunction was not dissolved unconditionally, but upon terms, that the plaintiff at law should execute a bond for securing the title to a tract of land," without averring in the plea that such bond was not thereupon given.

- Gray & Scott v. Campbell, 251

11. Where an injunction is dissolved upon a condition, and that condition has been complied with by the defendant in equity, the surety in the injunction bond is not exonerated. Ib.

12. See Forthcoming Bond, No. 4.

- Lusk v. Ramsay, pl. 3, 4, 417

13. The pendency of the bill in equity, in a county court, after dissolution of an injunction, is no bar to the complainant's obtaining another injunction from the superior court of chancery.

- Roberts v. Jordans, pl. 1, 498

14. See Account, No. 15, and Ibid, pl. 2.

15. See Assignment, No. 4, and Ibid, pl. 2.

16. If a creditor, holding a deed of trust to secure his debt, apply for an injunction to prevent a sale of the property at the instance of another creditor, and refuse to accede to just and reasonable terms offered him by the court, it is a badge of fraud, which may operate to deprive him of the advantage of the deed.

- Wright v. Hencock & Co., pl. 2, 521

17. Although a person, whose property is taken in execution to satisfy the debt of another, may proceed to recover that property, or damages for the taking and detaining thereof, in a court of law; and although the sheriff, having doubts as to the title to the property, may demand from the creditor an indemnifying bond, yet neither of these remedies is in exclusion of a bill of injunction to prevent the sale.

- Wilson & Trent v. Butler and others, 559

INSOLVENT DEBTOR.

1. A sergeant of a corporation has not the right to sue for money due to an insolvent debtor.
 Darby v. Henderson, 115

INSTRUCTIONS TO JURIES.

1. In an action upon a store account, if the act of limitations be not pleaded, the court is not authorized to instruct the jury to disregard such items as have been more than a year's standing.

- Taylor's adm'r v. Richards & Co., 8

2. In an action on the case against a sheriff for failing to levy an execution, if the return on the execution was, that there were no effects with which the debt could be satisfied, the burthen is thrown on the plaintiff of proving the falsehood of such return; and the court, if requested in a proper manner, ought so to instruct the jury. But if the defendant request the court to instruct the jury, that it is incumbent on the plaintiff to prove the falsehood of the return mentioned in the declaration, and no return be distinctly stated therein, the court ought to decline giving any instruction in pursuance of such request.

- Davis v. Johnson & Co., 81

3. A point, on which a party requested the court to instruct the jury, is not to be regarded as a mere abstract question, (concerning which the court was not bound to give an opinion,) if it appear, from the pleadings, that such point might have applied to the case before the jury, and the contrary be not stated.

- Shelton v. Oocke, Crawford & Co., 191

INTEREST.

1. Interest allowed on a legacy, (no certain time for payment being appointed,) from the end of one year from the testator's death; and to a legatee in remainder from the end of the year in which the tenant for life died.

- Shobe's ex'ors v. Carr and wife, 10

2. See Legacy, No. 5. Ib.

3. If a tender be made of a less sum than is justly due, a refusal to receive it is no bar to the subsequent recovery of interest, on the sum so tendered from the time of the tender.

- Shobe's ex'ors v. Carr and wife, Ib.

4. If a testator direct that no interest shall be demanded on a legacy, but that the executor will pay it off as soon as money can be raised by selling certain property, no interest is to be demanded until a reasonable time for raising the money shall have elapsed; after which, if the executor improperly withhold payment, he is chargeable with interest.

- Patton, adm'r of Page, v. Williams and wife, 59

5. An executor, except as to debts lost by his negligence or improper conduct, is chargeable with interest only on his actual receipts; and, generally, where interest is charged, the rule established in

the case of Granberry v. Granberry, 1 Wash. 249, ought to be observed.

Cavendish v. Fleming, 198

6. An executor is not chargeable with interest on a legacy payable to an infant, before a guardian has been appointed, and he has received notice of such appointment. Ib.

7. See Equity, Nos. 24, 25.

Moseley's adm'r &c. v. Buck & Brander, 283

8. A purchaser of land, being thoroughly informed of defects in the vendor's title, and agreeing, nevertheless, to pay interest on the purchase money from a certain day, shall not be relieved from paying such interest, on the ground, that he could not get possession of part of the land, which he knew at the time of entering into the agreement was held by another person.

Mayo v. Purcell, 243

9. Judgment ought not to be rendered on a three months' replevy-bond, for interest from a day anterior to the date of the "bond; but it may for interest from that date, on the rent and costs of the distress added together. And if the bond be taken including interest from a day anterior to its date, such erroneous interest may be deducted, and judgment entered for the right sum.

Williams v. Howard, 277

10. See Executors and Administrators, Nos. 25, 26, 27, 28, and

M'Call v. Peachy's adm'r, 288

11. An executor or administrator is chargeable with interest, in all cases where he has received it, and, also, where paper money, or specie, remained in his hands more than a reasonable time. (which, in this case, was said to be six months.) without being applied to the purposes of the estate. Ibid, pl. 16. Ib.

INVENTORY.

1. An appraisement of a decedent's estate, though not signed by the executor or administrator, and, therefore, not to be received as an inventory, is admissible as prima facie evidence of the value of the estate.

Rogers's adm'r v. Chandler's adm'r, 65

2. An executor or administrator, omitting to insert in the inventory certain credits belonging to the estate of the testator or intestate, is not to be charged, on that account, with more than shall be proven to have been received by him, or lost by his negligence.

M'Call v. Peachy's adm'r, 288

ISSUE.

1. See Error, No. 7.

Wilkinson's adm'rs v. Bennett, 514

JEOFFAILS.

1. After issue joined, in ejectment, on the title only, and a verdict for the plaintiff for the land in one of the counts in the declaration mentioned, it is no ground for arrest of judgment, that the two counts laid demises of the same land from different persons.

Throckmorton v. Cooper's lessee, 93

2. Quære. Would a demurrer to the declaration in this case have been sustained? Ib.

3. After verdict in an action for breach of a promise to marry, judgment ought not to be reversed on the ground that the time when the marriage was to be solemnized is left blank in the declaration.

Milstead v. Redman, 219

4. On a covenant, in which the plaintiff engaged to serve the defendant, as his overseer, for one year, and the defendant to pay to the plaintiff a certain part of all grain "made on the plantation," (after deducting the seed,) oats excepted; a declaration charging that the defendant did not, at the close of the year, pay to the plaintiff such part of the grain "made on the plantation," (without setting forth what crop was made,) is good after verdict.

Laughlin v. Flood, executor of Washington, 255

5. A count for money had and received, adjudged good after verdict: although the sum received was left blank.

Hall v. Smith, Young & Hyde, pl. 3, 550

6. See Recital, and

Sexton v. Holmes, 566

JOINT OBLIGATION.

1. In an action of debt against one obligor only, if the declaration describe the bond as joint, and do not state the other obligor to be dead, it is a fatal error. (though not pleaded in abatement,) and is not cured by verdict.

Newman v. Graham, 187

2. A declaration in debt, against two partners in

trade, charging that one of them executed the bond for himself and another, (without any other averment,) is too defective to support a judgment against such other partner, though he pleaded payment, and a verdict was found against him.

Garland v. Davidson, 189

JOINTURE.

1. See Dower, No. 1, and

Ball's devisees v. Ball's executors and widow, 270

JUDGMENT.

1. See Evidence, No. 3.

Chaney v. Saunders, 51

2. An appellate court ought not to reverse a judgment, without proceeding to give such judgment as the inferior court should have given.

Darby v. Henderson, 115

3. A scire facias, purporting to be founded upon a judgment entered at rules in the clerk's office of a county court, but not mentioning that that judgment was confirmed by not being set aside at the ensuing quarterly term, nor even that such quarterly term occurred prior to the suing out of the said scire facias, ought to be quashed, as not setting forth any legal cause of action.

Evans v. Freeland, 119

4. Where the defendant to a suit has not pleaded, but his appearance ball has, a judgment stating that the attorney for the defendant withdraws his plea, &c., and therefore it is considered, that the plaintiff recover against the defendant, must be understood as a judgment against the ball only, (without including the principal,) and is therefore erroneous.

Lee's adm'r v. Carter & Forbes, 131

5. A defendant's relinquishing his plea, and agreeing to the plaintiff's damages, is a confession of judgment, and, of course, a release of errors.

Cooke v. Pope's adm'r, 167

6. A confession of judgment for no certain sum, in an action sounding in damages, is "not sufficient to authorize the court to assess the damages, and enter judgment for a certain sum; but a writ of inquiry should be executed.

Dunbar v. Lindenbergers, 169

7. If a judgment on a summary motion be reversed, on the ground that the plaintiff's claim is not supported by evidence, the appellate court should proceed to enter judgment, that the plaintiff take nothing by his motion: and such judgment would be a bar to another motion for the same cause of action. But if such judgment be not entered, the judgment of reversal is too imperfect to be a legal bar.

Webb, executor of Osborne, v. M'Neil, 184

8. If the defendant in an action of covenant die, after judgment by default against him and the bail for his appearance, and before a writ of inquiry executed, the plaintiff cannot have a scire facias against the bail, but only against the executors and administrators of the defendant.

Saunders v. Gains, 225

9. A judgment on a bond, for payment of a debt by instalments, should be "for the debt in the declaration mentioned, to be discharged by the sum due at the time of institution of the suit; reserving liberty to the plaintiff to resort to a scire facias to recover such other damages as might thereafter arise under the condition of the bond."

Thatcher & Herndon v. Taylor & Cochrane, 249

10. See Pleading, No. 10.

Gray & Scott v. Campbell, 251

11. See Replevy-Bond, and

Williams v. Howard, 277

12. See Office Judgment, No. 3.

Quarles v. Buford, 487

13. After a judgment against an executor or administrator, as such, a fieri facias and return of nulla bona, an action, against him alone, on his administration bond, could always be maintained, without any previous suit suggesting a devastavit.

Meade and others v. Brooking, 548

JURISDICTION.

1. In an action of debt, in a county court, on a single bill, for more than one hundred dollars, if the jury find for the plaintiff the debt in the declaration mentioned, to be discharged by less than one hundred dollars, and, upon a writ of superseas, at the instance of the defendant, the judgment be reversed, the plaintiff cannot appeal to the court of appeals from such judgment of reversal.

Lewis v. Long, 136

2. To give the court of appeals jurisdiction, on the ground that the matter in controversy is a freehold or franchise, the right to the freehold or franchise must be directly the subject of the action, not incidentally, or collaterally.

Hutchinson v. Kellam, 203

3. If, therefore, in an action of trespass quare clausum fregit, the damages recovered be less than one hundred dollars, the defendant cannot appeal to this court, notwithstanding it appears from the record that the title or bounds of land were drawn in question. 202

4. See Equity, No. 34, and

Mayo v. Murchie, pl. 3. 358

5. See Injunction, No. 17, and

Wilson & Trent v. Butler and others, pl. 1, 559

6. See Discovery, No. 2.

Baird v. Bland and others, pl. 3, 570

JUSTIFICATION.

See Warrant, No. 1.

Wells v. Jackson, pl. 2, 458

LADING.

See Bill of Lading.

LANDS.

1. See Legacy, No. 2.

Shobe's ex'ors v. Carr and wife, pl. 2, 10

2. A testator having put his daughter's husband into possession of a leasehold tract of land, and delivered him the lease: permanent improvements also being made by the son-in-law, with the assistance of the family; and parol declarations by the testator, that he had given him the land in consideration of his having married his daughter, and to prevent his moving to Kentucky, being proved, it was decided, that the son-in-law had an equitable title to the land for the time the lease had to run, and to a release of the legal title, from the heirs, or executors, according as the interest conveyed by the lease might be greater or less. It was also decided, that the legal title to that land, (which was not expressly mentioned in the will,) was not intended to pass by a residuary devise. Ibid, pl. 4. Ib.

3. See Breach, No. 1.

Moss v. Stipp, 159

4. If, in an action of trespass quare clausum fregit, the damages recovered be less than one hundred dollars, the defendant cannot appeal to the court of appeals, notwithstanding it appears from the record that the title or bounds of land were drawn in question.

Hutchinson v. Kellam, 203

5. A purchaser of land, being thoroughly informed of defects in the vendor's title, and agreeing, nevertheless, to pay interest on the purchase money from a certain day, shall not be relieved from paying such interest, on the ground that he could not get possession of part of the land, which he knew, at the time of entering into the agreement, was held by another person.

Mayo v. Purcell, 243

6. If the purchaser agree to pay a certain sum in discharge of an incumbrance, for which sum he is to have a credit in part of the purchase money, and it does not appear that the vendor deceived him with respect to the sum for which the removal of such incumbrance could be obtained, he is not to be credited for any larger sum which the incumbrancer may compel him to pay. 243

7. See Purchaser, No. 13.

Foreman v. Newkirk and others, 275

8. See Lease, Nos. 1, 2.

Williams v. Howard, 277

9. See Disseisin, and

Davis and wife v. Martin, 285

10. See Rents, No. 5.

M'Call v. Peachy's adm'r, 288

11. See Title, No. 1.

Beverley v. Lawson's heirs, 317

12. See Conveyance, No. 2.

Geddy & Knox v. Butler and wife, 345

13. See Lottery, No. 1.

Mayo v. Murchie, pl. 1, 358

14. See Equity, No. 33, pl. 2, Ib.

15. See Towns, No. 2, pl. 4, Ib.

16. See Contingent Remainder, and

Coleman and wife v. Holladay, 510

17. See Devisees, No. 4.

Foster and wife v. Crenshaw's ex'ors, 514

18. See Reversion, No. 3.

Birbright, lessee of Hall, v. Hall, pl. 1, 536

19. See Bargain and Sale, and

Birbright, lessee of Hall, v. Hall, pl. 2, 536

20. See Leases, No. 5.

M'Clenahan v. Gwynn, 556

LEASES.

1. See Lands, No. 2, and

Shobe's ex'ors v. Carr and wife, pl. 4, 10

2. It seems, that on a lease of a tract of land, with sundry slaves and other personal property, reserving, by way of rent, a gross sum payable annually,

the remedy, by distress, may be resorted to without any express stipulation.

Williams v. Howard, 377

3. Rent may be payable in advance, by contract; and such rent may be distrained for, if not paid when due. Ib.

4. Where a testator directs the moneys arising from certain sources (among which are the rents of his lands,) to be placed out at interest, his executor is impliedly authorized to make leases of such lands, not already occupied by tenants, as are not necessary to be reserved for cultivation by the testator's own slaves.

M'Call v. Peachy's adm'r, 288

5. A person assigning a lease, for value received, but without any special agreement to be responsible for the title, is not bound to restore the purchase money upon the eviction of the assignee in consequence of a defect in the lessor's title; especially where the lessor has not been previously resorted to, or shown to be insolvent, and where the possibility of the eviction was in contemplation of both the parties at the time of the assignment.

M'Clenahan v. Gwynn, pl. 1, 556

6. Where a lease is assigned, and the assignee is evicted through a defect in the lessor's title, he may sue the lessor for compensation. Ibid, pl. 2. Ib.

LEGACY.

1. Interest allowed on a legacy, (no certain time for payment being appointed, from the end of one year from the testator's death, and to a legatee in remainder, from the end of the year in which the tenant for life died.

Shobe's ex'or v. Carr and wife, pl. 1, 10

2. If a testator devise to two of his sons certain lands rated at a certain sum, allowing them to pay his other children equal shares of that sum by instalments, such devisees, and those claiming under them, are personally responsible (in proportion to their respective estates) for the payment of such instalments, with lawful interest from the times when payable; and (in aid of such responsibility) the lands so devised are liable. pl. 2. Ib.

3. A testator bequeathing to the executors of his daughter's husband, to be divided among her children by him, a sum of money, it was considered as a legacy to them from their grandfather, and not assets belonging to the estate of their father, notwithstanding the object of the bequest was in the will stated to be, to make up their mother's fortune, part of which was not paid in her lifetime nor to her husband after her death.

Patton, adm'r of Page, v. Williams and wife, 59

4. If a testator desire that no interest shall be demanded on a legacy, but that the executors will pay it off as soon as money can be raised by certain property, no interest is to be demanded until a reasonable time for raising the money shall have elapsed; after which, if the executor improperly withhold payment, he is chargeable with interest. Ib.

5. A fund appointed by a will for payment of debts and legacies, must be considered sufficient, unless the contrary be proved. Ib.

6. A parol agreement, by an executor, to pay a legacy out of his own estate, is not void under the act to prevent frauds and perjuries, if a decree was previously obtained for the legacy, to be satisfied out of certain property appointed by the testator; for part of which property the executor was accountable under the decree, and responsible debts propriis; and such agreement was made in consideration of forbearance to enforce the decree. Ib.

7. An executor is not chargeable with interest on a legacy payable to an infant, before a guardian has been appointed, and he has received notice of such appointment.

Cavendish v. Fleming, 108

*LEGATEES.

1. See Slaves, Nos. 1, 2, and

Robertson v. Ewell, 1

2. See Contribution, Nos. 1, 2, and Armistead and others v. Dangerfield and wife, pl. 5, 20

3. All the residuary legatees or distributees, together with the executors or administrators of such as have died since the testator or intestate, ought to be parties to a suit for division of a residuum.

Sheppard's executor v. Starke and wife, pl. 3, 29

4. But where a division of a testator's estate, in pursuance of his will, is not to be made at one and the same time, but at the several periods when one or more of his children shall separate from the family, it is not necessary that all the legatees be

made parties to each suit in chancery for a division but only those entitled to participate in the division then in question.

- Branch's adm'r v. Booker's adm'r. 48
- 5. See Division, No. 2.
- Sheppard's ex'or v. Starke and wife, pl. 11. 29
- 6. See Division, Nos. 4, 5.
- Branch's adm'r v. Booker's adm'r, pl. 2, 3. 48
- 7. In a suit in chancery, on behalf of a person who claimed a share of a residuum, as purchaser from one of the legatees, the administrator, de bonis non, and all the children of the testator, were defendants to the bill; but proceedings were had against two of them only, viz. the legatee of whom the plaintiff purchased and another who also claimed the same share by a pretended purchase; it appearing that, by a decree in a suit in behalf of the administrator, de bonis non, a division among certain persons, as residuary legatees, had been directed; and one of the defendants, now before the court, had been ordered to pay to the other the share in question; yet it was determined that proceedings should have been had against all the defendants, and the cause was remanded to the court below for that purpose.
- Purcell v. Maddox. 79
- 8. See Vouchers, No. 1, 2, 3.
- McCall v. Peachy's adm'r, pl. 12, 13, 14. 268
- 9. See Wearing Apparel, No. 1, pl. 15. Ib.

LEGISLATURE.

- See Constitution, and
- Custis v. Lane, pl. 3. 579

LIEN.

- 1. If a testator devise to two of his sons certain lands, rated at a certain sum, allowing them to pay his other children equal shares of that sum, by instalments; such devisees, and those claiming under them, are personally responsible. (In proportion to their respective estates,) for the payment of such instalments, with lawful interest from the times when payable; and, (in aid of such responsibility,) the lands so devised are liable.
- Shobe's ex'ors v. Carr and wife. 10
- 2. The lien, by virtue of a writ of fieri facias upon the property of the debtor, is not released by his giving a forthcoming bond, but continues until such bond is forfeited.
- Lusk v. Ramsay, pl. 1. 417
- 3. What circumstances of collusion and combination, between a debtor and one of his creditors, to injure and defraud the rest, are sufficient to prevent such creditor from being entitled to any prior lien by virtue of a deed of trust executed for his benefit by the debtor.
- Wright v. Hencock & Co., pl. 1. 521
- 4. What are badges of fraud in such case. pl. 2. Ib.

LIFE ESTATE.

- 1. An appeal from a judgment in ejectment does not abate by the death of the lessor of the plaintiff, notwithstanding such lessor claimed the land for life only.
- Medley v. Medley. 191

LIMITATIONS. (ACT OF.)

- 1. A defendant cannot have the advantage of the act imposing a limitation of one year upon actions on store accounts, without pleading it: the court not being directed to cause such items as have been of more than one year's standing, in such accounts, to be expunged, or to instruct the jury to "disregard" them; and the jury not being required to "disallow and reject" them, without a plea.
- Taylor's adm'r v. Richards & Co., 8
- 2. Although the acknowledgment of a debt by one or more of the partners of a mercantile firm, after the dissolution thereof, is competent to do away the bar of the act of limitations in an action brought against the firm, the existence of the debt being first proved by other testimony, or admitted by the pleadings, yet such acknowledgment is not proper evidence of the existence of the debt, so as to charge the other partners.
- Shelton v. Cocke, Crawford & Co., 191
- 3. See Marriage Settlement, No. 4, and
- Baird v. Bland and others, pl. 2. 570

LOTTERY.

- 1. If the owner of a tract of land, on a navigable river, was authorized by law to establish a town upon it, and dispose of the lots by way of lottery; and, in the scheme of such lottery as advertised, adventurers therein were assured that the lots should be laid off in a town "convenient to the river, with public landings;" parol testimony is admissible, in aid of the inference "deducible from such printed proposals, to establish an equitable title in the inhabitants of the town, as tenants in common, to a piece of ground between the river and the lots actually laid off for the town.

ants in common, to a piece of ground between the river and the lots actually laid off for the town.

Mayo v. Murchie, pl. 1. 248

MARRIAGE.

- 1. In what case the marriage is itself such a separation of the wife, from the family of her deceased father, as entitles the husband to demand her share of the estate. See Willis, Nos. 24, 25.
- Branch's adm'r v. Booker's adm'r, 48
- 2. See Jeoffalls, No. 3.
- Milstead v. Redman. 219

MARRIAGE CONTRACT.

- 1. A testator having put his daughter's husband into possession of a leasehold tract of land, and delivered him the lease: permanent improvements, also, being made by the son-in-law, with the assistance of the family, and parol declarations, by the testator, that he had given him the land, in consideration of his having married his daughter, and to prevent his moving to Kentucky, being proved; it was decided that the son-in-law had an equitable title to the land for the time the lease had to run, and to a release of the legal title from the heirs, or executors, according as the interest conveyed by the lease might be greater or less.
- Shobe's ex'ors v. Carr and wife, 10

MARRIAGE SETTLEMENT.

- 1. See Dower, No. 1, and
- Ball's devisees v. Ball's ex'ors and widow. 279
- 2. See Contingent Remainder, and
- Coleman and wife v. Holladay. 510
- 3. If, by a deed of marriage settlement, duly recorded, slaves be conveyed to certain trustees and their heirs, to the use of the wife for life, and after her death, to the use of the husband for life, and, after the death of the survivor, to the use of the children of the marriage, equally to be divided between them and their heirs for ever; upon the deaths of the husband and wife, the children of the marriage are entitled, not only to the equitable, but the absolute legal estate.
- Baird v. Bland and others, pl. 1. 570
- 4. In such case, if the parents, in their lifetime, be deprived of the slaves, and depart this life, leaving children under age, the act of limitations does not run against the children until they attain the age of twenty-one years. pl. 2. Ib.

MITIGATION OF DAMAGES.

- 1. A case in which a warrant to arrest a person, of whom surety for the peace is demanded, is illegal and void as a justification, but may be given in evidence in mitigation of damages. See Warrant, No. 1.
- Wells v. Jackson, pl. 2. 458

MONEY HAD AND RECEIVED.

- 1. A count for money had and received, adjudged good after verdict, although the sum received was left blank.
- Hall v. Smith, Young & Hyde, pl. 3. 550

MORTGAGE.

- 1. Where a mortgagor is admitted to redeem, upon his bill filed for that purpose, the decree ought not to be, in general terms, that, upon his paying the money with interest, the mortgagee shall convey to him the mortgaged premises; but, that such conveyance be made, if he, within a limited time, do make such payment; and if not, that he be foreclosed of all equity of redemption; and that the mortgaged premises be sold.
- Turner v. Turner. 66
- 2. On a mortgagor's bill for account of profits, and a conveyance of the mortgaged premises, if he be still indebted on the mortgage, his equity of redemption should be allowed him, but the costs of suit should be decreed against him. Ib.

MOTION.

- 1. A decree, which is final in all respects except that "liberty is reserved to the parties, or either of them, to resort to the court for its further interposition, if it should be found necessary," may be amended on motion, in a summary way, or by bill of review.
- Sheppard's ex'or v. Starke and wife. 29
- 2. If a judgment on a summary motion be reversed on the ground that the plaintiff's claim is not supported by evidence, the appellate court should proceed to enter judgment, that the plaintiff take nothing by his motion; and such judgment would be a bar to another motion for the same cause of action. But if such judgment be not entered, the judgment of reversal is too imperfect to be a legal bar.
- Webb, executor of Osborne, v. McNeill. 184

NEGLECT.

1. If a slave be sold upon condition that the buyer, not liking, may return him in a given time, and while in the buyer's possession, but not through his neglect, he "be disabled by cold so as to be of little value, the buyer may refuse to keep him, and is not responsible for the loss, unless he expressly agreed to be so liable. But the buyer is responsible, without such agreement, for ordinary neglect; that is, if he failed to take such care of the slave as any man of common prudence, and capable of governing a family, takes of his own concerns. *Williams v. Moore.* 310
2. See Account, No. 15.
Roberts v. Jordans, pl. 2. 488

NEW TRIAL.

1. Where, for reasons appearing to the court, (though not specified,) a verdict is set aside, without requiring payment of costs, the appellate court will take it for granted those reasons were sufficient; no bill of exceptions being filed. *Hume v. Beale.* 226
2. It seems, that a party to whom a new trial is granted may, at the next term, without claiming such trial, file errors in arrest of judgment. *Hall v. Smith, Young & Hyde, pl. 1.* 550

NOTICE.

1. Purchasers from devisees and legatees are not exempted from contributing to make up the portion of a posthumous child, by their having purchased without notice of the claim. *Armistead and others v. Dangerfield and wife, pl. 6.* 30
2. If two actions be pending between the same parties, and in the same court, quære, whether a deposition, taken by virtue of a notice in which the particular action is not distinctly specified, can be read as evidence in either action? *Chaney v. Saunders.* 51
3. If the time appointed for taking a deposition be between the hours of twelve and one, quære, whether it can be read upon a certificate, stating, merely, that it is taken after twelve o'clock? *Ib.*
4. See Account, No. 15, and
Roberts v. Jordons, pl. 2. 488

NULLA BONA.

1. After a judgment against an executor, or administrator, as such, a fieri facias, and return of nulla bona, an action, against him alone, on his administration bond, could always be maintained, without any previous suits suggesting a devastavit. *Meade and others v. Brooking.* 548
2. Before the act of February 7th, 1814, "concerning executors and administrators," (sess. acts of 1813, ch. 13, p. 40,) a decree in chancery against an executor or administrator, directing him to pay a debt of his testator, or intestate, out of the assets in his hands to be administered, (with a fieri facias, and return of nulla bona,) was not sufficient evidence of a devastavit to authorize an action against the securities in the administration bond, but it was necessary to bring a previous suit against the executor or administrator, suggesting the devastavit. *Hairston v. Hughes and others.* 508

OATH.

- See Vouchers, Nos. 2, 3.
M'Call v. Peachy's adm'r, pl. 13, 14. 286

OBLIGATION.

- See Declaration, No. 3.
Bell v. Allen's adm'r. 118

OFFICE JUDGMENT.

1. A scire facias, purporting to be founded upon a judgment entered at rules in the clerk's office of a county court, but not mentioning that that judgment was confirmed, by not being set aside at the ensuing quarterly term, nor even that such quarterly term occurred prior to the suing out of the said scire facias, ought to be quashed, as not setting forth any legal cause of action. *Evans v. Freeland.* 119
2. See Pleading, No. 10.
Gray & Scott v. Campbell. 251
3. A clerk's entering and confirming a judgment, at rules, against a defendant and another person as "security for his appearance," is not sufficient to make such person liable as appearance bail; but a copy of the bail-bond should be inserted in the transcript of the record, for want of which the judgment should be reversed. *Quarles v. Buford.* 487

OFFICER.

- See Constitution, and
Custis v. Lane, pl. 3. 579

OFFICES.

1. A deputy sheriff holds his office during the pleasure of his principal, and may, by him, be removed from office, notwithstanding he has given bond and security to indemnify the principal in case of his neglect or misconduct; and it was agreed between them, that he should be the deputy for the time that the sheriff should continue in office under his then commission; but the deputy is not deprived thereby of his remedy against the principal for an undue exercise of such power of removal. *Hoge v. Trigg.* 86
2. If the deputy sue the sheriff for turning him out of office in violation of his contract, a plea that the plaintiff had been "guilty of a certain misfeasance, and other specified improprieties in his office, from which he was, therefore, dismissed by the defendant, is a full answer to the declaration. *Ib.* 86
3. Quære, whether a contract between a sheriff and his deputy, that the latter shall perform all the duties of the sheriffalty, receive all the fees and emoluments arising therefrom, and pay to the former a certain sum of money, be not void under the act of assembly against buying and selling of offices? *Ib.*

ONUS PROBANDI.

1. Where a slave is sold and delivered, although without a bill of sale, it is to be presumed, prima facie, that the seller has parted with his title; if, therefore, he contend that he reserved the title in himself until the purchase money should be paid, the onus probandi lies on him. *Randolph v. Randolph and others.* 90
2. Where an ex parte settlement of an administration account has taken place before commissioners appointed by the court, in which the executor or administrator qualified, if the legatees afterwards bring a suit in chancery for a new examination and settlement of such account, the vouchers in support hereof, if they be not ostensible, should be presumed to have existed, and the onus probandi thrown on the adverse party. *M'Call v. Peachy's adm'r.* 288
3. But it seems, the executor or administrator may be required to produce the vouchers, unless he shall declare on oath, or otherwise prove, that they were deposited with the clerk of such court, at or after examination of the account by the commissioners, and have not come to his possession since. *Ib.*
4. In such case, if the vouchers, or official copies of them be produced, the plaintiffs may, nevertheless, controvert the articles intended to be justified by them. Any article ought to be allowed on the oath of the defendant, if it be of such a nature, that the expense probably must have been incurred, or that, perhaps, a voucher for it could not have been procured; for example, mourning for the widow, mid-wife's fees, services performed by a negro carpenter, and the like. *Ib.*
5. A common carrier is liable for all accidents to goods entrusted to him for transportation, except such as arise from the act of God, the act of the enemies of the commonwealth, or the act of the owner of the goods. *Murphy, Brown & Co. v. Station.* 280
6. In such case, if a loss happens, the onus probandi lies on the carrier to exempt him from the liability; and it is not enough for him to prove, (where the goods are carried by water,) that the navigation is attended with so much danger that a loss may happen, notwithstanding the utmost endeavours of the waterman and crew to prevent it; that the person conducting the boat possesses competent skill, has used due diligence, and provided hands of sufficient strength and experience to assist him. *Ib.* 280

OVERSEERS OF THE POOR.

1. An action in behalf of an apprentice, upon his indenture of apprenticeship, ought not to be brought in the name of the overseers of the poor, but in his own name. *Poindexter v. Wilton and others.* 183
2. See Bastard Child, and
Fall v. the overseers of the poor of Augusta county. 496

PAPER MONEY.

1. If an executor be authorized by the will to put certain moneys out at interest, his changing the

bonds, shifting the debts, or applying moneys to his own use, or that of his friends, without any fraudulent design, is no reason for charging him, to the amount in specie, for so much paper money received.

M'Call v. Peachy's adm'r. pl. 5. 288
2. See *Executors and Administrators*, Nos. 28, and 20, pl. 6, 7. Ib.

3. In general an executor or administrator should not be debited, or credited, with the value of paper money, at the times when received or paid away by him, unless it be proved that he received it unnecessarily, or improperly delayed paying it away to those entitled to it. But the account of debts and credits should be stated in paper money and the balance scaled at the time of the last payment, which balance, turned into specie, should be carried to the subsequent account, in specie. pl. 10. Ib.

4. See *Commissions*, No. 8, and pl. 17. Ib.

PARTIES.

1. If it appear on the face of the record that proper parties to the suit are wanting, the decree will be reversed, unless the objection was expressly relinquished in the court below.

2. *Sheppard's ex'or v. Starke and wife.* pl. 2. 20
3. All the residuary legatees or distributees, together with the executors or administrators of such as have died since the testator or intestate, ought to be parties to a suit for division of a residuum. pl. 8. Ib.

3. The court cannot decree a distribution in favour of persons not parties to the cause. pl. 4. Ib.

4. Where the division of a testator's estate, in pursuance of his will, is not to be made at one and the same time, but at the several periods when any one or more of his children shall separate from the family, it is not necessary that all the legatees be made parties to each suit in chancery for a division; but only those entitled to participate in the division then in question.

Branch's adm'r v. Booker's adm'r. 48
5. In a suit in chancery, on behalf of a person who claimed a share of a residuum, as purchaser from one of the legatees, the administrator, *de bonis non*, and all the children of the testator, were defendants to the bill; but proceedings were had against two of them only, viz. the legatee of whom the plaintiff purchased and another, who also claimed the same share, by a pretended purchase; it appearing that, by a decree in a suit in behalf of the administrator, *de bonis non*, a division among certain persons, as residuary legatees, had been directed; and one of the defendants, now before the court, had been ordered to pay to the other the share in question; yet it was determined that proceedings should have been had against all the defendants, and the cause was remanded to the court below for that purpose.

Purcell v. Maddox. 79
6. Where a plaintiff in equity, having the equitable title to land, sues for the legal title, the person holding such legal title is a sufficient defendant, without making the person of whom he purchased a party to the suit.

Mayo v. Murchie. pl. 2. 368
7. Although consent of parties cannot give a court of equity jurisdiction, or supply the total absence of other necessary parties, yet such consent may dispense with the strictness of form, and enable the court to decide a cause in relation to parties who are, in fact, though possibly irregularly, before it. pl. 8. Ib.

8. Under what circumstances a single surviving trustee of a town is competent to be the plaintiff in a bill in equity, for the purpose of asserting the right of the inhabitants generally to land laid off and annexed to such town as a common. pl. 4. Ib.

9. See *Forthcoming Bond*, No. 6.

Luak v. Ramsay. pl. 8, 4. 417
10. A judgment at law being obtained against one of two obligors in a joint and several bond, and no proceedings to enforce it appearing, a court of equity ought not to charge the lands of the other obligor in possession of his devisees, without having made the obligor against whom the judgment was rendered, or his representatives, parties to the suit.

Foster and wife v. Crenshaw's ex'ors. pl. 2. 514

PARTNERSHIP.

1. A declaration in debt against two partners in trade, charging that one of them executed the bond for himself and another, (without any other averment,) is too defective to support a judgment against such other partner, though he pleaded payment, and a verdict was found against him.

Garland v. Davidson. 189
2. Although the acknowledgment of a debt by one or more of the partners of a mercantile firm, after the dissolution thereof, is competent to do away

the bar of the act of limitations in an action brought against the firm, (the existence of the debt being first proved by other testimony, or admitted by the pleadings,) yet such acknowledgment is not proper evidence of the existence of the debt, so as to charge the other partners.

Shelton v. Cocke, Crawford & Co. 191

PEACE, (SURETY FOR KEEPING THE.)

See *Warrant*, and
Wells v. Jackson. pl. 2, 3, 4. 458

PERISHABLE GOODS.

1. In determining which of the goods and chattels of a testator or intestate shall be sold, "as liable to perish, consume, or be the worse for using or keeping," some latitude of discretion must be allowed to the executor or administrator; and his conduct, appearing to be fair, and, probably, proceeding from a good intention, ought to be sanctioned by a court of equity.

M'Call v. Peachy's adm'r. 288

PLEADING.

1. If an executor or administrator wish to prove, by a deed of trust, that certain property in his possession is not to be considered assets, he must specially plead the deed, and cannot give it in evidence under a plea of "fully administered," in which it is not mentioned.

Taylor's adm'r v. Richards & Co. 8

2. A defendant cannot have the advantage of the act imposing a limitation of one year upon actions on store accounts, without pleading it: the court not being directed to cause such items as have been of more than one year's standing, in such accounts, to be expunged, or to instruct the jury to "disregard" them; and the jury not being required to "disallow and reject" them, without a plea. Ib.

3. If the plaintiff be permitted to amend his declaration, by consent of parties, after issue joined on a plea to the action, the defendant ought not to be permitted to plead in abatement any variance between the amended declaration and the writ which equally existed between the writ and the original declaration.

Moss v. Stipp. 150

4. In an action upon a written agreement for the sale of a tract of land, setting forth *that the vendor agreed to give the vendee possession and a conveyance free of incumbrances, on or before a certain day, for which the vendee agreed to pay to the vendor part of the purchase money on the same day, and to give him, for the balance, a deed of trust, or such other security as he might require, and that the conveyance was not to be executed until the first payment was made, and security given, the declaration, in behalf of the vendor, sufficiently charged a breach, by stating that the plaintiff was on that day in lawful and peaceful possession of the land, and ready to give the defendant possession, with a proper conveyance, clear of all incumbrances, but that the defendant failed to make the payment and give the security. 159

5. What pleas, to such a declaration, are insufficient. Ib.

6. A defendant's relinquishing his plea, and agreeing to the plaintiff's damages, is a confession of judgment, and, of course, a release of errors.

Cooke v. Pope's adm'r. 107

7. In an action of covenant, the declaration describing the covenant as sealed by the defendant, without mentioning any other person; and the plea being "covenants performed," though without praying over, a joint and several covenant sealed by the defendant, and others, but in other respects answering to the description in the declaration, is admissible as evidence to the jury.

Hollingsworths v. Dunbar. 168

8. A point, on which a party requested the court to instruct the jury, is not to be regarded as a mere abstract question, (concerning which the court was not bound to give an opinion,) if it appear, from the pleadings, that such point might have applied to the case before the jury, and the contrary be not stated.

Shelton v. Cocke, Crawford & Co. 191

9. In debt on a bond, if the defendant, after craving over, plead "payment," and it appear, from the condition of the bond, that only a part of the debt had become due at the time of institution of the suit, the plea extends to that part only, and not to sums which might become due thereafter.

Thatcher & Herndon v. Taylor & Cochrane. 249

10. It is no plea to an action upon an injunction bond, "that the injunction was not dissolved unconditionally, but upon terms, that the plaintiff at law should execute a bond for securing the title to a tract of land," without averring in the plea that such bond was not thereupon given.

Gray & Scott v. Campbell. 251

11. Such defective plea ought not to be received by the court to set aside an office judgment. *Ib.*

POSSESSION.

1. An absolute bill of sale of slaves, by an executor, who is nevertheless permitted to retain the possession thereof is fraudulent and void, as to legatees, as well as creditors and purchasers.

Robertson v. Ewell. 1

2. Where a slave is given to an infant, and left by the donor with the mother of such infant for its benefit, (the father being dead,) the possession by the mother is to be considered possession by the infant.

Mortimer v. Brumfield. 123

3. See Entry, Right of, and Birthright, lessee of Hall, v. Hall, 536

POSTHUMOUS CHILD.

1. A devise, in general terms, to the testator's "children," does not comprehend a posthumous child, so as to prevent it from claiming, under the act of assembly, as pretermitted by the will.

Armistead and others v. Dangerfield and wife. 20

2. Quære. Does the testator's knowing, at the time of making the will, that his wife is pregnant, make any difference in the case? *Ib.*

3. A posthumous child, unprovided for by settlement, and pretermitted by the last will of its father, is entitled to a share of the real estate, notwithstanding such child be a daughter, and it appear, from the will, that the testator intended to give all his lands to his sons. *Ib.*

4. Such posthumous child is entitled to such share of the real and personal estate, as it would have been entitled to if the father had died intestate; including profits of lands, hires of negroes, and interest and profits of other personal estate. *Ib.*

5. The portion of such posthumous child is not to be raised by a division of the estate into equal parts, but by a proportionable contribution by the devisees and legatees, and those claiming under them. *Ib.*

6. Purchasers from the devisees and legatees are not exempted from contributing to make up the portion of such posthumous child, by their having purchased without notice of such claim. *Ib.*

PRACTICE.

1. It is not necessary, in a special verdict, that fraud be found expressly, *eo nomine*. If facts amounting to fraud in legal construction be found.

Robertson v. Ewell. 1

2. If an executor or administrator wish to prove, by a deed of trust, that certain property in his possession is not to be considered assets, he must specially plead the deed, and cannot give it in evidence under a plea of "fully administered," in which it is not mentioned.

Taylor's adm'r v. Richards & Co. 8

3. A defendant cannot have the advantage of the act imposing a limitation of one year upon actions on store accounts, without pleading it. *Ib.*

4. A decree, which is final in all respects, except that "liberty is reserved to the parties, or either of them, to resort to the court for its further interposition, if it should be found necessary," may be amended, on motion, in a summary way, or by bill of review.

Sheppard's ex'or v. Starke and wife. 20

5. See Parties, Nos. 1, 2, 3, and pl. 2, 3, 4. *Ib.*

6. Under the prayer for general relief, the plaintiff in equity cannot recover a claim distinct from that demanded or put in issue by the bill. pl. 5, *Ib.*

7. A decree against an executor or administrator for a balance due on his administration account, ought not to be, "that he pay the same out of the estate in his hands to be administered;" but as his own proper debt. pl. 6. *Ib.*

8. See Parties, No. 4, and

Branch's adm'r v. Booker's adm'r, pl. 1, 43

9. See Decree, No. 6.

Turner v. Turner. 66

10. Where a defendant in chancery has not answered the bill, it is error to enter a final decree against him, without the previous service of a decree nisi, and his appearing before commissioners appointed to take an account, or having notice of their proceeding to take it, does not preclude him from making this objection.

Legrand v. Francisco. 83

11. In a suit in chancery against a defendant who is out of this country, and another within the same, having in his hands effects of, or otherwise indebted to, such absentee, a decree cannot be entered against the defendant in this country, until, by legal proof and regular proceedings, the plaintiff has established his claim against the absentee.

Gibson v. White & Co. 94

12. In such case, if the defendant in this country

appear not to be a debtor of the absentee, but to hold effects belonging to him by a title not effectual against creditors, or without any title at all, he should be considered personally responsible only for so much as he may have consumed or appropriated to his own use, so as not to be forthcoming, or for the profits he may have received; but, for that amount, a decree may be made against him personally, in the first place, holding the property in his hands ultimately bound, if he be insolvent, and for the balance of the plaintiff's claim, the court may proceed, in the first place, against the property itself, either by considering such defendant a trustee thereof, for the use of creditors, and directing a sale, unless the debt be paid by a given day, or by sequestering it, (under the act of assembly,) as the property of the absentee. *Ib.*

13. Quære, after a suit in chancery has been set for hearing, has the plaintiff a right to amend his bill before the hearing, as a matter of course, upon paying the defendant all costs occasioned thereby, or is such amendment to be permitted only upon good cause shown?

Boykin's devisees v. Smith and others. 103

14. After an injunction has been wholly dissolved, if the cause be set for hearing, on motion of the defendant in equity, he cannot take advantage of the circumstance that the bill should have been dismissed under the act of assembly.

Franklin v. Wilkinson. 113

15. It is not necessary, in the declaration in detinue, to state a special demand and refusal; but the general charge that the defendant, although often requested, &c., is sufficient.

Mortimer v. Brumfield. 123

16. See Abatement, No. 1.

Moss v. Stipp. 150

17. Under what circumstances a party, having been repeatedly indulged with continuances of a cause, may with propriety be refused a further continuance.

Milstead v. Redman. 219

18. If the defendant in an action of covenant die, after judgment by default against him and the bail for his appearance, and before a writ of inquiry executed, the plaintiff cannot have a *scire facias* against the bail, but only against the executors and administrators of the defendant.

Saunders v. Gaines. 225

19. In a decree of reversal, the appellate court will, if requested, further direct, that, in case the money and costs recovered by the appellee shall have been paid, the same be refunded, with lawful interest from the time of payment.

Stanard v. Brownlow. 220

20. The court of appeals, in affirming a decree, will add any explanation which may be necessary to make it correctly understood.

Mayo v. Purcell. 243

21. See Pleading, No. 9.

Thatcher & Herndon v. Taylor & Oochraue, trustees, &c. of Miller. 249

22. How a judgment on a bond, for payment of a debt by installments, should be worded. *Ib.*

23. Judgment ought not to be rendered on a three months' *replevy* bond, for interest from a day anterior to the date of the bond; but it may for interest from that date, on the rent and costs of the distress added together. And if the bond be taken including interest from a day anterior to its date, such erroneous interest may be deducted, and judgment entered for the right sum.

Williams v. Howard. 277

24. Where a bill in equity is exhibited by the vendor of land against the purchaser for specific performance, if the purchaser object to the title, and it appear doubtful whether the plaintiff can make such a title as would authorize a decree for specific performance, or other relief on giving bond to guard against remote or improbable contingencies, the title ought, of course, to be referred to a commissioner to be examined and reported upon.

Beverly v. Lawson's heirs. pl. 1, 317

25. See Title, and pl. 3, 4. *Ib.*

26. Where a plaintiff in equity, having the "equitable title to land, sues for the legal title, the person holding such legal title is a sufficient defendant, without making the person of whom he purchased a party to the suit.

Mayo v. Murchie. pl. 2. *Ib.*

27. See Parties, No. 6, and pl. 3. 356

28. See Parties, No. 7, and pl. 4. *Ib.*

29. The plaintiff cannot appeal from a judgment in favour of all the defendants, except one, in a joint action of trespass, until the suit has been abated, dismissed, or decided as to that one.

Wells v. Jackson. pl. 1, 458

30. See Bar, No. 3.

Roberts v. Jordan. pl. 1, 488

31. See Account, No. 15, and pl. 2. *Ib.*

32. See Assignment, No. 4, and pl. 3. *Ib.*

83. An administrator may declare in the debet and detinet on a bond executed to himself as such; and his executor or administrator has a right to bring an action upon it.

Bowden, ex'or of Moore, v. Taggart, 518

34. See Parties, No. 10. and

Foster and wife v. Crenshaw's ex'ors, pl. 2, 514

35. When lands, held by several devisees in the same will, are charged in equity to satisfy a bond debt of the devisor, the decree should be against the lands of all the devisees, (or the money received or claimed in lieu thereof,) in rateable proportions; and not against the land of one only, with liberty to that one to sue the others for contribution. pl. 3, Ib.

36. It seems, that a party to whom a new trial is granted may, at the next term, without claiming such trial, file errors in arrest of judgment.

Hall v. Smith, Young & Hyde, pl. 1, 550

37. See Assumpsit, Nos. 3, 4, and pl. 2, 3, Ib.

38. See Assumpsit, No. 5, and Sexton v. Holmes, 566

PRESUMPTION.

1. The refusal of an executor to qualify may be presumed from circumstances, without renunciation of record. See Conveyance, No. 2

Geddy & Knox v. Butler and wife, pl. 2, 345

2. See Account, No. 14.

Freeland, &c. v. Cocke's representatives, pl. 2, 352

PRESUMPTION OF TITLE.

1. The court of a county having caused a court-house and jail to be erected, in or about the year 1754, and courts having been continually held in such court-house until the year 1801, it ought, in a court of equity, to be presumed that the title to two acres of the land built upon, and adjacent, were duly vested in the court and their successors; although no deed from the original proprietor can be produced.

Boykin's devisees v. Smith and others, 102

2. Quære. Ought not such presumption to take place at law, as well as in equity? 103

3. It seems, that in such case, a decision in ejectment against a person claiming by assignment from the county court, is no bar to his recovering the land in a court of equity. Ib

PRINCIPAL OBLIGOR.

See Contribution, No. 3.

M'Cormack's adm'r v. Obannon's ex'or, &c., 494

PRISON BOUNDS.

1. A debtor, being surrendered to the sheriff by his special bail, (after judgment against him in a county court,) cannot legally be detained in jail, or within the prison bounds, on a bond given for that purpose, more than twenty days from the time of such surrender, if the creditor, his attorney, or agent, do not, within that time, charge him in execution in writing.

Green v. Garrett, 330

PROFITS.

1. See Posthumous Child, No. 4.

Armistead and others v. Dangerfield and wife, 30

2. See Wills, No. 25.

Branch's adm'r v. Booker's adm'r, 43

3. See Discovery, No. 2.

Baird v. Bland and others, pl. 3, 570

PROMISE.

1. See Declaration, No. 11.

Milstead v. Redman, 219

2. The plaintiff in assumpsit must charge the promise by the defendant positively, not by way of recital only; for, if the declaration be defective in this respect, it is a fatal error, and not cured by verdict.

Sexton v. Holmes, 566

PROTEST.

1. A copy of a bill of exchange and notarial protest, with an affidavit of the payee that the original is lost or mislaid, is not legal evidence to charge the drawer.

Wright v. Hancock & Co., pl. 3, 531

PUBLIC SECURITIES.

1. A testator, by directing certain moneys to be placed out at interest, "upon good and sufficient securities, in Virginia or Maryland, as his executors should think proper," authorized them to invest the same in loan-office certificates, or other public securities.

M'Call v. Peachy's adm'r, 228

*PURCHASE.

1. See Slaves, No. 10.

Williams v. Moore, 310

PURCHASE MONEY.

1. See Lease, Nos. 5, 6.

M'Clenahan v. Gwynn, pl. 1, 2, 556

PURCHASER.

1. See Executors and Administrators, No. 1, and Robertson v. Ewell, 1

2. See Posthumous Child, No. 5.

Armistead and others v. Dangerfield and wife, 20

3. Purchasers from devisees, or legatees, are not exempted from contributing to make up the portion of a pretermitted posthumous child, notwithstanding they purchased without notice of the claim of such child. Ib.

4. If, by an agreement under seal, between the vendor and purchaser of a tract of land, it be covenanted, that, if any part thereof should be recovered, by law from the purchaser, the vendor will abate, or refund, in proportion; and that he will not bring suit upon the bond for the purchase money, until the quantity of land which the purchaser is to get shall be ascertained; provided the purchaser prosecute a suit for that purpose in reasonable time;—a court of equity will give relief by injunction against a premature suit on the bond; and if it appear that the purchaser prosecuted his suit in reasonable time, and could not recover the land, the court will decree that the injunction be perpetual; that whatever money has been paid be refunded; that the bond be surrendered and cancelled, and the contract rescinded.

Bullitt's ex'rs v. Songster's adm'rs, 54

5. In such case, if the purchaser assigned to the vendor a bond of a third person in part payment, the court will decree that such bond be returned; or, if he fail to return it, that the vendor pay the purchaser the amount thereof, with interest, no equity in favour of the vendor appearing to exempt him from such responsibility. Ib.

6. The executor or administrator, and not the heir, of the purchaser, is entitled to relief, in case the suit on the bond be against the executor or administrator. Ib.

7. A purchaser of land, warranted by the vendor to be free of all incumbrance, is not precluded from relief in equity against his bond for the purchase money, by the circumstance that before he made the purchase he was fully apprized of the incumbrance.

Stockton v. Cook, 68

8. See Pleading, No. 3.

Moss v. Stipp, 150

9. If an agent, employed to sell a tract of land, become himself the purchaser, by bargaining with his employer, from whom he conceals the fact that a better price could be got from another person, he is guilty of fraud, and the contract ought to be vacated.

Moseley's adm'rs and heirs v. Buck and Brander, 232

10. In such case, the court of equity will compel him to reconvey the land, on receiving back his purchase money with interest, and make him account for the rents and profits. Ib.

11. A purchaser of land, being thoroughly informed of defects in the vendor's title, and agreeing, nevertheless, to pay interest on the purchase money from a certain day shall not be relieved from paying such interest, on the ground that he could not get possession of part of the land, which he knew, at the time of entering into the agreement, was held by another person.

Mayo v. Purcell, 243

12. If the purchaser agree to pay a certain sum in discharge of an incumbrance, for which sum he is to have a credit in part of the purchase money, and it does not appear that the vendor deceived him with respect to the sum for which the removal of such incumbrance could be obtained, he is not to be credited for any larger sum which the incumbrancer may compel him to pay. Ib.

13. Where the purchaser of land gives bonds for the purchase money, payable at different times, and the agreement is, that if the title to any part of the land prove defective, a deduction from the purchase money shall be made in proportion to the value of the land lost, a court of equity will not protect the purchaser against an assignee of one of the bonds, on the ground of a defect in the title to part of the land, if it appear that the bonds not assigned, and remaining unsatisfied, are sufficient to indemnify him against such loss.

Foreman v. Newkirk and others, 275

14. See Title, No. 1.

Beverly v. Lawson's heirs, &c., 317

QUANTUM MERUIT.

1. Where an executor has a claim against the estate of his testator, depending on a quantum meruit only, he may exhibit a bill in equity against his

co-executors and legatees, to have such claim established, and fixed at a certain sum.

Baker v. Baker and others.

2. In such case, he ought to state the claim with reasonable certainty, by setting forth his own estimate of his services; but, should he fail to do so, his bill ought not to be dismissed, but leave to amend it should be granted on motion.

Ib.

648

*RECITAL.

1. The plaintiff, in assumption, must charge the promise by the defendant positively, not by way of recital only; for if the declaration be defective, in this respect, it is a fatal error, and not cured by verdict.

Sexton v. Holmes,

566

RECORD.

1. A release entered of record, by a verbal direction, in open court, is valid under the statute of frauds; for the clerk who makes the note, or memorandum, is to be considered as the agent of both parties.

Boykin's devisees v. Smith and others.

102

REFUSAL TO QUALIFY.

1. An executor's refusal to qualify may be found on proof of declarations in pays, or presumed from circumstances, without any renunciation of record.

Geddy & Knox v. Butler and wife, pl. 2.

845

RELEASE.

1. A release entered of record, by a verbal direction, in open court, is valid under the statute of frauds; for the clerk who makes the note, or memorandum, is to be considered as the agent of both parties.

Boykin's devisees v. Smith and others.

102

2. A confession of judgment and release of equity will be supported, though made by a man of weak understanding in the habit of making improvident bargains, addicted to intoxication, and embarrassed in his circumstances; and though such confession was induced by the plaintiff's giving him time to pay the money, if no other influence was exerted, and no fraud was committed in obtaining such confession, the same being deliberately and voluntarily made by the defendant, or by virtue of a power of attorney, deliberately and voluntarily executed by him.

Mason v. Williams,

126

RELEASE OF ERRORS.

1. A defendant's relinquishing his plea, and agreeing to the plaintiff's damages, is a confession of judgment, and, of course, a release of errors.

Cooke v. Pope's adm'r's,

167

RELIEF.

1. Under the prayer for general relief, the plaintiff, in equity, cannot recover a claim distinct from that demanded, or put in issue, by his bill.

Sheppard's ex'or v. Starke and wife, pl. 5.

29

2. See Equity, No. 18.

Stockton v. Cooke.

68

3. Under what circumstances a right to relief in equity may be lost by acts of confirmation and compromise.

Mason v. Williams,

126

REMAINDER.

1. Interest allowed to a legatee, in remainder, from the end of the year in which the tenant for life died.

Shobe's ex'ors v. Carr and wife.

10

2. See Contingent Remainder, and

Coleman and wife v. Holladay,

510

3. Lands devised, without any specific charge by will or deed, ought not to be charged in equity to satisfy a bond debt of the deviser, until the personal estate is exhausted, including a remainder in slaves, expectant upon an estate for the life of the testator's widow.

Foster and wife v. Crenshaw's ex'rs,

514

4. See Reversion, and

Birthright, lessee of Hall, v. Hall, pl. 1.

536

RENTS.

1. See Equity, No. 24.

Moseley's adm'r's v. Buck & Brander,

333

2. See Replevy Bond, and

Williams v. Howard,

277

3. It seems, that on lease of a tract of land, with sundry slaves and other personal property, reserving, by way of rent, a gross sum payable annually, the remedy, by distress, may be resorted to without any express stipulation.

Williams v. Howard,

277

4. Rent may be payable in advance, by contract; and such rent may be distrained for, if not paid when due.

Ib.

5. Where a testator directs the moneys arising from certain sources (among which are the rents of his lands) to be placed out at interest, his executor is impliedly authorized to make leases of such lands, not already occupied by tenants, as are not necessary to be reserved for cultivation by the testator's own slaves.

M'Call v. Peachy's adm'r,

288

REPLEADER.

1. If a jury be impanelled "to try the issue joined," when, in reality, no issue is joined, the judgment must be reversed, and the verdict set aside, notwithstanding it was against the party who failed to meet, by a negative on his side, the affirmative matter pleaded on the other side.

Wilkinson's adm'r's v. Bennett,

514

REPLEVY BOND.

1. Judgment ought not to be rendered on a three months' replevy bond, for interest from a day anterior to the date of the bond; but it may for interest from that date, on the rent and costs of the distress added together. And if the bond be taken, including interest, from a day anterior to its date, such erroneous interest may be deducted, and judgment entered for the right sum.

Williams v. Howard,

277

RESIDUARY CLAUSE.

1. In this case, a general residuary clause, in a will, was construed as not carrying the reversion after a life estate in the land, there being other property which the testator evidently intended to convey by such clause; and, moreover, the life estate in the land being created for the benefit of the same persons to whom the residuum was bequeathed; it was, therefore, decided that they were not entitled to the fee simple, but that it vested in the heir at law.

Phillips and wife v. Melson and others,

76

2. See Legatees, No. 7.

Purcell v. Maddox,

79

RESIDUUM.

1. See Parties, and

Sheppard's ex'or v. Starke and wife, pl. 3.

29

2. An executor ought not to be compelled to make distribution of a residuum, until bond and security be given, by the distributees, as required by the act of assembly in the case of an administrator.

Ib.

3. Where a division of a testator's estate, in pursuance of his will, is not to be made at one and the same time, but at the several periods when one or more of his children shall separate from the family, it is not necessary that all the legatees be made parties to each suit in chancery for a division; but only those entitled to participate in the division then in question.

Branch's adm'r v. Booker's adm'r,

43

4. See Wills, Nos. 34, 25.

Ib.

RESTITUTION.

1. In a decree of reversal, the appellate court will, if requested, further direct, that, in case the money and costs recovered by the appellee shall have been paid, the same be refunded, with lawful interest from the time of payment.

Stanard v. Brownlow,

229

RETURN-DAY.

1. It seems, that, where a *capias ad satisfaciendum* is executed at any time before the return-day thereof, the sheriff may receive property tendered by the debtor in discharge of his body out of custody, and appoint a day of sale posterior to the return-day; and that a bond for the forthcoming of such property is good in law, though dated after such return day.

Dix v. Evans, pl. 2.

306

REVERSAL OF JUDGMENT.

1. An appellate court ought not to reverse a judgment, without proceeding to give such judgment as the inferior court should have given.

Darby v. Henderson,

115

2. See Jurisdiction, No. 1.

Lewis v. Long,

136

3. On a bill of exceptions, to the opinion of the court below, refusing to grant a continuance, the appellate court ought not to reverse the judgment for a ground of continuance not stated in such exceptions.

Ross v. Norvell,

170

4. See Summary Remedy, and

Webb, ex'or of Osborne, v. M'Neil,

184

5. See Jeoffails, No. 3.

Milstead v. Redman,

219

6. See Title, No. 4.

Beverly v. Lawson's heirs.

317

REVERSION.

1. In this case, a general residuary clause in a will, was construed as not carrying the reversion after a life estate in the land, there being other property which the testator evidently intended to convey by such clause; and, moreover, the life estate in the land being created for the benefit of the same persons to whom the residuum was bequeathed: it was, therefore, decided that they were not entitled to the fee simple, but that it vested in the heir at law.

Phillips and wife v. Melson and others.

76

2. A testator, who died in the year 1784, devised a tract of land to his sons, Joseph and Thomas, "during their natural life, and no longer, and then to each of their eldest sons, and their heirs, for ever; and, if no male issue, to each of their eldest daughters, and their heirs, for ever." Joseph and Thomas entered and made partition, and in the year 1797, Joseph died without having had any son or daughter. It was adjudged that his share of the land reverted to the testator's heir at law.

Birthright, lessee of Hall, v. Hall, pl. 1.

586

REVIEW. (BILL OF.)

See Bill of Review.

SALE.

1. See Slaves, Nos. 1, 2, and

Robertson v. Ewell.

1

650 *2. See Slaves, Nos. 5, 6, and

Randolph v. Randolph and others.

99

3. See Slaves, No. 10, and

Williams v. Moore.

310

4. See Forthcoming Bond, Nos. 4, 5, 6, and

Lusk v. Ramsay, pl. 2, 3, 4.

417

5. If lands be sold according to certain metes and bounds, and, by a covenant under seal, the vendor agree to warrant the title against all persons whatsoever, he is bound to include in a conveyance with general warranty, and in case of eviction, to make compensation for all the lands within those bounds, which he held and claimed as his own, at the time of the sale, and showed to the purchaser as part of the lands sold: notwithstanding his title thereto may be defective: but he is not bound to convey lands which were not held and claimed by him, at the time of the sale, nor shown as part of the lands sold, although his title-papers may comprehend them.

Beverly v. Lawson's heirs, pl. 2.

317

6. If land be sold on a credit, a day being appointed when the purchaser is to give bond and security for the money, and the vendor to convey the land, and on the day appointed the purchaser is ready with the bond and security, but the vendor not ready to convey; on a bill afterwards brought by the vendor against the purchaser, for specific performance, it is too rigorous to decree an absolute sale of the land, on a short notice to raise the purchase money: but if it appear on examination of the title, that the contract can, according to the principles of equity, be enforced on both sides, the decree should be that the land be held bound for the purchase, if bond and security for payment thereof be not given within a reasonable time after the title shall have been made, and approved by the judge, and after the plaintiff shall have performed such other acts as the court may enjoin upon him; and that thereupon the land be sold, after allowing such further reasonable time to redeem the same by payment of the debt and interest, as is customary in the case of mortgages. pl. 3.

Ib.

7. See Conveyance, Nos. 2, 3.

Geddy & Knox v. Butler and wife.

345

8. See Injunction, No. 17.

Wilson & Trent v. Butler and others, pl. 1.

559

9. See Slaves, No. 16, and pl. 2.

Ib.

SCIRE FACIAS.

1. A scire facias, purporting to be founded upon a judgment entered at rules in the clerk's office of a county court, but not mentioning that that judgment was confirmed, by not being set aside at the ensuing quarterly term, nor even that such quarterly term occurred prior to the suing out of the said scire facias, ought to be quashed, as not setting forth any legal cause of action.

Evans v. Freeland.

119

2. If the defendant in an action of covenant die, after judgment by default against him and the bail for his appearance, and before a writ of inquiry executed, the plaintiff cannot have a scire facias against the bail, but only against the executors or administrators of the defendant.

Saunders v. Gains.

226

3. A judgment on a bond, for payment of a debt

by instalments, should be "for the debt in the declaration mentioned, to be discharged by the sum due at the time of institution of the suit; reserving liberty to the plaintiff to resort to a scire facias to recover such other damages as might thereafter arise under the condition of the bond."

Thatcher & Herndon v. Taylor & Cochrane.

249

SECURITY.

1. The security, in a bond for the prosecution of an injunction, is not liable for the costs and damages which may accrue on an appeal to a superior court.

Woodson v. Johns.

230

2. The act of assembly, allowing damages on the affirmation of decrees in chancery, does not authorize the recovery of such damages of a security in a bond bearing date before that act.

Ib.

3. Where an injunction is dissolved upon a condition, and that condition has been complied with by the defendant in equity, the surety in the injunction bond is not exonerated.

Gray & Scott v. Campbell.

251

4. The surety in a forthcoming bond has a right to deliver the property on the day of sale, if he can, on that day, peaceably obtain possession thereof.

Lusk v. Ramsay, pl. 2.

417

5. See Equity, Nos. 36, 37, and pl. 3, 4.

Ib.

6. A court of equity will not compel a security in a bond to contribute to the relief of his co-security who has been forced to pay the debt, unless it appear that due diligence was used, without effect, to obtain reimbursement from the principal obligor, or that he was insolvent.

McCormack's adm'r v. Obannon's ex'or and devisees.

484

7. See Bail, No. 5.

Quarles v. Buford.

487

8. See Nulla Bona, No. 2.

Halrston v. Hughes and others.

508

SEISIN.

1. See Contingent Remainder, and

Coleman and wife v. Holladay.

510

SERGEANT OF A CORPORATION.

1. A sergeant of a corporation has not the right to sue for money due to an insolvent debtor.

Darby v. Henderson.

115

651

*SHERIFF.

1. In an action on the case, against a sheriff for failing to levy an execution, if the return on the execution was, that there were no effects with which the debt could be satisfied, the burthen is thrown on the plaintiff of proving the falsehood of such return; and the court, if requested in a proper manner, ought so to instruct the jury. But if the defendant request the court to instruct the jury, that it is incumbent on the plaintiff to prove the falsehood of the return mentioned in the declaration, and no return be distinctly stated therein, the court ought to decline giving any instruction in pursuance of such request.

Davis v. Johnson & Co.,

81

2. See Executions, and

Dix v. Evans.

308

3. See Forthcoming Bond, and

Lusk v. Ramsay, pl. 2, 4.

417

4. If two of the persons nominated to the governor by a county court have successively been commissioned to execute the office of sheriff in such county, and each has failed to give bond within the time prescribed by law, the governor, with advice of council, cannot thereupon commission the person who was commissioned in the first instance.

Bowers and others v. Millar.

492

5. Quære, whether an action upon the case lies against a sheriff for refusing to permit a person who is lawfully entitled, to vote at an election of members of the general assembly?

Custis v. Lane, pl. 2.

579

SLAVES.

1. An absolute bill of sale of slaves, by an executor, who is, nevertheless, permitted to retain the possession thereof, is fraudulent and void, as to legatees, as well as creditors and purchasers.

Robertson v. Ewell.

1

2. Quære, whether a sale, by an executor, of slaves, belonging to the estate of his testator, for the purpose of paying a private debt of his own to the purchaser, be void as to residuary legatees, upon its appearing that the personal assets were sufficient (exclusive of slaves) for paying the debts

and expenses, and that the purchaser knew in what right the executor held the property, though he might not have known the state of the assets? 1b.

8. In a division of slaves among legatees, if those allotted to some of them be valued at more, and to others at less, than their respective shares, and the commissioners making the division direct that each person whose allotment is too large shall pay a surplus, without designating to whom, it seems, that such payments are to be made to the executor, and by him to the other legatees, so as to make the division equal: and he is accountable if he deliver the slaves allotted to any legatee without receiving the surplus payable from him or her.

Sheppard's ex'or v. Starke and wife, 30

4. See *Willis*, Nos. 24, 26, and

Branch's adm'r v. Booker's adm'r, 43

5. When a slave is sold and delivered, (although without a bill of sale,) it is to be presumed, *prima facie*, that the seller has parted with his title; if, therefore, he contend that he reserved the title in himself until the purchase money should be paid, the onus probandi lies on him.

Randolph v. Randolph and others, 99

6. It seems, that a person who claims title to a slave, taken in execution, may get relief in equity by an injunction to prevent the sale, notwithstanding his remedy at law.

1b.

7. Where a slave is given to an infant, and left by the donor with the mother of such infant, for its benefit, (the father being dead,) the possession by the mother is to be considered possession by the infant.

Mortimer v. Brumfield, 132

8. It seems, that on a lease of a tract of land, with sundry slaves and other personal property, reserving, by way of rent, a gross sum, payable annually, the remedy, by distress, may be resorted to without any express stipulation.

Williams v. Howard, 377

9. A married settlement of land and slaves, for the wife's jointure, "in full satisfaction of her dower, or thirds, in any lands, tenements and hereditaments, whereof the husband should at any time during his life be seised of any estate of inheritance," was not a bar to her right of dower in the slaves though made before the act of 1792, declaring slaves to be personal estate.

Ball's devisees v. Ball's ex'ors and widow, 379

10. If a slave be sold, upon condition that the buyer, not liking, may return him in a given time, and while in the buyer's possession, but not through his neglect, he be disabled by cold so as to be of little value, the buyer may refuse to keep him, and is not responsible for the loss, unless he expressly agreed to be so liable. But the buyer is responsible without such agreement for ordinary neglect: that is, if he failed to take such care of the slave as any man of common prudence, and capable of governing a family, takes of his own concerns.

Williams v. Moore, 310

11. An agreement under seal, by which A. (being much involved in debt) binds certain slaves to B., until they attain the age of twenty-one years, upon a condition merely "that B. shall treat them in a lawful and humane manner, and if he shall die or remove from the county, they shall be treated equally well, or it shall be optional with A. whether they shall remain any longer in the said service," is not on valuable consideration, but voluntary only, and void against creditors.

Broadfoot v. Dyer, 350

12. See *Remainder*, and

Foster and wife v. Crenshaw's ex'ors, 514

13. A suit on a bond was brought against the debtor in a county in which he did not reside: he confessed judgment on the return of the writ, and furnished the sheriff having the execution with a list of slaves and other property of his, to be advertised to be sold at his own house: the property (without being seen by the sheriff, until the day of sale) was advertised, and sold to the creditor for a fair price, though no other person bidde. The creditor, (whose claim was proved to be just and bona fide,) being a brother of the debtor's wife, permitted the property to remain in the debtor's possession, and, within five years afterwards, conveyed the same, in trust, for the use of the wife and children of the debtor, by a deed, recorded in a different county from that in which the property was. None of these circumstances were considered unfair; and the deed was adjudged to be good against other creditors.

Wilson & Trent v. Butler and others, pl. 2, 559

14. See *Marriage Settlement*, Nos. 3, 4, and

Baird v. Bland and others, pl. 1, 2, 570

15. A person, entitled to a legal estate in slaves, may sue in equity to recover them, if thereby a multiplicity of suits may be prevented: calling on the defendant to discover how long he has had them in possession, and to discover and state an account of their profits. pl. 2, 1b.

SPECIFIC PERFORMANCE.

1. A decree in chancery, declaring the court's opinion that an agreement, for the sale of a tract of land, should be specifically performed by both the parties, and directing the vendee to execute a mortgage of the same land to secure the purchase money, is to be understood as requiring the vendor, in the first place, to make a title to him.

Mayo v. Purcell, 243

2. See *Title*, and

Beverly v. Lawson's heirs, 317

STORE ACCOUNTS.

See *Limitations*, No. 1, and

Taylor's adm'r v. Richards & Co., 8

SUFFRAGE, (RIGHT OF.)

1. See *Columbia*, (District of,) and

Custis v. Lane, pl. 1, 579

2. Quære, whether an action upon the case lies against a sheriff, for refusing to permit a person, who is lawfully entitled, to vote at an election of members of the general assembly? pl. 2, 1b.

SUMMARY REMEDY.

1. If a judgment on a summary motion, be reversed on the ground that the plaintiff's claim is not supported by evidence, the appellate court should proceed to enter judgment, that the plaintiff take nothing by his motion: and such judgment would be a bar to another motion for the same cause of action. But if such judgment be not entered, the judgment of reversal is too imperfect to be a legal bar.

Webb, executor of Osborne, v. M'Neil, 184

SUPERIOR COURT OF CHANCERY.

1. The pendency of the bill in equity, in a county court, after dissolution of an injunction, is no bar to the complainant's obtaining another injunction from the superior court of chancery.

Roberts v. Jordans, pl. 1, 488

SURCHARGING OR FALSIFYING.

1. When a party claims to charge another by virtue of an account rendered, he must take that account all together, and not garble or alter it, unless he can surcharge or falsify the same, either by showing errors in calculation, or proving from other testimony, that it is incorrect, as to the amount charged or debited, or stated upon principles not conformable to the agreement or understanding of the parties at the time.

Freeland &c. v. Cocke's representatives, pl. 1, 352

SURETY FOR THE PEACE.

See *Warrant*, and

Wells v. Jackson, pl. 2, 3, 4, 456

See *Security*.

SURETIES.

SURRENDER.

1. It seems, that a special bail's surrender of his principal to the sheriff is effectual, without his exhibiting a bail piece, or other written evidence of his being bail, if the surrender be made in the county in the court of which he was accepted, and entered as special bail in open court, and it appear that the fact was known to the sheriff, who, nevertheless, refused to accept the surrender and hold the principal in custody.

Evans v. Freeland, 119

2. A debtor, being surrendered to the sheriff by his special bail, (after judgment against him in a county court,) cannot legally be detained in jail, or within the prison bounds, on a bond given for that purpose, more than twenty days from the time of such surrender, if the creditor, his attorney, or agent, do not, within that time, charge him in execution, in writing.

Green v. Garrett, 239

658 *TENDER AND REFUSAL.

1. If a tender be made of a less sum than is justly due, a refusal to receive it is no bar to the subsequent recovery of interest on the sum so tendered, from the time of the tender.

Shobe's ex'ors v. Carr and wife, pl. 2, 10

TITLE.

1. Where a bill in equity is exhibited by the vendor of land, against the purchaser, for specific performance, if the purchaser object to the title, and it appear doubtful whether the plaintiff can make

such a title as would authorize a decree for specific performance, or other relief, on giving bond to guard against remote or improbable contingencies, the title ought, of course, to be referred to a commissioner, to be examined and reported upon.

Beverly v. Lawson's heirs, pl. 1, 817
2. If lands be sold according to certain metes and bounds, and, by a covenant under seal, the vendor agree to warrant the title against all persons whatsoever, he is bound to include in a conveyance with general warranty; and, in case of eviction, to make compensation for all the lands within those bounds, which he held and claimed as his own, at the time of the sale, and showed to the purchaser, as part of the lands sold, notwithstanding his title thereto may be defective: but he is not bound to convey lands which were not held, and claimed by him, at the time of the sale, nor shown as part of the lands sold, although his title-papers may comprehend them, pl. 2, *Ib.*

3. If land be sold on a credit, a day being appointed when the purchaser is to give bond and security for the money, and the vendor to convey the land, and on the day appointed the purchaser is ready with the bond and security, but the vendor not ready to convey: on bill, afterwards brought by the vendor, against the purchaser, for specific performance, it is too rigorous to decree an absolute sale of the land, on a short notice, to raise the purchase money; but if it appear, on examination of the title, that the contract can, according to the principles of equity, be enforced on both sides, the decree should be that the land be held bound for the purchase money, if bond and security, for payment thereof, be not given within a reasonable time, after the title shall have been made and approved by the judge, and after the plaintiff shall have performed such other acts as the court may enjoin upon him; and that, thereupon, the land be sold, after allowing such further reasonable time to redeem the same, by payment of the debt and interest, as is customary in the case of mortgages, pl. 3, *Ib.*

4. When a decree, in favour of the vendor, against the purchaser of lands and of sundry personal property, is reversed, and the cause remanded for a reference of the title, and a survey to be made before commissioners: the court of appeals will direct that the appellant have liberty to show and prove to them, if he can, what parts of the personal property, stipulated for, were not delivered under the contract, and the value thereof; although the court would not have remanded the cause for that purpose alone, pl. 4, *Ib.*

5. See *Towns*, No. 1, and *Mayo v. Murchie*, pl. 1, 358
6. See *Equity*, No. 33, and pl. 2, *Ib.*
7. See *Lease*, Nos. 5, 6, and *M'Clenahan v. Gwynn*, 566

TOBACCO.

1. An executor, or administrator, is not chargeable, specifically, with tobacco received by him, and not disbursed on account of his testator's estate, but only with the price actually received for such tobacco, where that can be ascertained, and, where not, with the then current value thereof.
M'Call v. Peachy's adm'r, 288

TOWNS.

1. If the owner of a tract of land, on a navigable river, was authorized by law to establish a town upon it, and dispose of the lots by way of lottery; and, in the scheme of such lottery, as advertised, adventurers therein were assured that the lots should be laid off in a town "convenient to the river, with public landings;" parol testimony is admissible, in aid of the inference deducible from such printed proposals, to establish an equitable title in the inhabitants of the town, as tenants in common, to a piece of ground between the river and the lots actually laid off for the town.
Mayo v. Murchie, pl. 1, 358

2. Under what circumstances a single surviving trustee of a town is competent to be the plaintiff in a bill in equity, for the purpose of asserting the right of the inhabitants generally to land laid off and annexed to such town as a common, pl. 4, *Ib.*

TRESPASS.

1. In an action of trespass, *quare, clausum fregit*, if the damages recovered be less than one hundred dollars, the defendant cannot appeal to the court of appeals, notwithstanding it appears from the record that the title or bounds of land were drawn in question.
Hutchinson v. Kellam, 203

2. The plaintiff, in a joint action of trespass against several defendants, cannot appeal from a judgment in favour of all except one, until the suit

has been abated, dismissed, or decided, as to that one.

Wells v. Jackson, pl. 1, 458

654

*TRUST, (DEED OF.)

1. See *Deed*, No. 1, and *Taylor's adm'r v. Richards & Co.*, 8
2. See *Trustees*, No. 1, and *Ross v. Norvell*, 170
3. See *Contingent Remainder*, and *Coleman and wife v. Holladay*, 510
4. See *Fraud*, Nos. 10, 11, and *Wright v. Hancock & Co.*, pl. 1, 2, 521
5. A suit, on a bond, was brought against the debtor, in a county in which he did not reside; he confessed judgment on the return of the writ, and furnished the sheriff, having the execution, with a list of slaves and other property of his, to be advertised to be sold at his own house. The property (without being seen by the sheriff, until the day of sale) was advertised and sold to the creditor, for a fair price, though no other person bidded; the creditor, (whose claim was proved to be just and bona fide,) being a brother of the debtor's wife, permitted the property to remain in the debtor's possession, and, within five years afterwards, conveyed the same, in trust, for the use of the wife and children of the debtor, by a deed recorded in a different county from that in which the property was. None of these circumstances were considered unfair, and the deed was adjudged to be good against other creditors.
Wilson & Trent v. Butler and others, pl. 2, 550
6. See *Marriage Settlement*, Nos. 3, 4, and *Baird v. Bland and others*, pl. 1, 2, 570

TRUSTEES.

1. The trustee, in a deed of trust, conveying property to be sold for payment of a debt, is equally the agent of the debtor and creditor, and a competent witness, in an action of ejectment, against the debtor, in behalf of a purchaser from himself, (to whom he has made a deed, with warranty against himself and his heirs only,) to prove that the sale of the property was advertised according to the terms of the deed of trust.
Ross v. Norvell, 170
2. See *Towns*, No. 2, and *Mayo v. Murchie*, 358

TRUST ESTATE.

See *Contingent Remainder*, and *Coleman and wife v. Holladay*, 510

USURY.

1. A continuance ought not to be granted at law on the ground that the party, a few days before that appointed for the trial, filed a bill in equity for a discovery of usury, as auxiliary to his defence at law, unless he make affidavit that the usury therein charged had recently come to his knowledge.
Ross v. Norvell, 170

VACATING OF CONTRACTS.

1. If an agent, employed to sell a tract of land, become the purchaser himself, by bargaining with his employer, from whom he conceals the fact that a better price could be got from another person, he is guilty of fraud, and the contract ought to be vacated.
Moseley's adm'r and heirs v. Buck & Brander, 322
2. In such case, the court of equity will compel him to reconvey the land, on receiving back his purchase money, with interest, and make him account for the rents and profits. *Ib.*

VARIANCE.

1. If the plaintiff be permitted to amend his declaration, by consent of parties, after issue joined on a plea to the action, the defendant ought not to be permitted to plead in abatement any variance between the amended declaration and the writ which equally existed between the writ and the original declaration.
Moss v. Stipp, 159

VENDOR AND VENDEE.

1. If, by an agreement under seal, between the vendor and purchaser of a tract of land, it be covenanted, that if any part thereof should be recovered, by law, from the purchaser, the vendor will abate, or refund, in proportion; and that he will not bring suit upon the bond for the purchase money, until the quantity of land which the purchaser is to get be ascertained; provided the purchaser prosecutes a suit for that purpose in reasonable time;—a court of equity will give relief by injunction against a

premature suit on the bond; and if it appear that the purchaser prosecuted his suit in reasonable time, and could not recover the land, the court will decree that the injunction be perpetual; that whatever money has been paid be refunded; that the bond be surrendered and cancelled, and the contract rescinded.

Bullitt's ex'rs v. Songster's adm'rs, 54
2. In such case, if the purchaser assigned to the vendor a bond of a third person in part payment, the court will decree that such bond be returned; or, if he fail to return it, that the vendor pay the purchaser the amount thereof, with interest, no equity in favour of the vendor appearing to exempt him from such responsibility. Ib.

3. See Purchaser, No. 6. Ib.

4. See Equity, No. 13. Ib.

Stockton v. Cook, 68

5. In an action upon a written agreement for the sale of a tract of land, setting forth that the vendor agreed to give the vendee possession and a conveyance, free of incumbrances, on or before a certain day, for which the vendee agreed to pay to the vendor part of the purchase money, on the same day, and to give him, for the balance, a deed of trust, or such other security as he might require, and that the conveyance was not to be executed until the first payment was made, and security given, the declaration, in behalf of the vendor, sufficiently charged a breach, by stating that the plaintiff was on that day in lawful and peaceful possession of the land, and ready to give the defendant possession, with a proper conveyance, clear of all incumbrances, but that the defendant failed to make the payment and give the security. Ib.

Moss v. Stupp, 150

6. What pleas, to such a declaration, are insufficient. Ib.

7. See Purchaser, No. 13.

Foreman v. Newkirk and others, 375

8. See Title, Nos. 1, 2, 3.

Beverley v. Lawson's Heirs, 317

9. See Interest, No. 8.

Mayo v. Purcell, 343

10. See Lands, Nos. 5, 6. Ib.

11. A decree in chancery, declaring the court's opinion that an agreement for the sale of a tract of land, should be specifically performed by both parties, and directing the vendee to execute a mortgage of the same land, to secure the purchase money, is to be understood as requiring the vendor, in the first place, to make a title to him. Ib.

VERDICT.

1. Upon issue joined on the plea of fully administered, a verdict finding, in general terms, the issue for the plaintiff, and that assets, equal to the claim of the plaintiff, came to the hands of the defendant, is uncertain and insufficient. It should set forth, with sufficient certainty, what portion of the assets, which came to the defendant's hands, was undistributed at the time of suing out the plaintiff's writ.

Roger's adm'x v. Chandler's adm'x, 65

2. Where, for reasons appearing to the court, (though not specified,) a verdict is set aside, without requiring payment of costs, the appellate court will take bill for granted those reasons were sufficient; no bill of exceptions being filed.

Hume v. Beale, 226

3. See Repleader, No. 1.

Wilkinson's adm'rs v. Bennett, 314

4. A special verdict in ejectment, finding that the executors, who failed to join in the deed, "never did take upon themselves the burthen of executing the will, and never did relinquish their right so to do," (when it appears that they were living at the time of the date of the deed,) is so defective, that a venire facias de novo should be awarded. See Executors and Administrators, No. 45.

Geddy & Knox v. Butler and wife, pl. 2, 345

5. See Money Had and Received, and

Hall v. Smith, Young & Hyde, pl. 3, 550

6. See Recital, and

Sexton v. Holmes, 506

VOLUNTARY AGREEMENT.

1. An agreement under seal, by which A. (being much involved in debt) binds certain slaves to B. until they attain the age of twenty-one years, upon a condition merely, "that B. shall treat them in a lawful and humane manner, and, if he shall die, or remove from the county, they shall be treated equally well, or it shall be optional with A. whether they shall remain any longer in the said service," is not on valuable consideration, but voluntary only, and void against creditors.

Broadfoot v. Dyer, 350

VOTERS.

1. See Suffrage, (Right of,) and
Custis v. Lane, pl. 1, 2. 579

VOUCHERS.

1. Where an ex parte settlement of an administration account has taken place, before commissioners appointed by the court, in which the executor or administrator qualified, if the legatees afterwards bring a suit in chancery for a new examination and settlement of such account, the vouchers in support thereof, if they be not ostensible should be presumed to have existed, and the onus probandi thrown on the adverse party.

M'Call v. Peachy's adm'r, 238

2. But, it seems, the executor or administrator may be required to produce the vouchers, unless he shall declare on oath, or otherwise prove, that they were deposited with the clerk of such court, at or after examination of the account by the commissioners, and have not come to his possession since. Ib.

3. In such case, if the vouchers, or official copies of them, be produced, the plaintiffs may, nevertheless, controvert the articles intended to be justified by them. Any article ought to be allowed, on the oath of the defendant, if it be of such a nature that the expense probably must have been incurred, or that, perhaps, a voucher for it could not have been procured; for example, mourning for the widow, mid-wife's fees, services performed by a negro carpenter, and the like. Ib.

WARRANT.

1. A warrant to arrest a person, of whom surety for the peace is demanded, being executed, neither by a sworn officer, nor the person to whom it was directed by the magistrate, but by an individual, selected by the prosecutor, who erased the name of the person appointed by the magistrate, and substituted that of the person selected by himself, is, thereby, rendered altogether illegal and void as a justification, but may be given in evidence, in mitigation of damages.

Wells v. Jackson, pl. 2, 458

2. Quare, if the persons to be arrested be described only by their surnames, the counties they reside in, and their professions, or trades, without their christian names: is not such warrant too general and uncertain, and, therefore, illegal and void? pl. 5. Ib.

3. A warrant directing the "associates" of persons named, to be arrested, without mentioning the names of such associates, is illegal and void as to them. pl. 4. Ib.

WARRANTY.

1. A purchaser of land, warranted by the vendor to be free of all incumbrance, is not precluded from relief in equity against his bond for the purchase money, by the circumstance that before he made the purchase he was fully apprized of the incumbrance.

Stockton v. Cook, 68

2. If lands be sold according to certain metes and bounds, and, by a covenant under seal, the vendor agree to warrant the title against all persons whatsoever, he is bound to include in a conveyance with general warranty; and, in case of eviction, to make compensation for all the lands within those bounds, which he held and claimed as his own at the time of the sale, and showed to the purchaser as part of the lands sold, notwithstanding his title thereto may be defective; but he is not bound to convey lands which were not held and claimed by him at the time of the sale, nor shown as part of the lands sold, although his title papers may comprehend them.

Beverley v. Lawson's heirs, pl. 2, 317

WEARING APPAREL.

1. The executor ought not to be charged, at the suit of a general residuary legatee, with the wearing apparel of the testator, if the same be not proved to have been converted to his use, and a sale of it was not necessary for payment of debts or legacies.

M'Call v. Peachy's adm'r, pl. 15, 238

WIDOW.

See Dower.

WILLS.

1. If a testator devise to two of his sons certain lands, rated at a certain sum, allowing them to pay his other children equal shares of that sum, by instalments, such devisees, and those claiming under them, are personally responsible, (in proportion to their respective estates,) for the payment of such instalments, with lawful interest from the times

when payable; and, (in aid of such responsibility.) the lands so devised are liable.

Shobe's ex'ors v. Carr and wife. 10

2. A case in which a legal title to a tract of land which was not expressly mentioned in the will, was decided not to pass by a residuary devise. See Marriage Contract, No. 2.

Shobe's ex'ors v. Carr and wife. 10

3. A devise, in general terms, to the testator's "children," does not comprehend a posthumous child, so as to prevent it from claiming, under the act of assembly, as pretermitted by the will.

Armistead and others v. Dangerfield and wife. 20

4. Quære. Does the testator's knowing, at the time of making the will, that his wife is pregnant, make any difference in the case? Ib.

5. See Posthumous Child, Nos. 3, 4, 5, 6. Ib.

6. Quære. If a testator direct that each of his children, upon separating from the family, shall have a "child's share" of the personal property, is it to be such part as he or she would have been entitled to in case of the father's intestacy? or is the whole to be divided among the children, excluding the widow? Or, among the children and the widow, in such manner as to give her a child's part?

Branch's adm'r v. Booker's adm'r. 43

7. In such case, the marriage of a daughter (with the widow's consent, if such consent be requisite under the will) is such a separation from the family as entitles her husband to demand her share of the estate; and this although she continue until her death, to reside with the widow, and no demand be made of an allotment of her share during her lifetime; he is, also, entitled to the profits received upon such share, from the day of the marriage, or a reasonable time thereafter, with interest thereupon, and is, in like manner, chargeable with his proportion of the expense of maintaining such slaves as produce no profit. Ib.

8. A testator bequeathing to the executors of his daughter's husband, to be divided among her children by him, a sum of money, it was considered as a legacy to them from their grandfather, and not assets belonging to the estate of their father, notwithstanding the object of the bequest was in the will stated to be, to make up their mother's fortune, part of which was not paid in her lifetime, nor to her husband after her death. Patton, adm'r of Page, v. Williams and wife. 59

9. If a testator desire that no interest shall be demanded on a legacy, but that the executor will pay it off as soon as money can be raised, by selling certain property, no interest is to be demanded until a reasonable time for raising the money shall have elapsed, after which, if the executor improperly withhold payment, he is chargeable with interest. Ib.

10. A fund appointed by a will for payment of debts and legacies, must be considered sufficient, unless the contrary be proved. Ib.

11. In this case, a general residuary clause in a will was construed as not carrying the reversion after a life estate in the land, there being other property which the testator evidently intended to convey by such clause; and, moreover, the land being created for the benefit of the same persons to whom the residuum was bequeathed: it was, therefore, decided that they were not entitled to the fee simple, but that it vested in the heir at law. Phillips and wife v. Melson and others. 76

12. See Disseisin, No. 10.

Davis and wife v. Martin. 285

13. An administrator, with the will annexed, has, in general, the same powers which, under the will, the executors would have had if they had qualified. McCall v. Peachy's adm'r. 288

14. Where a testator directs the moneys arising from certain sources (among which are the rents of his lands) to be placed out at interest, his executor is impliedly authorized to make leases of such lands, not already occupied by tenants, as are

not necessary to be reserved for cultivation by the testator's own slaves. Ib.

15. A testator, by directing certain moneys to be placed out at interest, "upon good and sufficient securities, in Virginia or Maryland, as his executors should think proper," authorized them to invest the same in loan-office certificates, or other public securities. Ib.

16. If an executor be authorized by the will to put certain moneys out at interest, his changing the bonds, shifting the debts, or applying moneys to his own use, or that of his friends without any fraudulent design, is no reason for charging him, to the amount in specie, for so much paper money received. Ib.

17. In such case, it being important that the monies should be always kept at interest, which could, perhaps, be better effected by changing the bonds, than by receiving the money from one man, and seeking for another to whom to lend it, the executor should not be liable, in case of insolvencies, unless the change was made injudiciously, or from fraudulent motives; and, as to any moneys actually converted, by him, to his own use, or lent to his friends, without security, he should be chargeable with the value thereof, at the times, respectively, when it was so converted, or lent, provided, that in all such cases of loans, without security, if the borrower, and, also, the executor himself, (who, in that case, stands in the place of a security,) were sufficiently adequate and responsible, at the time, for the sums so lent as aforesaid, (of which competency the subsequent re-payment of the money should be deemed conclusive evidence,) the foregoing rule ought not to apply, but, in such cases, they should be considered as on a common footing with other borrowers, and the account be taken accordingly. 288

18. Where a testator, who empowered his executors to sell and convey certain real estate, died before the 1st of January, 1787, the construction of the will, as to the power of the executors to convey, is to be governed by the statute of 31 Henry VIII. ch. 4, and not by the act of 1785, ch. 61, notwithstanding the conveyance was executed after the 1st of January, 1787.

Geddy & Knox v. Butler and wife, pl. 1. 345

19. See Executors and Administrators, No. 46, and pl. 2. Ib.

20. A testator, who died in the year 1784, devised a tract of land to his sons, Joseph and Thomas, "during their natural life, and no longer, and then to each of their eldest sons and their heirs for ever, and, if no male issue, to each of their eldest daughters, and their heirs for ever." Joseph and Thomas entered and made partition, and, in the year 1797, Joseph died, without having had any son or daughter: it was adjudged that his share of the land reverted to the testator's heir at law. Birthright, lessee of Hall, v. Hall, pl. 1. 536

WITNESS.

1. See Evidence, No. 3.

Chaney v. Saunders. 5

2. The trustee, in a deed of trust, conveying property to be sold for payment of a debt, is equally the agent of the debtor and creditor, and a competent witness, in an action of ejectment against the debtor, in behalf of the purchaser, from himself, (to whom he has made a deed with warranty against himself and his heirs only,) to prove that the sale of the property was advertised according to the terms of the deed of trust.

Ross v. Norvell. 170

WRIT.

See Pleading, No. 3.

Moss v. Stipp. 159

